Supreme Judicial Court for the Commonwealth Full Court: SJC-13547 Filed: 2/5/2024 5:06 PM

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Appellant
V.

RICHARD DILWORTH,
Appellee

COMMONWEALTH'S BRIEF
ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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February 2024

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ISSUE PRESENTED

I. Whether the defendant met his burden for Equal Protection discovery.

II. Whether disclosure of the ordered discovery would violate the Commonwealth’s surveillance and confidential informant privilege.

III. Whether the motion judge abused his discretion by dismissing the case against the defendant.

STATEMENT OF THE CASE

This case is before this Court on appeal of the Commonwealth from the dismissal of firearm related indictments in the Suffolk Superior Court.

On June 12, 2018, a Suffolk County grand jury returned four indictments against the defendant for (1) unlicensed possession of a firearm outside a home or office, in violation of G. L. c. 269, § 10(a); (2) unlicensed possession of ammunition, in violation of G. L. c. 269, § 10(h); (3) carrying a loaded firearm, in violation of G. L. c. 269, § 10(n); and (4) possession of a large capacity feeding device in violation of G. L. c. 269, § 10(m). On June 14, 2018, a Suffolk County grand jury returned five additional indictments against the defendant for (1) unlicensed possession of a firearm outside a home or office, in violation of G. L. c. 269, § 10(a);(2) unlicensed possession of ammunition, in

violation of G. L. c. 269, § 10(h); (3) carrying a loaded firearm, in violation of G. L. c. 269, § 10(n); (4) possession of a large capacity feeding device in violation of G. L. c. 269, § 10(m); and (5) Receiving a Firearm with a Defaced Serial Number in violation of G. L. c. 269, § 11C (CA. 3, 20).[1]

On August 15, 2018, the defendant filed a motion for discovery, which among other things requested "the snapchat account, user name, photo and chat history of the 'false' snapchat account used to gather evidence against Mr. Dilworth." (CA. 37-38). On September 11, 2018, the Commonwealth opposed (CA. 39-48). On September 28, 2018, the Court allowed the defendant's motion in part, but did not allow the defendant's request for the undercover snapchat account information (CA. 6, 23).

On October 31, 2018, the defendant filed a motion requesting discovery relative to a claim of selective prosecution pursuant to Mass. R. Crim. P. 14 (CA. 49-55). He filed an identical motion alternatively requesting the same information under Mass. R. Crim. P. 17 on November 26, 2018. The Commonwealth filed a memorandum in opposition on January 18, 2019, and after a hearing, the Court (Ullman, J.) denied the defendant's motion under Mass. R. Crim. P. 14 and allowed his motion

[1] References to the Commonwealth's appendix will be cited by page number as (CA. __)

(with modifications) under Mass. R. Crim. P. 17 ("The January 18, 2019 Order") (CA. 58-73).

On March 20, 2019, the Commonwealth filed a motion to reconsider the January 18, 2019 Order (CA. 74-81), which was denied without hearing on March 25, 2019 (CA. 10, 27).

The Commonwealth appealed the matter under G.L. c. 211, § 3, and filed a motion to stay discovery pending its appeal (Docket # SJ-2019-0171). The Single Justice denied the petition without a hearing. The Commonwealth appealed to the full bench of the SJC, which ruled that the Single Justice had not abused her discretion (Docket# SJC-12764). *Commonwealth v. Dilworth,* 485 Mass. 1001 (2020).

After the SJC's decision, the Commonwealth complied with the January 18, 2019 Order, and filed a motion to produce the discovery pursuant to a protective order, which was allowed on October 8, 2020 (CA. 13, 30).

On January 13, 2021, after the initial discovery order was satisfied, the defendant filed "The Defendant's Motions for Equal Protection Discovery or in the Alternative Rule 17 Summons" -- relying this time on *Commonwealth v. Long*, 485 Mass. 711 (2020), which had been decided during the pendency of the discovery litigation (CA. 14, 31, 74-92). The Commonwealth again opposed, and on March 30, 2021, the Court (Krupp, J.)

allowed the defendant's motion ("The March 30, 2021 Order") (CA. 105-112).

On May 7, 2021, while the Commonwealth was still compiling discovery pursuant to the March 30, 2021 Order, the defendant filed another discovery motion, requesting this time "color copies of the user icons or bitmojis, and the user names, for the fake Snapchat accounts used by officers in the Youth Violence Strike Force between August 1, 2027 and July 31, 2018, including but not limited to the account(s) used to monitor Mr. Dilworth" (CA. 113-119). On June 1, 2021, the Commonwealth filed its opposition. On June 24, 2021, the Court (Krupp, J.) allowed the defendant's motion ("The June 24, 2021 Order") (CA. 120-123).

On December 3, 2021, the Commonwealth filed a motion to reconsider the June 24, 2021 Order, with an accompanying affidavit from Detective Brian Ball (CA. 124-143). On December 8, 2021, the Court (Krupp, J.) denied the Commonwealth's motion to reconsider (CA. 17, 34). On February 3, 2022, the Commonwealth again petitioned the Court under G.L. c. 211, § 3, which was denied by the Single Justice without a hearing (Docket # SJ-2022-0049).

On May 24, 2022, the Commonwealth filed its "Notice of Non Compliance" (CA. 168-185). In this filing, the Commonwealth put the Court on notice that it would be unable to comply with the June 24, 2021, discovery order

because it would put police officers and confidential informants at risk (CA. 168-185). On that same day, the defendant filed a motion to dismiss, alleging both egregious prosecutorial misconduct and severe prejudice to the defense (CA. 147-167). The defendant's motion was allowed on June 27, 2022 (CA. 186-192, 195-201).

That same day, the Commonwealth filed its notice of appeal (CA. 18, 36).

STATEMENT OF FACTS

A. The First Discovery Hearing and Order ("The January 18, 2019 Order")

The defendant was arrested for various firearm offenses based on police officers viewing multiple videos of him on Snapchat holding firearms, and then, when approached by officers shortly after viewing the videos, having actual firearms on his person. *See infra,* at pp. 13-14.

In allowing the defendant's initial discovery motions, Judge Ullman found the following facts:

> Reducing gun violence in Boston is a law enforcement priority and an important matter of public safety and health. [FN1: See, e.g., City of Boston, "Regional Gun Buyback Program Part of Regional Gun Safety Collaboration," Dec. 15, 2017, https://www.boston.gov/news/regional-gun-buyback-program-part-regional-gun-safety-collaboration (last visited Jan. 2, 2019); Boston Children's Hospital, "Gun Violence and Children: Why it's a public health issue,"

Thriving,
https://thriving.childrenshospital.org/gun-violence-children-issue (last visited Jan. 2, 2019).

In this endeavor, social media can serve as a valuable law enforcement tool. [FN2: See, e.g., Heather Kelly, "Police Embrace Social Media as Crime-fighting Tool," CNN Business, August 30, 2012, https://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/index.html (last visited 12/27/18).

However, the U.S. Constitution and the Massachusetts Declaration of Rights require that race play no part in any decision by police to investigate or prosecute crime. [FN3: See infra at Section A]

The defendant, Richard Dilworth ("Dilworth"), a black male, has made an initial, limited statistical showing suggesting that the Boston Police Department ("BPD") uses Snapchat as an investigative tool almost exclusively against black males. Dilworth seeks additional discovery that he believes may support a claim of racial discrimination in police use of Snapchat [FN4: Dilworth's motion seeks information, not a finding of discrimination or other wrongdoing by BPD, and this Court makes no such finding].

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

RELEVANT FACTS: [FN5: For purposes of this motion only, the parties stipulate to the facts set forth herein].

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

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

While "following" the "youngrick44" account, officers viewed eight separate Snapchat videos of Dilworth, holding what appeared to be a firearm. There is no evidence that BPD gained access to the "youngrick44" account by hacking into the account or using any means other than "friending" Dilworth while acting in an undercover capacity.

On January 11, 2018, BPD officers arrested Dilworth and recovered a loaded Smith & Wesson revolver from Dilworth' s waistband. The District Attorney's office charged Dilworth with multiple offenses arising out of seizure of the revolver (Docket No. 1884-CR-00453).

After being released on bail, Dilworth was again seen on Snapchat by BPD officers holding what appeared to be a firearm. He was again arrested by Boston police, on May 11, 2018, in the possession of a firearm, this time a

loaded Ruger pistol. The District Attorney's office charged Dilworth with multiple offenses arising out of seizure of the pistol (Docket No. 1884-CR-00469).

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

On October 31, 2018, in each of his two cases, Dilworth filed Defendant's Motion for Discovery: Selective Prosecution pursuant to Mass. R. Crim. P. 14 (Filing #12 in Docket No. l 884-CR-00453; Filing #15 in Docket No. 1884-CR-00469). On November 26, 2018, in each of his two cases, Dilworth filed a motion seeking the same material pursuant to Mass. R. Crim. P. 17 (Filing #16 in Docket No. 1884-CR-00453; Filing #19 in Docket No. 1884-CR-00469).

The motions seek "all police/incident reports or Form 26 reports generated by the Boston Police Department from June 1, 2016 to October 1, 2018 for investigations that involve the use of 'Snapchat' social media monitoring." The motions excluded "reports for investigations where the police have not yet arrested and charged the suspect." Dilworth subsequently modified his requests to exclude documents related to human trafficking investigations and sexual assault investigations.

In support of the motions, Dilworth submitted affidavits of his attorney, stating that counsel had conducted an "informal survey," sending questions to all Committee for Public Counsel Services ("CPCS") Public Defender

> Division staff attorneys in Suffolk County and some attorneys who serve as bar advocates in Suffolk County for indigent criminal defendants. Dilworth's attorney estimated that these attorneys collectively are responsible for roughly 25% of the criminal cases that are prosecuted in Suffolk County. The questions included "if lawyers had 'Snapchat' cases, what the race of the defendant was, and whether the defendant was the person being targeted by the investigation." The affidavits further state that counsel received responses identifying defendants in 20 such cases. Of those cases, 17 of the defendants (85%) were black, and three (15%) were Hispanic. There were no non-Hispanic white defendants.
>
> "Incident reports" or "police reports," also known as "1-1's," usually memorialize an initial investigation and arrest and are readily searchable within an electronic database. However, it is the practice of the BPD not to identify Snapchat in incident reports as the investigatory tool that was used, so a search of incident reports will not easily identify "Snapchat cases."
>
> BPD's use of Snapchat and other social media as an investigative tool has typically been memorialized in separate reports, known as Form 26 reports. These reports are prepared on a computer, and the officer who has used the social media submits the reports in paper form or electronically to that officer's supervisor.
>
> Apparently, Form 26 reports cannot be electronically searched.

(CA. 58-62). Judge Ullmann rejected the Commonwealth's argument that the defendant did not have a viable basis for his request because the alleged discriminatory practice did not result in a search or

seizure and ruled that the discriminatory use of an investigatory tool by law enforcement could violate equal protection under the Fourteenth Amendment of the United States Constitution and arts. 1 and 10 of the Massachusetts Declaration of Rights (CA 62-73). Judge Ullmann then found defendant had made a threshold showing that the requested documents were material and relevant to his defense by "demonstrating a reasonable basis to infer that racial profiling *may* have been the basis for [defendant] having been targeted by police for investigation via Snapchat" (CA. 62-73). While allowing defendant's motion, Judge Ullmann limited the scope and time frame of the discoverable materials to "all Form 26 reports prepared by an officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring[, excluding d]documents related to human trafficking investigations, sexual assault investigations and murder investigations" (CA. 62-73).

B. The Second Discovery Hearing and Order (The March 30, 2021 Order)

The Commonwealth thereafter collected the relevant discovery to comply with the January 18, 2019 Order, and filed a motion to produce the discovery pursuant to a protective order, which Judge Krupp allowed on October 8, 2020 (CA. 13, 30).

On January 13, 2021, after the January 18, 2019 Order was satisfied, the defendant filed an additional discovery motion, "The Defendant's Motions for Equal Protection Discovery or in the Alternative Rule 17 Summons" relying this time on *Commonwealth v. Long*, 485 Mass. 711 (2020), which had been decided during the pendency of the discovery litigation (CA. 82-100). His motion did not include a request for the usernames or bitmojis associated with undercover police snapchat accounts (CA. 82-100). The affidavit attached to this motion addressed a different motion filed that same day requesting internal affairs records from the Police Department, and there was no affidavit attached to specifically support the defendant's new equal protection discovery motion. On February 17, 2021, the Commonwealth again objected, stating that the defendant had failed to meet his burden for equal protection discovery under *Commonwealth v. Betances*, 451 Mass. 457 (2008) (CA. 101-112). The Commonwealth further challenged the defendant's reliance on *Long* in a case

not involving a motor vehicle stop based on a minor traffic infraction (CA. 101-112). This motion was heard by a different Judge than who had issued the January 18, 2019, discovery (Krupp, J.). On March 30, 2021, Judge Krupp allowed the defendant's motion, finding the following:

> The Commonwealth sought relief from Judge Ullmann's January 2019 Order under G.L. 211, § 3. A Single Justice denied the petition for interlocutory review without a hearing. The Commonwealth then sought review by the full court. On June 16, 2020, the Supreme Judicial Court rejected the Commonwealth's further appeal and upheld the Single Justice's ruling. Commonwealth v. Dilworth, 485 Mass. 1001, 1003 (2020) (rescript).
>
> In October 2020, pursuant to the January 2019 Order, the Boston Police produced to defendant 21 responsive Form 26 reports. The Form 26 reports did not contain race or demographic information about the people monitored on Snapchat.
>
> Defendant then filed the instant discovery motion for six additional categories of material in support of his equal protection claim. The Commonwealth assented to producing documents responsive to four categories, but objected to producing the materials sought in Requests 1 and 4. Request 1 seeks "booking sheets, color booking photos and police incident reports for the arrests associated with each of the twenty-one 'Form 26' reports that have been provided in discovery." Request 4, labeled "Social Media Investigations," seeks:
>
> a. Notice of any documentation that exists, in addition to the previously provided "Form 26" reports and the associated

video recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1, 2017 and July 31, 2018 (i.e., a spreadsheet or list of people being monitored, officer notes, screenshots, etc.).

b. Notice of the total number of people being monitored on Snapchat by the Youth Violence Strike Force between August 1, 2017 and July 31, 2018.

c. Any recording or image that is part of discovery that has been turned over to any defendant that shows all or part of the 'friends list' being used on Snapchat or, in the alternative, the recordings from all the cases in the Form 26 reports.

d. Documentation of any other arrests, or search warrant executions that occurred between August 1, 2017 and July 31, 2018 that were based on Snapchat monitoring by members of the Youth Violence Strike Force or other members of the Boston Police Department (noting the exceptions in the original discovery order excluding murder, human trafficking or sexual assault investigations).

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

The Commonwealth objects to this discovery on grounds similar to those advanced before Judge Ullmann in connection with his January 2019 Order. The Commonwealth concedes that certain of these requests are relevant and discoverable under the rationale of the January 2019 Order, but seeks an alternative to producing some of the considerable data

that would not be relevant but that would be contained in some of the documents requested.

***

The Commonwealth also argues the materials in Requests 1 and 4(a)-(d) are not relevant to an equal protection claim insofar as they seek information about all individuals targeted for Snapchat surveillance as opposed to just information about individuals similarly situated to defendant who were not stopped by police. In support, the Commonwealth contends the equal protection framework discussed in *Commonwealth v. Lora*, 451 Mass. 425 (2008) (inference of impermissible discrimination may be raised with statistical evidence), and *Commonwealth v. Long*, 485 Mass. 711 (2020) (inference of impermissible discrimination may be raised based on totality of circumstances), only applies if a defendant is seeking to suppress the fruits of a discriminatory motor vehicle stop. Because there was no motor vehicle stop here, the Commonwealth contends defendant may only raise a reasonable inference of impermissible discrimination by satisfying the tripartite burden established in *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978) (showing requires evidence that broader class of persons violated the law and was treated differently based on impermissible classification). I am not persuaded by the Commonwealth's arguments.

The crux of defendant's equal protection argument is that Boston Police officers chose only to monitor the Snapchat accounts of young men of color. Assuming, *arguendo*, that this is true, it must also be true that the Boston Police are not monitoring the Snapchat accounts of young white males, which would in turn preclude defendant from identifying any similarly situated white males. To the extent the tripartite burden presumes underlying circumstances in which law enforcement has treated similarly situated persons more

favorably, it is ill-suited to assess the merits of defendant's claim. In view of similar concerns, in the January 2019 Order Judge Ullmann determined that the *Lora* equal protection framework could be used "beyond traffic stops to include challenges to police activity in the context presented here, i.e., use of social media as an investigative tool." *Dilworth*, 2019 WL 469356 at *4. I decline to revisit this ruling or determine at this stage whether defendant may also raise an inference of impermissible discrimination under the equal protection framework established in *Long*. Defendant's ability to substantiate his equal protection claim is likely to turn on the substance of the information he gathers in discovery.

I am satisfied that the information defendant seeks in Requests 1 and 4 is relevant and material to his defense. Defendant contends that the materials responsive to Request 1 will provide race and demographic information that did not appear in the Form 26 reports he received in response to his Rule 17 request, and that such information is necessary to generate meaningful statistical evidence. I agree and the Commonwealth does not meaningfully contest this. Defendant also argues Requests 4(a)-4(d) will yield information that will allow him to compile statistical evidence and explore the demographic composition of the total population the Boston Police targeted for Snapchat surveillance during the relevant time period; and the information sought in Request 4(e) is relevant to future discovery requests concerning the mechanics and oversight of the Boston Police Department's use of Snapchat in investigations.

The relevance and materiality of the statistical evidence defendant seeks to compile is briefly discussed above and was addressed more extensively in the January 2019 Order. It is worth noting, however, that regardless of any disparities the demographic

> information of the individuals documented in the Form 26 reports ultimately reveals, statistical evidence based on the racial composition of just 21 people may not be sufficient to support an inference of impermissible discrimination by itself. The information sought by way of Requests 4(a)-4(d), which goes beyond defendant's previous request by seeking information about people who were monitored, but never charged, will provide statistical evidence based on a greater number of data points that may support or dispel the requisite inference.
>
> Nonetheless, many of the materials responsive to Requests 4(c) and 4(d) are likely to contain information that is not relevant to defendant's equal protection claim. As a result, the Commonwealth has asked the Court to allow it to direct members of the Boston Police Department's Youth Violence Strike Force to review any reports, booking sheets, videos, screen shots, or other documentation of all those people they were monitoring on Snapchat between August 1, 2017 and July 1, 2018 and disclose in writing each individual's perceived race, gender and age. The Commonwealth's request is reasonable and will be adopted without prejudice, subject to the conditions described in the order below.

(CA. 120-123)

C. The Defendant's Further Discovery Motion (The June 24, 2021 Order)

On May 11, 2021, while the Commonwealth was still compiling discovery pursuant to the March 30, 2021 Order, the defendant filed another discovery motion, requesting, "color copies of the user icons or bitmojis, and the user names, for the fake Snapchat accounts used by officers in the Youth Violence Strike Force between

August 1, 2027 and July 31, 2018, including but not limited to the account(s) used to monitor Mr. Dilworth" (CA. 121-127). The defendant, through his motion, acknowledged that these items had previously been requested on August 15, 2018, and that the Commonwealth had relied upon the confidential informant and surveillance privileges in opposition (CA. 121-127). The defendant argued that he had made a showing that this information was relevant and helpful to the defense because the information was allegedly necessary to support his equal protection claim, specifically claiming that, "choosing a bitmoji or user icon and name based on the race it portrays, is relevant to the totality of the circumstances of this investigatory scheme, and is material to the fair presentation of this case" (CA. 113-119). The defense again relied upon the Court's decision in *Long* in order to allow for a totality of the circumstances argument (CA. 113-119). Counsel for the defendant authored and signed an affidavit in support of this motion (CA. 113-119). The affidavit stated that Mr. Dilworth is a young Black man, charged with firearm possession offenses, that he is raising a selective investigatory scheme challenge to the social media monitoring of the Youth Violence Strike Force, and that the decision to select the race, skin tone, hair style, and other features of the user image icon that police used for their fake Snapchat accounts reflects

deliberate choices made early in this investigation about the demographics of the people the police were targeting (CA. 113-119).

On June 1, 2021, the Commonwealth filed its opposition, again invoking the surveillance and informant privileges, arguing that the defendant had failed to raise a valid equal protection claim under current law, had failed to meet his burden for equal protection discovery under *Betances*, and was misplaced in his reliance on the standard articulated in *Long* (CA. 15, 28).

On June 24, 2021, the Court (Krupp, J.) allowed the defendant's motion (CA. 120-123). In response to the Commonwealth's arguments regarding equal protection, Judge Krupp again cited back to the January 2019 order stating, "As I did in my March 30, 2021 Order, I decline to revisit Judge Ullman's January 2019 Order, or to determine at this stage whether defendant may also raise an inference of impermissible discrimination under the equal protection framework established in *Commonwealth v. Long*, 485 Mass. 711 (2020)." (CA. 120-123). No additional findings were made in this regard. Judge Krupp ruled that neither the surveillance privilege nor informant privilege applied and that if they had, the defendant had made a showing that the information was relevant and helpful to the defense (CA. 120-123). Specifically, Judge Krupp noted that "the defense

believes, and has introduced considerable anecdotal information to support the reasonableness of its belief, that the police targeted predominantly young men of color to monitor their Snapchat accounts for illegal activity" (CA. 120-123). With regard to the confidential informant and surveillance privileges, Judge Krupp found that disclosure of this information "does not raise a concern with the physical safety of an informant or police officers," and that "the police technique of secretly infiltrating Snapchat accounts is an infinitely renewable resource" (CA. 120-123).

D. The Commonwealth's Motion to Reconsider Judge Krupp's June 24, 2021, Discovery Order

On September 13, 2021, the Commonwealth was finally able to complete compilation of the discovery ordered on March 30, 2021. Following the compilation of this information, Detective Brian Ball of the Boston Police Department began drafting an affidavit to address the June 24, 2021 order.

On November 29, 2021, the Commonwealth received an affidavit from Detective Ball explaining why disclosure of the additional information in the June 2021 order, specifically the usernames and bitmojis, would in fact jeopardize the safety of both confidential informants and police officers, and why these undercover snapchat accounts are not infinitely renewable surveillance

locations (CA. 124-143). Specifically, Detective Ball attested the following:

> It is increasingly common to use information gained from a human confidential informant or undercover officer and corroborate that information from intelligence gleaned from social media postings… It has been this affiant's experience that gang members will actively seek out and assault and/or kill individuals they perceive to be cooperating with law enforcement… The disclosure of the social media account in these hearings would allow the target of the investigation the ability to narrow down the inevitable list of individuals believed to have cooperated with law enforcement. The disclosure of the account details, such as the username and description of the account's profile picture, would instantly jeopardize other investigations conducted with similar tactics… It has become commonplace for suspected Law Enforcement undercover accounts to be publicly exposed when discovered.

(CA. 135-143). Detective Ball gave one example of a police detective who had received a number of death threats as the result of his account being exposed. The affidavit explained that Snapchat gives user accounts a number based upon the account's activity. (CA. 135-143).

The affidavit also explained the value of social media investigations, why they are specifically valuable in gang and firearm investigations, how the police utilize Snapchat for investigations, and how the police choose who to friend request (CA. 135-143). With regard to how police determine who to friend request, Detective Ball attested,

> The targets of these investigations are chosen based upon the Investigator’s prior knowledge of the Suspect or his/her associates. This is almost always based upon the target’s connection to criminal activity. In most cases, the law enforcement account will send a friendship request to the account of the individual suspect of criminal activity. As stated earlier, the law enforcement account does not have any connection to or resemblance to any known individual. No interaction, other than the act of requesting a user’s friendship, takes place. In many cases, the law enforcement account will receive invitations from the friends of the target once the connection between the two accounts is made.

(CA. 135-143). The affidavit also relayed that this method of policing has allowed police to narrow their focus to those perpetuating firearm violence, instead of casting a wide net (as the defendant’s motions assert) averring that,

> [t]his method of proactive policing has allowed Investigators the ability to direct firearm related investigation toward individuals known to be actively carrying firearms. This has led to the recovery of hundreds of firearms from individuals known to carry out acts of violence. In addition to the benefit of reducing acts of violence by gang members, it has allowed Investigators to focus their efforts on the violent members of a particular gang rather than the lesser involved individuals ... This directed policing has greatly minimized negative encounters with the public because the police are acting with a greater level of tangible intelligence…this has resulted in a marked decrease in situations where an individual may be stopped by the police and feel a level of harassment in the encounter.

(CA. 135-143). This affidavit was submitted to the Court on December 3, 2021, with the Commonwealth's motion to reconsider the order to disclose the additional information in the June 2021 order (*i.e.*, the usernames and bitmojis) (CA. 17, 34). On December 8, 2021, the Court denied the Commonwealth's motion to reconsider, stating that the Commonwealth did not cite any change of circumstances, newly discovered evidence or information, or any development in the relevant case law (CA. 17, 34).

E. The Defendant's Motion to Dismiss and the Commonwealth's Notice of Non-Compliance

On May 24, 2022, the Commonwealth filed its "Notice of Non Compliance" in which the Commonwealth asserted that it would be unable to comply with the June 24, 2021, discovery order because it would put police officers and confidential informants at risk (CA. 168-185). The Commonwealth asked that no sanctions be imposed as the defendant suffered no prejudice from the Commonwealth's refusal to provide the discovery, as he did not have a viable equal protection claim and had failed to meet his burden to obtain such discovery, despite the plethora of discovery already provided. On that same day, the defendant filed a motion to dismiss, alleging both egregious prosecutorial misconduct and severe prejudice

to the defense (CA. 186-192). The defendant largely relied upon *Commonwealth v. Washington W.,* 462 Mass. 204 (2012), to support his claim of prosecutorial misconduct (CA. 186-192). The defendant alleged he was prejudiced because the discovery was relevant to an equal protection claim under *Long* (CA. 186-192). On June 8, 2022, the Commonwealth filed its opposition to the Defendant's Motion to Dismiss arguing that the Commonwealth's actions were not to gain a tactical advantage, but to prevent irrevocable harm to an important public safety tactic (CA. 19, 35).

On June 27, 2022, the Court allowed the motion finding that the refusal to produce court-ordered discovery needed to support a core defense in the cases was a deliberate discovery violation that prejudiced the defendant's right to a fair trial (CA. 186-192, 195-201). The dismissal was issued "without prejudice to the Commonwealth's right to proceed if the June 2021 order is vacated by the Supreme Judicial Court or the Appeals Court" (CA. 186-192, 195-201).

SUMMARY OF THE ARGUMENT

I. The defendant's discovery motions are not governed by *Commonwealth v. Long* and should instead be analyzed under the general equal protection general selective prosecution framework which requires a defendant to show (1) that a broader class of persons

than those prosecuted violated the law, (2) that failure to prosecute was either consistent or deliberate, and (3) that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex, which the defendant did not do here. (pp. 29-41)

II. The motion judge erred in finding that the Commonwealth did not appropriately assert the confidential informant and surveillance privileges where both were properly raised. (pp. 41-48).

III. The motion judge erred in dismissing the defendant's case where the defendant not prejudiced as he was provided with an abundance of discovery which could have been used to attempt to meet his burden for an equal protection motion, the Commonwealth attempted to comply with the various discovery orders and did not commit egregious misconduct, and the Commonwealth asserted a surveillance and confidential informant privilege (pp.48-52).

ARGUMENT

I. THE DEFENDANT FAILED TO MEET HIS BURDEN FOR EQUAL PROTECTION DISCOVERY UNDER THE GENERAL EQUAL PROTECTION RULES GOVERNING DISCOVERY AND IS NOT ENTITLED TO THE REVISED FRAMEWORK OF *COMMONWEALTH V. LONG*.

The Supreme Judicial Court has issued a series of cases delineating the Commonwealth's discovery obligations for claims of selective enforcement under

the equal protection guarantees of the Massachusetts Declaration of Rights, art 1 & 10. In 2020, the SJC issued its decision in *Long*, which modified the standard previously articulated in *Commonwealth v. Lora*, 451 Mass. 425 (2008), the seminal case when the defendant filed his original discovery motions in 2018.

In *Lora*, the SJC held that "evidence of racial profiling is relevant in determining whether a traffic stop is the product of selective enforcement violative of the equal protection guarantee of the Massachusetts Declaration of Rights; and the evidence seized in the course of a stop violative of equal protection should, ordinarily, be excluded at trial." 451 Mass. at 426. To be entitled to discovery to support an equal protection claim in this context, a defendant must "'present evidence which raises at least a reasonable inference of impermissible discrimination,' including evidence that 'a broader class of persons than those prosecuted has violated the law, ... that failure to prosecute was either consistent or deliberate, ... and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex.'" *Id.* at 437, quoting *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978). Because of the difficulty of showing that a particular officer's intent in making a specific motor vehicle stop was racially motivated, the SJC held that the defendant's burden could be met through

the presentation of evidence of that officer's motor vehicle stops in other cases. *See id.* at 442. As the SJC later explained:

> The decision in *Lora* was intended to make it easier for defendants to establish racial discrimination by allowing them to raise a reasonable inference of racial profiling based on an officer's conduct in other traffic stops. From this pattern of unequal treatment, and in the absence of explicit "smoking gun" evidence concerning that particular stop, a judge could infer that the challenged stop of an individual defendant was motivated by race.

Long, 485 Mass. at 720. Nevertheless, under *Lora*, a defendant was required to establish a reasonable inference of discrimination by showing: 1) that a broader class of people than those prosecuted violated the law, 2) that the failure to prosecute was consistent or deliberate, and 3) that the failure to prosecute was based on an impermissible classification, such as race. 451 Mass. at 437.

In *Long*, however, the SJC reduced this evidentiary burden in the context of motor vehicle stops because "it virtually always will be the case 'that a broader class of persons' violated the law than those against whom the law was enforced." 485 Mass. at 722, citing *Commonwealth v. Bernardo B.*, 452 Mass. 158, 168 (2009). The Court thus held that the first two requirements of the general selective prosecution analysis are not required and

announced instead the "totality of the circumstances test," requiring a defendant to present only enough evidence to support a reasonable inference that the stop was based on membership in a protected class. *Id.* In creating this test that deviates from the general selective prosecution analysis, the SJC considered the lack of sufficient records regarding traffic stops. *Id.* at 720 and 722. The Court also held that

> [a] defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop; such discovery may include the particular officer's recent traffic stops and motor vehicle-based field interrogations and observations (FIOs). To the extent that the relevant information exceeds the automatic discovery requirements of Mass. R. Crim. P. 14 (a) (1) (A), as amended, 444 Mass. 1501 (2005), a defendant may seek such discovery by means of a motion filed pursuant to Mass. R. Crim. P. 14 (a) (2).
>
> At the discovery stage, the question is whether the defendant has made a threshold showing of relevance." *Bernardo B.*, 453 Mass. at 169, discussing Mass. R. Crim. P. 14 (a) (2). Where relevant and material, discovery also would include information regarding the policies and procedures pertaining to the officer's unit, as well as the officer's typical duties and responsibilities.

Long, 485 Mass. at 724-726 (internal citations omitted).

In *Commonwealth v. Robinson Van-Rader,* 492 Mass. 1 (2023), the SJC expanded the holding of *Long* to apply beyond motor vehicle stops and held that "the equal

protection standard established in *Long f*or traffic stops applies equally to pedestrian stops and threshold inquiries, as well as other selective enforcement claims challenging police investigatory practices." *Id.* at 17-18. In so doing, the SJC reasoned that the tripartite burden of *Lora*

> is equally ill-suited to other claims of discriminatory law enforcement practices. There is no reason to anticipate, for example, that a defendant challenging a threshold inquiry on the sidewalk in front of a public housing complex would be better able to prove a negative -- that similarly situated suspects of other races were *not* investigated.

Robinson-Van Rader, 492 Mass. at 18. But, while the SJC specifically held that pedestrian stops and threshold inquiries are bound by the reduced burden of *Long*, it did not articulate which "other selective enforcement claims challenging police investigatory practices" are likewise covered. *Robinson-Van Rader*, 492 Mass. at 18.

Here, the defendant's motion and accompanying affidavit for discovery related to police SnapChat monitoring to uncover firearm crimes is decidedly not the type of police investigatory practice contemplated by *Robinson-Van Rader*, and the defendant should not be entitled to the discovery ordered here in the June 24, 2021 Order. First, as explained below, the action of police officers sending a Snapchat friend request to a defendant who then voluntarily accepts that request, as

the defendant here did, does not constitute an intrusion in the way that a pedestrian stop or threshold inquiry does. Unlike in traffic stops, where it can be presumed that most individuals are committing minor motor vehicle violations and not being stopped for it, the Court cannot likewise assume that most users of Snapchat are posting illegal firearms and not being investigated for it. Therefore, the tripartite burden is appropriate in cases involving investigative techniques, such as the use of Snapchat. Moreover, the concerns of the SJC -- that the tripartite burden to show a negative is ill-suited to street-level investigations -- is inapplicable here, where the defendant himself could have created his own fake Snapchat accounts to determine the demographic composition of people posting videos of illegal guns on Snapchat.

In *Commonwealth v. Carrasquillo*, 489 Mass. 107 (2022), the SJC held that the defendant failed to meet his burden of demonstrating a subjective expectation of privacy in social media content where the defendant was unaware of his privacy settings. *Id.* at 119-120. It also found that the defendant had no reasonable expectation of privacy in his Snapchat postings where he permitted unknown individuals to gain access to his content, reasoning that "once the possibility of an undercover police officer being able to view virtually all of the defendant's Snapchat content materialized,

the defendant's privacy interest was further diminished". *Id.* at 124.

Although the SJC did not establish a bright line rule that there is no privacy interest in content posted on social media, the defendant's conduct here is indistinguishable from that of the defendant in *Carrasquillo*, demonstrating that the defendant here did not have any expectation of privacy in his Snapchat posts, and the conduct of the officers in requesting the defendant as a friend that the defendant voluntarily accepted is a far cry from "police investigatory practices" such as motor vehicle and pedestrian stops which involve a physical intrusion on a defendant's person and privacy rights. Moreover, here, the defendant has made no assertion that his account was private or that he only accepted friend requests from individuals he knows. As the record demonstrates, undercover officers were in fact accepted as friends by the defendant and allowed to view his posted content (CA. 58-62). To the extent the defendant wished to assert an expectation of privacy in these posts, that should have been done prior to any rulings on discovery orders for equal protection discovery.

As such, the defendant's reliance on *Long* is misplaced and his discovery request should be analyzed under the general selective prosecution framework, which requires that a defendant's initial showing includes

evidence "that a broader class of persons than those prosecuted violated the law ... that failure to prosecute was either consistent or deliberate ... and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex." *Long*, 485 Mass. at 722 quoting *Lora*, 451 Mass. at 437.

Although the Court in *Lora* ruled that evidence supporting a claim that a defendant was stopped for discriminatory motives might be material and relevant, the Court noted in *Betances*, decided the same day, that "[a] categorical, and unsupported, request for all of an arresting officer's police reports, even for a reasonable period of time . . . cannot be sufficient by itself, in this area of law, to justify an automatic production order under rule 14 (a)(1)(A)." *Betances*, 451 Mass. at 461. If such a request was sufficient, every officer's reports would routinely be demanded in every case involving the stop of a minority defendant. *Id*. The SJC declined to approve the use of the discovery rules to impose such an onerous burden on the Commonwealth in the absence of a preliminary showing by the defendant that a reasonable basis exists to require the information sought. Instead, under general selective enforcement analysis, in order for this type of discovery to be ordered under Rule 14, the defendant must have made a preliminary showing, by way of an

affidavit containing reliable information, demonstrating a reasonable basis to infer that profiling, and not another reason alone, may have been the basis for the stop. *Id.* at 462. It is not sufficient to aver speculation that profiling may be occurring on the part of the arresting officer or his department. *Id.*

Here, while three discovery motions were filed, the merits of whether the defendant had met his burden were only addressed once, in the January 2019 Order. In that order, the motion judge explicitly stated that "this is not a case in which the defendant has shown that a person of a different race similarly situated to him was treated more favorably by law enforcement than he was treated" (CA. 58-73). The two orders that followed relied upon the January 2019 findings and did not independently evaluate whether the defendant had met his burden (CA. 105-112, 120-123). Indeed, the only affidavits submitted in support of the defendant's requests for discovery were authored by counsel for the defendant (CA. 53-55). Counsel's affidavit filed in support of the January 2019 Order contains no reasonable basis to believe that the officers involved in this case friend requested the defendant based on his race. Counsel merely averred that he conducted an "informal survey" of some public defenders asking for the race of any defendant they represented who was arrested as a result

of a Snapchat investigation (CA. 53-55). In response, he received information about 20 defendants, 85% of whom were black (CA. 53-55). The survey is silent as to the racial makeup of the clients represented by these attorneys generally, or the racial makeup of clients represented by these attorneys on gun cases *not* arising from Snapchat investigations. Based on this affidavit, the motion judge found that counsel made an "inference that Dilworth's race may possibly have been a factor in initially targeting him for use of Snapchat as an investigative tool" (CA. 65-66). In finding an inference, the motion judge noted that "[t]he racial composition of the defendants in the 20 cases identified by Dilworth differs dramatically from the racial composition of Boston's population as a whole" (CA. 65-66). However, comparing the racial composition of 20 individuals charged with firearm offenses as the result of Snapchat investigations against the racial composition of the city of Boston is inappropriate and irrelevant in this context. The survey, affidavit, and ultimately the Court's Order failed to address the central issue in any equal protection motion -- whether "a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate .. and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex'

(citations omitted)." *Lora*, 451 Mass. at 437. In fact, while the defendant's challenge is to the police action of sending him a friend request, the affidavit is silent as to any facts surrounding other friend requests sent by the police. Instead, the defendant offers facts, based on a limited survey, that speak only to other individuals who were similarly situated and treated *exactly the same* as the defendant, specifically other individuals who posted illegal firearms on Snapchat who were stopped, arrested, and charged by the police. Thus, the defendant's discovery motion should have been denied.

Alternatively, should this Court find that the traditional equal protection tripartite framework is inapplicable to cases alleging equal protection violations at an investigatory phase that involves monitoring of social media, the Commonwealth suggests a discovery procedure similar to that in place in New Jersey, and not the vastly reduced burden a defendant has in *Long*. Under the New Jersey framework, "[a] defendant advancing such a claim has the ultimate burden of proving by a preponderance of the evidence that the police acted with discriminatory purpose, i.e., that they selected him because of his race." *State v. Segars*, 172 N.J. 481, 493 (2002):

> In addition to that ultimate burden, defendant bears the preliminary obligation of

> establishing a prima facie case of discrimination. A prima facie case is one in which the evidence, including any favorable inference to be drawn therefrom, could sustain a judgment. Once a defendant through relevant evidence and inferences establishes a prima facie case of racial targeting, the burden of production shifts to the State to articulate a race neutral basis for its action. That burden of production 'has been described as so light as to be 'little more than a formality. It is met whether or not the evidence produced is found to be persuasive. In other words, the determination of whether the party defending against an Equal Protection challenge has met its burden of production can involve no credibility assessment. What is required is that the evidence produced shows a race-neutral motivation and thus raises a genuine issue of fact framed with sufficient clarity so that the other party has a full and fair opportunity to demonstrate pretext. ... [O]nce the State has met its burden of production by articulating a race-neutral explanation for its actions, the presumption of discrimination simply drops out of the picture. [The] defendant retains the ultimate burden of proving discriminatory enforcement.

Id. (internal citations omitted). Under this rubric, a defendant first must make a preliminary prima facie showing of discrimination, through evidence or affidavit that the law enforcement action being challenged was made solely based on the defendant's membership in a protected class. If that burden is met, the burden would shift to the Commonwealth to articulate a race neutral reason for the investigative action being challenged. The reason articulated by the Commonwealth must only provide a race-neutral motivation framed with sufficient clarity so that the other party has a full and fair

opportunity to demonstrate pretext and request appropriate and relevant discovery through a *Betances* motion. The added phase would not only allow the Commonwealth to produce a race neutral reason without burning useful investigative techniques, but would also allow the defendants to pursue additional discovery with notice of the Commonwealth's purported race neutral reason.

For example, were this procedure followed in the case before the Court, and assuming the defendant had met the initial burden through his affidavit, the burden would have shifted to the Commonwealth to provide a race neutral reason, which could have been accomplished through Detective Ball's affidavit stating that, "[t]he targets of these investigations are chosen based upon the Investigator's prior knowledge of the suspect of his/her associations. This is almost always based upon the target's connection to criminal activity" (CA. 140-153). The defendant could then have checked this explanation against the twenty defendants he was able to identify through his informal survey. If the Detective's explanation was not supported by the information known to counsel, an affidavit containing that information may have allowed him to meet his burden for further discovery under *Betances*. This would allow the defendant to explore an Equal Protection claim

without ordering the Commonwealth to provide discovery that would threaten all undercover Snapchat accounts.

II. THE SNAPCHAT ACCOUNT USERNAME AND BITMOJI ASSOCIATED WITH IT ARE PROTECTED FROM DISCLOSURE AS THEY ARE THE EQUIVALENT OF CONFIDENTIAL INFORMANT AND SURVEILLANCE LOCATION PRIVILEGES.

A. Confidential Informant Privilege

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

There is a specific two-stage process for determining whether an asserted privilege not to disclose this information holds or should be vitiated. *Commonwealth v. Whitfield,* 492 Mass. 61, 68-69 (2023); *Commonwealth v. D.M.*, 480 Mass. 1004, 1005 (2018). The

first stage is determining if the Commonwealth validly asserted the privilege. *D.M.*, 480 Mass. at 1005. The privilege may be asserted where disclosure would endanger the informant or where disclosure would otherwise impede law enforcement efforts. *Id.* If the privilege was properly asserted, then the motion judge evaluates the defendant's need for the information. *Id.* at 1006. The evaluation must be made in the context of whether the information is sought for use in a preliminary hearing or for use in the trial itself. *Id.* The privilege not only protects the release of the name of an informant, but also forbids the disclosure of details that would in effect identify the informant. *Commonwealth v. John*, 36 Mass. App. Ct. 702 (1994). Here, the motion judge abused his discretion by ordering discovery that would risk disclosure of confidential informants.

Here, the Commonwealth has appropriately asserted the confidential informant privilege. As explained in Detective Ball's affidavit, disclosure of the Snapchat usernames and bitmojis is tantamount to the disclosure of multiple confidential informants and surveillance locations (CA. 143-151). Moreover, the affidavit explains, the bitmojis and usernames (informant's identities and surveillance locations) have been used in numerous other criminal investigations both past and ongoing (CA. 143-151). In a case involving confidential

informants, disclosure of the identity of a confidential informant would undoubtedly compromise the use of that informant in the future because its anonymity would be lost and disclosed as a law enforcement source. Similarly, disclosure of the means and methods used by Boston Police to investigate, here the username and bitmoji associated with an undercover Snapchat account, would jeopardize not only this case but many others, and unnecessarily so where the user name and bitmoji are not "percipient witnesses" to the criminality with which defendant is charged (unlawful possession), but merely equivalent to the tip that led police to discover the defendant in such unlawful possession. By using publicly available means to access third party social media pages, law enforcement has been able to gather information, secure evidence of criminal activity, effectuate lawful arrests, and remove numerous unlawful firearms from the community, as they did in each of the defendant's cases before the Court. The use of this resource has also reduced the number of random street encounters (CA. 143-151). However, disclosure of the means and methods by which these observations were made will inevitably put informants at risk and compromise pending investigations utilizing these techniques and jeopardize law enforcement's ability to conduct further investigations utilizing any of the existing usernames and bitmojis.

Since the privilege was properly asserted, the Court should have evaluated the defendant's need for the information. *D.M.*, 480 Mass. at 1006. To overcome the Commonwealth's confidential informant privilege, the defendant bears some obligation to demonstrate that the disclosure of the confidential informant would provide material evidence needed by the defendant to present a fair case at trial. *Id.* Here, the defendant has failed to show that the discovery in question would be material or relevant to the litigation of the case, and therefore has failed to meet his burden to pierce the veil of the Common-wealth's privilege. The purported purpose of the requested discovery order would be to allow the defendant to rebut the presumption, at a motion to suppress on Equal Protection grounds, that a law enforcement officer acted in good faith. *Betances* at 461. In such a motion, the burden lies on the defendant, and "[i]n order to meet this burden, the defendant must first 'present evidence which raises at least a reasonable inference of impermissible discrimination,' including evidence that 'a broader class of persons than those prosecuted has violated the law ... that failure to prosecute was either consistent or deliberate ... and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex' (citations omitted)." *Lora*, 451 Mass. at 437, quoting *Franklin*, 376 Mass. at 894. Here, however, the

Commonwealth had already provided a race neutral reason, through Detective Ball's affidavit, regarding why officers friend request the individuals that they do, and furthermore, offered to produce this information through testimony at an evidentiary hearing. As such, in balancing the defendant's need for the requested information against the Commonwealth's privilege, the Court should have considered the proffered race neutral reason, and in the end, concluded that the probative value of the additional discovery requested was far outweighed by the government's privilege.

B. Surveillance Privilege

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

Lugo, 406 Mass. 565, 566 (1990) (surveillance location privilege vitiated by discrepancies in officer's testimony).

The information sought by the defendant here is analogous to disclosure of both a confidential informant's identity and a surveillance location. The defendant seeks to identify usernames and bitmojis used by all officers to gather information, thereby making known the identities and locations of police in virtual spaces. Virtual surveillance locations such as Snapchat have likely resulted in more seizures of illegal firearms than any physical surveillance location. Here, Detective Ball's affidavit established how use of the usernames and bitmojis have been, and are, ongoing, and how disclosure would effectively destroy the use of this law enforcement effort, thereby establishing the legitimacy of the privilege to not disclose. *D.M.,* 480 Mass. at 1005. The Commonwealth suggested to the lower court that should the Court want to hear from a witness on this issue, the Commonwealth would be welcome to an evidentiary hearing. The Court declined to hold such a hearing.

The defendant failed to establish an exception that would vitiate the Commonwealth's surveillance location privilege. In *Grace*, the officer testified regarding his observations, the distance, lack of obstructions, and his use of binoculars. 43 Mass. App. Ct. at 905.

On cross examination, the defendant sought to elicit the exact location from which the officer made these observations. *Id.* When the Commonwealth's objection was sustained, the defendant objected, citing he was precluded from conducting a full cross-examination. *Id.* The Court held that the defendant had not met his burden of showing an exception to the privilege. *Id.* at 906.

Here, as in *Grace*, the defendant failed to meet his burden of establishing an exception to the Commonwealth's privilege. As discussed *supra*, the defendant's basis for seeking the information, to raise a *Long* claim, is not relevant to the facts of this case. His reliance on *Long* is not only misplaced, but he has continuously failed to meet his burden for such discovery under *Betances*. As such, this discovery is irrelevant and his motion to compel production of the Snapchat username and emoji associated with the account should have been denied.

III. THE COURT ABUSED ITS DISCRETION IN DISMISSING THE INDICTMENTS FOR THE COMMONWEALTH'S FAILURE TO PROVIDE DISCOVERY BECAUSE THE DISCOVERY WAS NOT RELEVANT AND THEREFORE THE DEFENDANT SUFFERED NO PREJUDICE FROM THE COMMONWEALTH'S FAILURE TO PRODUCE IT.

"Dismissal of a criminal case is a remedy of last resort because it precludes a public trial and terminates criminal proceedings." *Commonwealth v. Mason*, 453 Mass. 873, 877 (2009), quoting *Commonwealth*

v. Cronk, 396 Mass. 194, 196-197 (1985). Dismissals are only appropriate where there is egregious prosecutorial or police misconduct and prejudice to the defendant's right to a fair trial, and where the dismissal is necessary to cure the prejudice. *Washington W.*, 462 Mass. at 215, citing *Mason*, 453 Mass. at 877.

Here, the Commonwealth put the Court on notice that it would not be able to comply with the June 2021 discovery order because it would put police officers and confidential informants at risk. The Court found that the discovery at issue, specifically the bitmojis and usernames of all Boston Police undercover accounts, went directly to a core defense in the case and that deliberate non-compliance of a discovery order issued by the court was an egregious discovery violation. In doing so, the Court listed several alternatives the Commonwealth could have taken, many of which the Commonwealth indeed had attempted, which was not acknowledged by the Court.

First, the Court noted that the Commonwealth had not "taken any of the measures available to protect such information consistent with seeking to comply with a court order" (CA. 188-194). A protective order, however, would be of little comfort to the Commonwealth given the plethora of cases following Mr. Dilworth's case in these discovery motions. Had this discovery been provided, it would have undoubtedly been ordered in

countless other firearm cases involving Snapchat, as was the case with the first two discovery orders. Second, the Court found that Detective Ball's affidavit did not include a single example of particular circumstances suggesting that disclosure of the information would imperil the safety of informants or officers or would impede ongoing investigations. However, this ignored the context of the example given in the affidavit which stated,

> The disclosure of an account name or specific account details would undoubtedly render that account useless in future investigations. It has become commonplace for suspected Law Enforcement undercover accounts to be publicly exposed when discovered. In many cases, individuals that will post screen shots of the undercover account and will urge his or her followers to share the image. In one case, a YVSF Detective's picture and name was attached to the warning. This posting was widely shared and resulted in the Detective receiving a number of death threats.

(CA. 188-194). Clearly, the warning that went out was the disclosure of the undercover account and the Detective's real name and photo were attached to that warning. Third, the Court suggested that an affidavit could have been submitted in camera, a request the Commonwealth made over two years prior which was swiftly denied by the Court. And finally, the Court concluded that it "could not accept the argument that revealing *anything* about icons, bitmojis, and user names" would imperil the safety of confidential informants and/or

undercover officers and impede ongoing investigations (CA. 188-194). This conclusion infers, however, that the Commonwealth refused to turn over any information about the icons, bitmojis, and usernames, which is not true. In the Commonwealth's opposition filed in June 2021, the Commonwealth asked the Court, if it found the defendant had met his burden for such discovery, to order the Commonwealth to "direct members of the Boston Police Youth Violence Strike Force to disclose the race/skin tone of the emoji used as the profile picture on his or her account, and that the Commonwealth be ordered to provide that information to the defendant" (CA. 188-194). The Court did not adopt this scope of discovery in its Order and therefore, the Commonwealth responded to the Order it was given.

Given the Court found a discovery violation, it had to decide what, if any, remedy should be applied. Such remedies should be "tailored to cure any prejudice to the defendant resulting from a discovery violation, and are remedial, not punitive, in nature." See *Commonwealth v. Carney*, 458 Mass. 418 (2010). For example, the Court may dismiss the indictment, exclude evidence, or limit the scope of testimony of witnesses. Dismissal and exclusion of evidence are two of the most severe sanctions the Court has at its disposal.

Here, the defendant legally suffered no prejudice, so sanctions served no remedial purpose. The

defendant's main argument for needing such discovery was to explore a motion to suppress based on alleged equal protection violations pursuant to *Lora*, and *Long*. However, the defendant failed to meet his burden for the requested discovery and failed to establish any viable argument for such a hearing in any of his filings. Further, the defendant was provided with an abundance of discovery which could have been used to attempt to meet his burden for an equal protection motion. Indeed, after the Commonwealth was denied appellate review on the first two discovery motions, it complied with the discovery orders, which took several months to compile as the orders were significantly burdensome. Moreover, the Commonwealth has asserted a surveillance and confidential informant privilege.

Where the Appeals Court has not ruled on the merits of whether the defendant has met his burden to obtain the requested discovery, the Commonwealth has provided extensive discovery at each turn, and the production of the discovery would cause irrevocable harm to an important public safety investigatory tactic, there was no egregious prosecutorial misconduct and the defendant suffered no prejudice. Therefore, the sanction of dismissal served no remedial purpose and the Court abused its discretion in ordering it.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the Court's order of dismissal on the indictments and the Court's discovery order.

Respectfully submitted
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June 27, 2023

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ADDENDUM

G.L. c. 269, § 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or
(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than

two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

****

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a

fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.
(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 21/2 years or in state prison for not more than 5 years.

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(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this

subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

G.L. c. 269, § 11C: Removal or mutilation of serial or identification numbers of firearms; receiving such firearm; destruction.

Whoever, by himself or another, removes, defaces, alters, obliterates or mutilates in any manner the serial number or identification number of a firearm, or in any way participates therein, and whoever receives a firearm with knowledge that its serial number or identification number has been removed, defaced, altered, obliterated or mutilated in any manner, shall be punished by a fine of not more than two hundred dollars or by imprisonment for not less than one month nor more than two and one half years. Possession or control of a firearm the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner shall be prima

facie evidence that the person having such possession or control is guilty of a violation of this section; but such prima facie evidence may be rebutted by evidence that such person had no knowledge whatever that such number had been removed, defaced, altered, obliterated or mutilated, or by evidence that he had no guilty knowledge thereof. Upon a conviction of a violation of this section said firearm or other article shall be forwarded, by the authority of the written order of the court, to the colonel of the state police, who shall cause said firearm or other article to be destroyed.

G.L. c. 211, § 3: Superintendence of inferior courts; power to issue writs and process.

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Mass. R. Crim. P. 14: Pretrial Discovery.

(a) Procedures for discovery

(1) Automatic discovery

(A) Mandatory discovery for the defendant
The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:
(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
(iii) Any facts of an exculpatory nature.
(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.
(v) The names and business addresses of prospective law enforcement witnesses.
(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.
(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.
(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.
(B) Reciprocal discovery for the prosecution
Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the

parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(vi), (vii), and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of automatic discovery; sanctions

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

(D) Record of convictions of the defendant, codefendants, and prosecution witnesses

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

(E) Notice and preservation of evidence

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

vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for discovery

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

(3) Certificate of compliance

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

(4) Continuing duty

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

(5) Work product

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

(6) Protective orders

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

for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.
(7) Amendment of discovery orders
Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant.
(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

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Mass. R. Crim. P. 17: Summonses for witnesses.
(a) Summons

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(2) For production of documentary evidence and of objects. A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

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Article 1 of the Massachusetts Declaration of Rights.
All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their

lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Article 10 of the Massachusetts Declaration of Rights. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH
vs.

RICHARD DILWORTH

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

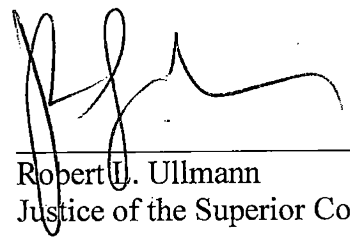
CONCLUSION AND ORDER

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

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

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

Dated: June 27, 2022



Robert L. Ullmann
Justice of the Superior Court

U4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH
vs.

RICHARD DILWORTH

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

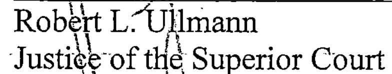
[3] The only specific example described by Detective Ball involved disclosure of a BPD detective's actual name and photo, not an icon, bitmoji or user name. *Id.* ¶ 23.

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

CONCLUSION AND ORDER

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

Dated: July 22, 2022



Robert L. Ullmann
Justice of the Superior Court

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20: it consists of less than 50 pages.

/s/Caitlin Fitzgerald
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Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant via the Odyssey Electronic Filing Service to the following user:

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Respectfully submitted
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February 2024

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

RICHARD DILWORTH,
Defendant-Appellee

BRIEF FOR THE COMMONWEALTH
ON APPEAL FROM A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY