2023-P-0042

Commonwealth of Massachusetts

Appeals Court

COMMONWEALTH

v.

RICHARD DILWORTH

BRIEF OF DEFENDANT-APPELLEE

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ISSUES PRESENTED

I. To substantiate an anticipated selective enforcement claim, Mr. Dilworth moved for discovery of bitmojis and usernames of the false Snapchat accounts created by police officers to surveil social media users. Did Judge Krupp abuse his broad discretion in concluding Mr. Dilworth made a threshold showing that the discovery was material and relevant to a colorable selective enforcement defense challenging police investigatory practices?

II. Did Judge Krupp abuse his discretion in concluding that neither the confidential informant nor surveillance location privileges bar the ordered discovery of the fake social media account bitmojis and usernames?

III. The Commonwealth egregiously and deliberately violated a court order to produce discovery material and relevant to an equal protection defense that the police were selecting targets for investigation based—at least in part—on race. Did Judge Ullman abuse his broad discretion in concluding that dismissal was appropriate?

PROCEDURAL HISTORY

The history of the discovery disputes in this case is recounted at [CA196-198, Add.75-77][1] of Judge Ullmann's Order allowing the "Defendant's Motion to

[1] The Commonwealth's brief is cited as [CB#]. The Commonwealth's Appendix is cited as [CA#]. The Addendum to this brief is cited as [Add.#].

Dismiss with Prejudice as Sanction for Commonwealth's Refusal to Produce Court Ordered Discovery for Mr. Dilworth's Equal Protection Claim."

STATEMENT OF THE FACTS

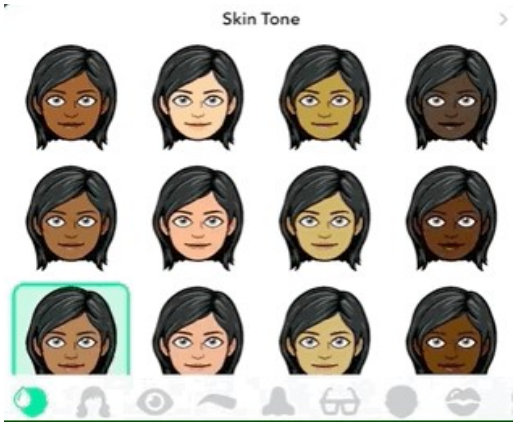
Snapchat is social media application ("app") that enables users to share video and other content. Snapchat users create personal accounts. An existing Snapchat account can be accessed only by permission from the account holder. The account holder grants access to someone who wants to "follow" the account by "friending" the requester. "Friends" generally have access to the account holder's postings. [CA59, Add.45]

In or around October 2017, a Boston Police Department [BPD] officer submitted a request through the Snapchat app to "follow" a Snapchat account with the username "youngrick44."[2] The officer did not identify himself as a police officer, and he did not use either the name or photo of anyone known to Mr. Dilworth. Mr. Dilworth as "yougrick44" accepted the request and became "friends" with BPD officers, who were acting in an undercover capacity. While

[2]According to discovery received in this litigation, BDP officers secretly monitor thousands of young people of color within the city of Boston between August 1, 2017 and July 31, 2018, including Mr. Dilworth. [CA157]

"following" the "youngrick44" account, officers viewed eight Snapchat videos of Mr. Dilworth, holding what appears to be a firearm. [CA59-60, Add.45-46][3]

At issue in this appeal is the dismissal of indictments as a sanction for the Commonwealth's refusal to produce court ordered discovery of user images, or "bitmojis", associated with false Snapchat accounts used by the BPD officers, during a one-year period. A user creating a new account on Snapchat must create a bitmoji for their account profile. This bitmoji is seen by other users or "friends" within the application. To create the bitmoji, users select from various options, including skin color, skin tone, hair color, and hair style. The images below are color screenshots of this process within the mobile application:



[CA154-155]

[3] The parties stipulated to these facts as the basis for the discovery motion, [CA59-60, Add.45-46], affirmed by the Supreme Judicial Court in *Commonwealth v. Dilworth*, 485 Mass. 1001 (2020).

Summary of Argument

I. Mr. Dilworth's discovery motion easily meets the materiality and relevance threshold, where there is a reasonable basis to infer that racial profiling may have been the reason that he was targeted for social media surveillance. The discovery order was well within the motion judge's broad discretion. [pp. 11-14] The equal protection guarantee protects against government discrimination based on race, regardless of whether the conduct involves a search or seizure. The discovery order was well within the discretion of the motion judge. [pp. 14-27]

II. Judge Krupp's conclusion that neither the surveillance-location nor the confidential-informant privileges bar discovery of the false Snapchat bitmojis and usernames was correct, and well within his discretion. [pp. 27-36]

III. Judge Ullmann's conclusion that dismissal was the appropriate remedy for the Commonwealth's deliberate and egregious violation of court-ordered discovery was correct, and well within his broad discretion to impose sanctions for discovery violations. [pp. 36-42]

Argument

Richard Dilworth, along with thousands of other young people of color, was surveilled by BPD officers, using police-created social media (Snapchat) accounts. Since 2018, Mr. Dilworth has diligently sought to gather information material and relevant to a claim that he was targeted for police surveillance in a manner that

"was motivated at least in part by race." *Commonwealth v. Long*, 485 Mass. 711, 726 (2020).

Mr. Dilworth has prevailed in his various discovery motions for "information that would substantiate his claim." *Commonwealth v. Dilworth*, 485 Mass. 1001, 1003 (2020). But disclosure has lagged. Rather than litigate the merits, the Commonwealth has consistently opposed discovery, first at the trial court, and then on interlocutory review. Although it cloaks its opposition in various guises, the common thread is rejection of equal protection scrutiny of police investigatory practices. The Commonwealth's arguments against discovery have been rejected by every trial and appellate court to consider them. In the meantime, the Supreme Judicial Court's selective enforcement jurisprudence has grown more robust. See *Commonwealth v. Robinson-Van Rader,* 492 Mass. 1, 18 (2023).

The Commonwealth's present appeal moves beyond opposition to obstruction. Unhappy with the motion judge's latest discovery order and rebuffed by the single justice's denial of interlocutory relief, the Commonwealth refused to comply with the court order. It asked the trial court to turn a blind eye to the discovery violation, and proceed with the prosecution as if the order was never issued. The trial court declined to endorse the Commonwealth's egregious and deliberate discovery violation. Because the discovery went to a core issue in the anticipated selective enforcement defense, the court properly exercised its

discretion to dismiss the case. For the reasons below, this Court should affirm Judge Ullmann's dismissal.

I. The motion judge correctly concluded that the discovery is material and relevant to an anticipated selective enforcement defense.

A. The bitmoji discovery is material and relevant to the selective enforcement defense.[4]

The discovery order was a lawful exercise of the motion judge's broad discretion.[5] Mr. Dilworth's motion for selective enforcement discovery easily met the "threshold showing of relevance" standard. *Long*, 485 Mass. at 741, quoting *Commonwealth v. Bernardo B.*, 453 Mass 158, 169 (2009). As Judge Krupp observed, "[d]iscovery of the . . . fictional Snapchat user identities is reasonably expected to offer relevant, material, and persuasive graphic evidence of the racial and ethnic

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[4] In the Commonwealth's view, the correctness of the Judge Krupp's discretionary discovery order is relevant to whether Judge Ullmann abused his discretion in dismissing the case, in response to the Commonwealth's discovery violation. But the Commonwealth has waived a direct challenge to the bitmoji discovery order, where, after the single justice denied its petition under G.L. c. 211, § 3, the Commonwealth chose to defy the order, rather than appeal it pursuant to S.J.C. Rule 2:21. "Issues not raised at trial or pursued in available appellate proceedings are waived." *Commonwealth v. Pisa*, 384 Mass. 362, 366 (1981), citing *Commonwealth v. Harrington*, 379 Mass. 446, 449 (1980). In any event, Judge Krupp's order was a proper exercise of his discretion.

[5]The Court reviews discovery orders for abuse of discretion. A discretionary decision constitutes an abuse of discretion only where "the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." *Vazquez-Diaz v. Commonwealth*, 487 Mass. 336, 345 (2021), quoting *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014).

demographics targeted by the Boston Police for secret monitoring". [CA122, Add.70] The motion judge's ruling on the bitmoji discovery "presumed familiarity with" and incorporated previous rulings in related discovery motions. [CA120-121, Add.68-69] There was no error. Indeed, the Supreme Judicial Court recently praised Mr. Dilworth's discovery motions—set out at [CA49-55]—earlier in this litigation as an exemplary "illustration of an initial showing . . . sufficient to order discretionary discovery" for an equal protection claim. *Commonwealth* v. *Cuffee*, 492 Mass. 25, 31-32 (2023). The motion for bitmoji discovery was cut from the same cloth. [CA113-119] Judge Krupp's "discovery ruling that enabled Mr. Dilworth to gather information that would substantiate his claim," *Dilworth,* 485 Mass. at 1003, was well within his considerable discretion.

As the Supreme Judicial Court recently reaffirmed, "at the discovery stage, a defendant is not required to establish a prima facia case of discrimination." *Cuffee*, 492 Mass at 30. The reason is simple: "to adopt a higher burden . . . would place criminal defendants in the untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement." *Cuffee*, 492 Mass at 30, quoting *Bernardo B.,* 453 Mass at 169. Judge Ullmann properly concluded that Mr. Dilworth met the threshold showing by presenting reliable information, in affidavit form, "demonstrating a reasonable basis to infer that racial profiling *may* have been the basis for his having been

targeted for police investigation". [CA65, Add.51], citing *Commonwealth v. Betances*, 451 Mass 457, 461-462 (2008).[6] Judge Krupp echoed this conclusion in the context of the bitmoji discovery motion, observing that "there is no question here that discovery" of the bitmojis was relevant to "allow [Mr. Dilworth] to demonstrate or at least draw an inference" about racially discriminatory "Snapchat monitoring." [CA121, Add.69]

The Commonwealth claims that Mr. Dilworth failed to meet his discovery burden because he did not identify white people displaying guns on Snapchat that were not targeted for investigation [CB34] The motion judge properly rejected this argument. As Judge Krupp explained,

> The crux of the 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 Boston Police are not monitoring the Snapchat accounts of young white males, which in turn would preclude defendant from identifying any similarly situated white males.
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> [CA109][7]

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[6] It bears notice that Judge Ullmann concluded that Mr. Dilworth met his burden for discovery production under "presumption of regularity" applied to police conduct. [CA66, Add.52] The Supreme Judicial Court has since clarified that the "presumption of regularity" does not attach to police investigatory action prior to the decision to charge, see *Robinson-Van Rader*, 492 Mass. at 20, reducing one hurdle for a defendant to overcome in seeking discovery.

[7] The Commonwealth's contention that "the defendant himself could have created his own fake Snapchat accounts to determine the demographic composition of young people posting videos of illegal guns on Snapchat," [CB34]

The Supreme Judicial Court recently echoed this reasoning, explaining that "[a]sking a defendant claiming selective enforcement to prove who *could* have been targeted . . . but was *not*, or who [the investigating agency] *could* have investigated, but did *not*, is asking [the defendant] to prove a negative." *Robinson-Van Rader*, 492 Mass. at 18 (citation omitted, emphasis in original). There was no error. Judge Krupp's conclusion that Mr. Dilworth met the threshold showing of relevance and materiality for selective enforcement discovery was a proper exercise of his broad discretion. [CA122, Add.70]

B. The ordered discovery is material and relevant to a "selective enforcement claim challenging police investigatory practices."

"At the discovery stage, the question is whether the defendant made a threshold showing of relevance." *Long*, 485 Mass. at 740-741, quoting *Bernado B.,* 453 Mass. at 169.

Here, as in *Dilworth,* the thrust of the Commonwealth's opposition to discovery "puts the cart before the horse," *Dilworth*, 485 Mass. at 449 n.5, by opposing discovery (and indeed, defying a court order) because it claims that Mr.

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is difficult to understand. Mr. Dilworth is not aware of any authority that would require him to violate the terms of the Snapchat user agreement and initiate his own investigation into the racial demographics of illegal activity on social media, before he is entitled to discovery material and relevant to an equal protection defense.

Dilworth lacks "any viable argument" [CB52] for invoking equal protection principles to challenge police investigations that do not also (in the Commonwealth's view) "constitute an intrusion." [CB34] But equal protection violations — in the form of racially-discriminatory police investigatory practices — do not require an art. 14 predicate. "Because the equal protection clause is intended to prevent discriminatory governmental conduct, the particular 'stage' of an investigation is not relevant." *Robinson-Van Rader,* 492 Mass. at 23. Both motion judges correctly rejected the Commonwealth's argument.

Mr. Dilworth notes that the Commonwealth's arguments are often inconsistent, and at places difficult to understand. Certain passages in the Commonwealth's appellate brief suggest that it now concedes (contrary to its position below) that racially discriminatory Snapchat surveillance could give rise to a "selective enforcement claim[] challenging police investigatory practices." *Robinson-Van Rader*, 492 Mass. at 18, and takes issue only with the test applicable to an anticipated equal protection claim. But however framed, the attempt to exclude "challeng[es] to police investigatory practices," *id.* that involve social media surveillance from the *Lora/Long* equal protection scrutiny is wrong. The Supreme Judicial Court has already concluded that discovery "enab[ling] Dilworth to gather information that would substantiate his claim (or not)" is appropriate in the context of this very case, *Dilworth,* 485 Mass. at 1003, which

presents a question of discriminatory use of "social media as an investigative tool." [CA109, Add.64], quoting [CA67, Add.53] The law has only gotten more favorable for Mr. Dilworth's claims since then. *Long*, 485 Mass. at 723-724, *Robinson-Van Rader,* 492 Mass. at 18.

In any event, the question on appeal is whether the motion judge correctly dismissed the prosecution as a result of the Commonwealth's "deliberate" and "egregious" non-compliance with a discovery order. [CA199, Add.78] To the extent that the Commonwealth seeks to justify its deliberate discovery violation by casting doubt on the merits of an anticipated social media surveillance-based equal protection claim, the Commonwealth is once again wrong.

1. The right to equal protection of the laws prohibits discriminatory enforcement, regardless of whether the investigation implicated a search or seizure.

"[P]olice use of an investigative technique based on a suspect's membership in a protected class violates the equal protection principles" in the state and federal constitutions. [CA63, Add.49] See *Commonwealth v. Lora*, 451 Mass. 425, 436-437 (2008). The rulings on the discovery motions below have consistently "reject[ed] the Commonwealth's . . . argument that the law on selective enforcement is not applicable" because Snapchat surveillance "was not 'a search or seizure.'" [CA62, Add.48] See [CA120, Add.68] ("presum[ing] familiarity with Judge's Ullmann's Memorandum of Decision and Order"). As Judge Ullmann

explained in ordering previous selective-enforcement discovery in this case "a claim of discriminatory enforcement does not require the existence of conduct that constitutes a search or seizure for constitutional searches." [CA62, Add.48] The order that the Commonwealth disclose "'user icons or bitmojis and the user names' used by BPD officers to infiltrate and monitor Snapchat accounts" during a one year period, [CA197, Add.76] is consistent with the Supreme Judicial Court's ruling in *Dilworth*, and well within the trial court's discretion.

The Supreme Judicial Court affirmed that approach in this very case, where it rejected the Commonwealth's bid to foreclose discovery based on its incorrect view "that there could never be an equal protection violation (in the form of selective prosecution)" due to racially discriminatory Snapchat surveillance. *Dilworth,* 485 Mass. at 1003 n.5.

The Commonwealth's bid to revive this argument a second time fares no better. In opposing the discovery below, the Commonwealth argued that discovery was inappropriate because "[Mr. Dilworth] cannot sustain a selective prosecution claim through a showing that an investigative technique that does not implicate the Fourth Amendment or Article 14." [CA170] In the Commonwealth's view, its refusal to comply with the discovery order "does not prevent that defendant from vindicating *any actual claims* regarding the constitutionality of his arrest and prosecution." [CA170] (emphasis added). This approach, of course, is

precisely what *Dilworth* rejected. See also *Washington W.*, 462 Mass. at 214. The motion judge properly rejected the Commonwealth's "suggestion [to] allow the case to proceed as if the June 2021 Order [for bitmoji discovery] never issued." [CA199, Add.77]

Excluding an investigative technique from equal protection scrutiny is flatly inconsistent with the binding legal principles articulated in *Dilworth.*[8] But even if *Dilworth* did not foreclose the Commonwealth's argument (and it does), the Supreme Judicial Court recently made clear that "the equal protection standard established in *Long* for traffic stops applies equally to . . . other selective enforcement claims challenging police investigatory practices." *Robinson-Van Rader*, 492 Mass. at 18. See also *United States v. Davis,* 793 F.3d 712 (7th Cir. 2015)(en banc) (allowing discovery to pursue equal protection claim based on showing that

[8] *Dilworth* refutes the Commonwealth's categorical opposition to the discovery order as a matter of precedent. It also compels rejection of the Commonwealth's argument under the "law of the case" doctrine, which "reflects a 'reluctance to reconsider questions decided upon earlier in the appeal in the same case.'" *Commonwealth v. Clayton*, 63 Mass. App. 608, 611 (2005), citing *King v. Driscoll*, 424 Mass. 1, 7-8 (1996). The *Dilworth* Court's conclusion that neither the motion judge nor the single justice abused their discretion with respect to the Form 26 discovery order "that enabled Dilworth to gather information that would substantiate his claim,"485 Mass. at 1003, necessarily rejected the Commonwealth's categorical opposition to discovery in the service of an equal protection claim based on racially discriminatory social media surveillance.

all thirty-seven defendants targeted in ATF 'false stash house' investigation were Black).

In an apparent nod to *Robinson-Van Rader*, the Commonwealth purports to retreat from its categorical opposition to non-search equal protection claims it championed below. It attempts to distinguish "other selective enforcement claims challenging police investigatory practices," that the *Robinson-Van Rader* Court held fall under the *Long* equal protection framework, *Robinson-Van Rader*, 492 Mass. at 707, from what it calls "cases involving investigative techniques, such as the use of Snapchat." [CB34] The distinction proposed by the Commonwealth is dubious on its own terms, and, in any event, makes no difference to the discovery ordered below. As the motion judge explained, Mr. Dilworth is entitled to the discovery because he has "present[ed] reliable information . . . demonstrating a reasonable inference that racial profiling *may* have been the basis for his having been targeted by police for investigation via Snapchat." [CA65, Add.51] The "user icons and bitmojis" are material and relevant to a potential equal protection claim because they potentially "allow [Mr. Dilworth] to demonstrate or at least draw an inference about the ethnic and/or racial demographic the Boston Police chose to target for Snapchat monitoring." [CA121, Add.69]

The Commonwealth now seeks (for a second time) to cast doubt on any constitutional limits to racially discriminatory enforcement that, in its view, "do

not constitute an intrusion in the way that a pedestrian stop or threshold inquiry does." [CB34] The gravamen of the Commonwealth's opposition remains a conflation of the search and seizure law, on the one hand, with protections against discriminatory enforcement of the law, on the other. The Commonwealth faults Mr. Dilworth for failing to "assert an expectation of privacy in [the Snapchat] posts" which it claims, "should have been done prior to any rulings on discovery orders for equal protection discovery." [CB35]

The Commonwealth is wrong. The equal protection clause prohibits discriminatory "police investigative practices," *Robinson-Van Rader*, 492 Mass. at 18, regardless of the "stage of the investigation" in which they occur. *Id.* at 23. So, the Commonwealth's discussion of cases addressing "subjective expectation of privacy in social media content" in the context of art. 14 and the Fourth Amendment is irrelevant to the selective enforcement issues in this case. [CB34-35], discussing *Commonwealth v. Carrasquillo*, 489 Mass. 107 (2022) (no constitutionally recognized expectation of privacy in Snapchat videos seen by undercover). The fact that social media surveillance "does not constitute an intrusion in the way that a pedestrian stop or threshold inquiry does," [CB34] (as the Commonwealth puts it) does not affect the viability of a selective enforcement claim. See generally *Robinson-Van Rader*, 492 Mass. at 22-23, *Long*, 485 Mass. at 758

(Cypher, J., concurring) (querying of license plates based on race violates equal protection despite absence of privacy interest in a license plate).

Lora illustrates this principle. There, the Court took pains to distinguish unreasonable searches and seizures, on the one hand, and, on the other, "selective enforce[ment] of the laws in contravention" of the equal protection guarantees of the Fourteenth Amendment and arts. 1 and 10. *Lora,* 451 Mass. at 436. At issue was an "objectively valid" traffic stop that the defendant argued was "the product of selective enforcement predicated on race." *Id.* at 436, 440. The Court concluded that racial profiling was not cognizable under art. 14, because the officer's "subjective intent is irrelevant to the legality of the stop and the subsequent search." *Id.* at 435. But that did not end the constitutional inquiry. Instead, the question was whether the otherwise-lawful traffic stop arose from racial profiling "in violation of the right to the equal protection of the laws." *Id.* at 440. In other words: whether non-white drivers were "treated differently because of their race." *Id.* at 441. The Court concluded that "statistical evidence demonstrating disparate treatment" could "meet the defendant's burden" to establish "impermissible discrimination." *Id.* at 426. The focus of *Lora's* equal protection analysis was the officer's pre-contact decision to follow and stop the vehicle for a traffic violation after he "observed that the two occupants of the vehicle were dark skinned." *Id.* at 426. The stop itself was irrelevant.

A challenge to the reasonableness of the stop, and selective enforcement challenge, are distinct and independent inquiries. *Lora,* at 436 (Fourth Amendment principles "play[] no role" in equal protection analysis), quoting *Whren v. United States*, 517 U.S. 806, 813 (1996). The Commonwealth's suggestion that Mr. Dilworth should have "asserted an expectation of privacy in [his Snapchat] posts" [CB35] is flatly inconsistent with this holding. That *Lora* (and *Long* and *Robinson Van-Rader*) involved assertion of *both* racial profiling *and* unreasonable stops does not make selective enforcement claims dependent on art. 14 "intrusion" as the Commonwealth suggests. [CB34] The opposite is true. "[I]nvestigative techniques that do not qualify as searches and seizures requiring reasonable suspicion 'must still comport with the equal protection clause.'" *Robinson-Van Rader*, 492 Mass. at 23, citation omitted.

This has long been the law. In *Bernardo B.*, 453 Mass. 158 (2009), decided one year after *Lora*, a Juvenile Court judge allowed the defendant (a boy charged with statutory rape for sexual contact with three girls) to seek discovery "to investigate and, if possible, support this claim that he had been selectively prosecuted because of his gender." *Id.* at 160.[9] On appeal from the single justice's denial of the

[9] The defendant sought information "concerning the district attorney's policies and decisions to prosecute in cases alleging statutory rape where both a defendant and any complainants were minors, on the grounds that this was relevant to his claim that the disparity in treatment between him and the

Commonwealth's G.L. c. 211, § 3 petition, the issue was whether the boy had made a "threshold showing of relevance" to the claim of selective enforcement. *Id.* at 169. The Court concluded that he had. *Id.* at 176. There was no suggestion — by the Court or the Commonwealth — that the anticipated selective prosecution claim depended on an art. 14 search, or an "intrusion" as the Commonwealth now claims is required. [CB34][10] Rather, citing *Lora*, the Court identified the issue as one of "prosecution based on arbitrary or otherwise impermissible classification." *Id.* at 168.

Bernardo B. arose — as here, and as in *Dilworth* — in the context of a discovery order dispute. Yet, the Commonwealth's brief does not attempt to distinguish it. For good reason: *Bernardo B.'s* teaching is fundamentally incompatible with the rule that the Commonwealth seeks.[11] See also

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complainant girl children was based on gender discrimination." *Bernardo B.,* 453 Mass. at 169. See also *id.* at 165 n.20.

[10] Indeed, the boy was apparently not searched or seized at all, apart from his arrest five days after the mother of one of the complainants contacted the police, *Bernardo B.*, 453 Mass. at 161-163, a seizure that would apply to all criminal defendants, including Mr. Dilworth. See *infra* Argument I(B)(2).

[11] It is of no moment that *Bernardo B.* involved a selective prosecution defense (similarly situated remain unprosecuted) and Mr. Dilworth anticipates a selective enforcement defense (similarly situated not targeted for enforcement). "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). The fact that the discovery Mr. Dilworth seeks is aimed at Boston Police "investigative practices," *Robinson-Van Rader,* 492 Mass. at 18, and not the District Attorney's Office, is a distinction without a difference in this case.

Commonwealth v. Washington W., 457 Mass. 140, 142-144 (2010) (affirming discovery order in sexual orientation selective prosecution case). The sole citation to *Bernardo B.*, in the Commonwealth's brief, is in a block quote from *Long* explaining that "at the discovery stage, the question is whether the defendant has made a threshold showing of relevance." [CB32], citing *Long*, 485 Mass. at 725, quoting *Bernardo B.,* 453 Mass. at 169. That is exactly the showing Mr. Dilworth made here. *Cuffee*, 492 Mass. at 31 (noting with approval threshold showings in *Robinson Van-Rader* and *Dilworth* by way of affidavit citing police studies, media reports, and professional experience). Where the motion judge correctly concluded that the bitmojis are relevant to "allow[ing] the defendant to demonstrate or at least draw an inference about the ethnic and/or racial demographic the Boston Police chose to target for Snapchat monitoring," [CA121, Add.69] Mr. Dilworth easily meets the "threshold showing of relevance" test.[12]

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[12] The Commonwealth also asks this Court to impose a new framework, purportedly derived from an out-of-state case, in place of what the Commonwealth describes as "the vastly reduced burden the defendant has in *Long.*" [CB39] It hopes that this test, under which it claims "a defendant first must make preliminary prima facie showing of discrimination" [CB40] would foreclose the discovery ordered below.

That request is misplaced. The Commonwealth did not argue for the new test below. *Commonwealth v. Fredericq*, 482 Mass. 70, 84 n.9 (2019) (declining to "address merits of argument" to "abandon . . . precedent" and adopt a new rule where not raised below). Moreover, the Appeals Court has "no power to alter, overrule, or decline to follow the holding of cases the Supreme Judicial Court has decided." *Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485 (2003). In any event, the Commonwealth's proposed test has little to recommend it as a policy matter.

The Commonwealth's focus on "intrusion" is mistaken. [CB34] Although investigations during the "pre-contact stage cannot give rise to Fourth Amendment constitutional concerns," the Equal Protection Clause "does not contain a seizure requirement." *United States v. Avery,* 137 F.3d 343, 353 (6th Cir. 1997). "Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion." *Id.* at 353. See also, *Robinson-Van Rader*, 492 Mass. at 23, citing *Avery.* The upshot, as the motion judge recognized, is that equal protection principles protect citizens from police action, including based solely on impermissible racial considerations. An investigative decision to "target someone for surveillance," whether at an airport (as in *Avery*) or on Snapchat (as here) is not immune from constitutional scrutiny. Nor are there grounds, as the Commonwealth now asserts, to throw up novel, additional barriers for defendants seeking discovery in this context, over and above those set out in the rules of criminal procedure and the case law.

The Commonwealth already has ample opportunity at the merits stage, under the Supreme Judicial Court's equal protection test, to "rebut[] the reasonable inference that the stop or investigation was not motivated at least in part by race." *Robinson-Van Rader*, 492 Mass. at 24 (affirming denial of defendant's motion on this ground). Indeed, that opportunity would have been afforded the Commonwealth in this very case (had it not egregiously violated the discovery order, and invited dismissal) if and when Mr. Dilworth, after receiving the ordered discovery presented a selective enforcement defense.

The Commonwealth "has failed to advance any persuasive reason that it cannot, or should not, be required to meet its obligation of production." *Bernardo B.*, 453 Mass. at 161. The discovery order was well within the motion judge's considerable discretion. *Commonwealth v. Lampron*, 441 Mass. 265, 271 (2004) (discovery within discretion and "single justice acted within his discretion in denying" G.L. c. 211, § 3 petition).

2. In any event, Mr. Dilworth was seized as a result of the "investigatory practices" at issue.

The Commonwealth's "intrusion" dependent argument also fails for another reason: Mr. Dilworth *was* seized, when he arrested, as the direct result of the Snapchat surveillance for which he seeks discovery. [CA59-60, Add.45-46] Recall that the trooper in *Lora* stopped the defendant's vehicle for a minor traffic infraction after he "observed that the two occupants of the vehicle were dark skinned." *Lora*, 451 Mass. at 427. That stop did not violate art. 14, regardless of the Trooper's "subjective intent," because "motive" is irrelevant. *Id*. at 436. But the selective enforcement claim rested on entirely different foundation, alleging racial profiling in violation of the equal protection of the laws: specifically, that the Trooper had "targeted" (e.g., followed) the driver because of his race, and *then* stopped him for a lawful reason. *Id.* at 436-438. See *Robinson-Van Rader*, 492 Mass. at 22-24 (alleging that defendant was stopped because of race); *State v. Soto*, 324 N.J. Super. 66, 84 (1996) ("officially sanctioned or *de facto* policy of targeting minorities

for investigation"). That is the same claim that Mr. Dilworth raises here: that he was "targeted" for Snapchat surveillance, and then seized when the surveillance gave the officers probable cause to believe that he had committed a crime. So even if the Commonwealth's intrusion-dependent theory of equal protection holds water (and it doesn't) Mr. Dilworth meets it here. For this reason as well, the motion judge was well within his discretion to order the discovery of the bitmojis, and enforce the order with dismissal, when the Commonwealth egregiously and deliberately violated it.

II. The motion judge correctly concluded that neither of the Commonwealth's asserted privileges barred disclosure.

Judge Krupp correctly concluded that the "informant and surveillance location privileges" asserted by the Commonwealth "are not directly applicable to electronic surveillance of the type apparently employed to watch Snapchat postings." [CA121, Add.69] Moreover, as he explained, even if social media surveillance tangentially implicated the interests protected by the asserted privileges (a proposition that he found doubtful) they would "yield where . . . the information sought is relevant and material to a defense" of selective enforcement because it would allow Mr. Dilworth to "demonstrate or draw an inference" about the "racial demographic the Boston Police chose to target for Snapchat monitoring." [CA121-122, Add.69-70] In assessing the Commonwealth's privilege claims, Judge Krupp properly applied the governing two-part test, *Commonwealth*

v. Whitfield, 492 Mass 61, 68-69 (2023)., and considered the "particular circumstances" of this case, including the "possible defenses [and] the possible significance of the [assertedly privileged] testimony." *Commonwealth v. Lugo,* 406 Mass. 565, 570 (1990). There was no error, much less any abuse of the motion judge's broad discretion. *Whitfield*, 492 Mass. at 67 (decision on privilege reviewed for abuse of discretion).[13]

At the threshold, Mr. Dilworth observes that the Commonwealth's objection to discovery in this appeal focuses less on the asserted privileges than on attacking the anticipated selective enforcement claim. The Commonwealth complains that Mr. Dilworth "has failed to show" that the bitmojis "would be material or relevant to the litigation in this case." [CB45] It claims that discovery is unwarranted because it has "already provided a race neutral reason, through Detective Ball's affidavit, regarding why officer's friend request the individuals they do." [CB46][14] The "Commonwealth's version of the defendant's burden [for

[13] The Commonwealth petitioned the single justice for relief, under G.L. c. 211, § 3. It contended that "Judge Krupp abused his discretion in issuing his order . . . both because the Commonwealth has long recognized privileges, to which the defendant demonstrated no exception, and because the information is irrelevant to any pretrial motion." [Commonwealth's Motion to Vacate Discovery Pursuant to G.L. c. 211, § 3, p. 1, SJ-2022-0049 (Feb. 3, 2022)] The single justice denied the petition. [Add.73] The Commonwealth did not seek review of that Order under S.J.C. Rule 2:21.

[14] Here, the Commonwealth relies on an unsigned and undated affidavit attached to a motion to reconsider filed five months after Judge Krupp ordered

discovery] puts the cart before the horse." *Bernardo B.*, 453 Mass. at 169. The courts below have repeatedly concluded that Mr. Dilworth has a colorable selective enforcement claim, or, in other words "demonstrated a reasonable basis to infer that racial profiling *may* have been the basis" for Snapchat surveillance. [CA65, Add.51] That is sufficient for the discovery. The Commonwealth's asserted "race neutral reason[s]" for the Snapchat targeting [CB46] are relevant to rebut an inference of selective enforcement (at the second step on the merits of an equal protection claim) if and when a reasonable inference of racial profiling has been established (at the first step on the merits). *Long*, 485 Mass. at 724-726 ("burden shifting framework under *Lora* remains the same"). See also *Robinson-Van Rader*, 492 Mass. at 24 (evidence supported "determination that police stopped the defendant to investigate his involvement in a recent shooting, and not because of his race"). But that is not a discovery question. *Long*, 485 Mass. at 725 ("At the discovery stage, the question is whether the defendant made a threshold showing of relevance"). See *Dilworth*, 485 Mass. at 1003 ("all [motion judge] did . . . was to make a discretionary discovery ruling that enabled Dilworth to gather information that would substantiate his claim (or not)"). There is little doubt that

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the discovery. [CA200, Add.79] Judge Krupp properly discounted that affidavit. [Add.72](denying motion to reconsider)

the ordered discovery is both material and relevant to the anticipated selective enforcement claim here.

A. The asserted privileges are not implicated by discovery of false account bitmojis.

The informant privilege exists to protect "the public interest in effective law enforcement," by encouraging "citizens to communicate their knowledge of the commission of crimes to law-enforcement officials . . . by preserving their anonymity." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). *Commonwealth v. Hernandez*, 421 Mass. 272, 274-275 (1995) (similar standard for surveillance-location privilege).

As Judge Krupp observed, the Commonwealth's attempt to "analogize" false social media accounts to the informant and surveillance location privilege is "[in]apt." [CA121, Add.69] The asserted privileges "are not directly applicable to electronic surveillance of the type apparently employed to watch Snapchat posting" for two obvious reasons. [CA121-122, Add.69-70] First disclosure of the "user icon, bitmoji, or user names" at issue in the discovery "does not raise a concern with the physical safety of an informant or of police officers. [CA122, Add.71], citing *Hernandez*, 421 Mass. at 276. Moreover, disclosure would "not prevent the police from inventing new [false Snapchat identities] to continue their collection of information from the Snapchat platform." [CA122, Add.71] The creation of false Snapchat account is "an infinitely renewable resource" and

"spoiling" false accounts "used three or four years ago . . . does not prevent the police from creating any number of others." [CA122, Add.70]

Clearly, Snapchat surveillance — from a false account — contrasts sharply with the disclosure risks to human informants, as well as the "spoiling" of surveillance locations. The discovery of the false account bitmojis poses "no[] concern[] with protecting a confidential informant, or an informant's property." *Hernandez*, 421 Mass. at 276. Because the discovery does not implicate human informants, there is no "anonymity" to "preserve," nor does disclosure affect the recruitment of human informants "to perform that obligation." *Roviaro*, 353 U.S. at 59. Judge Krupp's conclusions are amply supported by case law and the facts of the surveillance at issue in the ordered discovery.

The Commonwealth speculates, without "factually supporting [its] argument," [CA200, Add.79], that disclosure would somehow "put police officers and confidential informants at risk." [CB49] But that concern — even to the extent that it was conceivably raised in an unsigned affidavit attached to its Motion to Reconsider [CA124-134] — makes little sense.[15] Judge Krupp correctly disregarded

[15] There is a single reference that could plausibly be construed as alleging "put[ting] police officers . . . at risk" in the unsigned affidavit attached to the motion to reconsider. The document states that "public exposure" of an "undercover account" had "in one case" resulted in "posts [of] screen shots of the undercover account" and "a YVSF Detective's picture and name was attached to the warning." [CA142] But the affidavit does not explain the connection between

it. [Add. 72] ("unsigned and undated [affidavit] is only now being submitted more than five months after the Court's decision [and] generally rehashes arguments previously presented [and] rejected"). See *Commonwealth v. Thomas*, 399 Mass. 165, 167 (1987) (weight and credibility of affidavits are for motion judge). As Judge Ullmann put it, addressing the Commonwealth's "egregious discovery violation" [CA199, Add.78] in the context of the motion to dismiss, "[w]ithout factual information, this Court cannot accept the argument that revealing *anything* about icons, bitmojis, and usernames deployed by BPD four-to-five years ago would imperil the safety of confidential informants and/or undercover officers and impede ongoing investigations." [CA200, Add.79] Both motion judges correctly rejected the Commonwealth's asserted privileges. There was no error.

B. Even if the discovery somehow implicated the privileges, disclosure was appropriate where the discovery is material and relevant to the fair adjudication of the selective enforcement defense.

Upon a showing that the discovery is relevant and material to the defense, even a properly asserted confidential informant or surveillance location privilege must yield to a defendant's rights. *Whitfield,* 492 Mass at 68-69. The defendant's burden is "relatively undemanding" requiring merely an articulated basis sufficient for the judge to assess the materiality and relevancy of the discovery if

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the disclosure of a fake account to the "YVSF Detective" or how the discovery ordered by Judge Krupp in this case would possibly link any detective (much less an informant) to the bitmoji associated with the fake account.

it is not already apparent. *Commonwealth v. D.M.*, 480 Mass. 1004, 1006 (2018). If a privilege exists, a surveillance location still must be disclosed if it is "relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause." *Commonwealth v. Grace,* 43 Mass. App. Ct. 905, 906 (1997). *Commonwealth v. Dias*, 451 Mass. 463, 469 (2008) (same for informant privilege).

Judge Krupp correctly concluded that the discovery is relevant to Dilworth's claim that BPD may be targeting its Snapchat surveillance based on race, under the test articulated by the Supreme Judicial Court. [CA121, Add.69] See *Long*, 485 Mass. at 724 ("When examining the totality of the circumstances, judges should consider factors such as: (1) patterns in enforcement actions by the particular police officer"). *Lora*, 451 Mass. at 442 (2008) (defendant *may* use statistics to present an equal protection claim).

As Judge Ullmann observed (in ordering the Form 26 discovery) "social media can serve as a valuable law enforcement tool [,] [h]owever, the U.S. Constitution and the Massachusetts Declaration of Rights require that race play no part in any decision by police to investigate a crime." [CA58, Add.44] The targeting decisions made by the police at the outset of an investigation are a particularly important component of "police investigative practices," *Robinson-Van Rader*, 492 Mass. at 18. The creation of bitmoji user images by officers represents an early instance of officer discretion in the selection of surveillance

targets. [CA113-119] Accordingly, the bitmojis "used by police to infiltrate Snapchat accounts" are material and relevant to "inference[s] about the ethnic and/or racial demographic the Boston Police chose to target for Snapchat monitoring." [CA121, Add.69] There is therefore little question that the ordered discovery, as Judge Ullmann concluded, "goes directly to the core of the defense in this case." [CA199, Add.78]

Because the bitmoji discovery relates directly to the "selection" of enforcement targets, it is clearly material and relevant to "selective enforcement claims challenging police investigatory practices," *Robinson-Van Rader*, 492 Mass. at 18, contemplated here, where Mr. Dilworth will bear the initial burden of establishing a "reasonable inference" that race was a motivating factor in the police action. *Long*, 485 Mass. at 726. As Judge Ullmann observed, the "overly restrictive approach" championed by the Commonwealth "would undermine the Supreme Judicial Court's encouragement to defendants that they employ the *Lora* framework to ferret out whether or not discrimination has played any role in law enforcement decisions about whom to investigate or prosecute." [CA70-71, Add.56-57], citing *Commonwealth v. Buckley*, 478 Mass. 861, 871 (2018). And here, Mr. Dilworth's relevance and materiality showing is even stronger, where the Court has recently explained that a defendant raising a selective enforcement claim may

rely on many classes of evidence (beyond statistics) to raise an inference "that the officer discriminated on the basis of race." *Long*, 485 Mass. at 723-724.

Contrary to the Commonwealth's argument, the fact that it previously complied with other discovery orders (such as the order affirmed in *Dilworth*) does not detract from the materiality and relevance of the bitmojis. "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". [CA200, Add.79] See *Commonwealth v. Robertson*, 162 Mass. 90, 97 (1894) (parties are "entitled to present the issue to the [factfinder] with all the evidence legitimately bearing upon it").

Every court to have considered the issue has concluded the racial demographics of the people surveilled are material and relevant to an equal protection claim, and therefore were properly subject to a discovery order. See *Dilworth,* 485 Mass. 1001, SJ-2019-0171, SJ-2022-0049, [CA58-73, Add.44-59], [CA105-112, Add.60-67], [CA195-201, Add.74-80]. And here, decisions about how to style their Snapchat account bitmojis may even more concretely show evidence of discriminatory purpose pervading the "challeng[ed] police investigatory practice," *Robinson-Van Rader*, 492 Mass. 18, where the bitmojis used by the police illustrate the racialized targeting of the investigation. The Supreme Judicial Court has recently explained that "the evidence necessary to raise a reasonable inference of discrimination need not be statistical." *Long*, 485 Mass. at 271. See also

Buckley, 478 Mass. at 871 (encouraging defendants to seek discovery and present evidence of racial discrimination). The discovery easily clears the materiality and relevance bar with respect to Mr. Dilworth's anticipated equal protection defense.

For these reasons, Judge Krupp correctly concluded that — even if the informant and surveillance-location privileges were somehow relevant to Snapchat bitmojis — those privileges yielded to Mr. Dilworth's right to present a defense. [CA122, Add. 70], citing *Dias*, 451 Mass. at 468. "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case.'" *Id.* at 468. quoting *Roviaro*, supra, at 60-61. Where the Commonwealth's asserted interests in protecting informants and surveillance locations are — at best — extremely tangential, and where the evidence "goes directly to a core defense," [CA 199, Add.78] the motion judge was well within his considerable discretion in ordering the disclosure.

III. Dismissal for deliberate refusal to produce ordered discovery that went to the core of an anticipated selective enforcement defense was well within Judge Ullmann's discretion.

Mr. Dilworth now turns to the principal question on appeal: Did Judge Ullmann abuse his discretion in dismissing the indictment in response to the Commonwealth's "deliberate non-compliance" with the court order to provide

Mr. Dilworth with discovery material to his selective enforcement defense? [CA199, Add.78] He did not.

This Court reviews sanctions for discovery violations for abuse of discretion. See *Washington W.*, 462 Mass. at 213. "There is no question that a judge may in his discretion order discovery of information necessary to the defense of a criminal case, and that, on failure of the Commonwealth to comply with a lawful discovery order, the judge may impose appropriate sanctions, which may include dismissal of the criminal charge" *Commonwealth v. Douzanis*, 384 Mass. 434, 436 (1981), *Commonwealth v. Cronk*, 396 Mass. 194, 198–99, (1985), see also Mass. R. Crim. P. 14 (c)(1). As set out above, and in the various rulings by the motion judges in this case, "the discovery that the Commonwealth and BPD have refused to provide goes directly to the core defense in this case, i.e., that Dilworth's prosecution was the result of unconstitutional police action." [CA 199, Add.78] In *Washington W.*, the Supreme Judicial Court explained that dismissal is appropriate, and within the motion judge's discretion, where egregious prosecutorial misconduct prejudices the defendant's "opportunity to develop his factual claim that he was the victim of selective prosecution." *Washington W.*, 462 Mass at 216. The same is true here.

Under Mass. R. Crim. P 14(c), judges are granted wide discretion in crafting sanctions for noncompliance with discovery orders. *Commonwealth v. Baldwin*, 385

Mass. 165, 177 (1982). A judge may exclude the withheld evidence or "enter such other orders as it deems just under the circumstances". Mass. R. Crim. P. 14(c)1; 14(c)2. These rules are 'based on the assumption that the trial court is in the best situation to consider the opposing arguments concerning a failure to comply with a discovery order and to fashion an appropriate remedy.'" *Commonwealth v. Giontzis*, 47 Mass. App. Ct. 450, 459 (1999) (quoting Reporters' Notes to Mass. R. Crim. P. 14(c)). Accordingly, a judge's sanctions order is reviewed for abuse of discretion. *Commonwealth v. Carney*, 458 Mass.418, 425 (2010).

Sanctions are remedial measures and "should be tailored appropriately to cure any prejudice resulting from a party's noncompliance and to ensure a fair trial." *Commonwealth v. Carney*, 458 Mass. 418, 427 (2010). Here, the Commonwealth and the BPD blatantly refused to obey a court order, even after it had survived a motion to reconsider and a G.L. c. 211, § 3 petition to the single justice. "Litigants may not resort to self-help remedies and unilaterally flout court decrees." *Carney*, 458 Mass. at 433 n.20. The requirement that parties obey the orders of a court is especially important in this case, where the Boston Police Department is withholding evidence that would provide "persuasive graphic evidence" of online racial targeting in their investigations. [CA122, Add.70]

As Judge Ullmann explained, *Washington W.* is directly analogous to the deliberate discovery violation in this case. There, the Commonwealth was

ordered to provide statistical data concerning the district attorney's prosecution of juvenile sexual assault charges to prepare, assess, and establish a potential selective prosecution claim. *Id*. at 206-208. The Commonwealth's motion to reconsider and petition under G.L. c. 211, § 3, were both denied. The Commonwealth refused to turn over the discovery. In response, the motion judge dismissed the charges with prejudice. *Id*. The Supreme Judicial Court affirmed. *Id*. at 213-214. It explained the "right to a fair trial [. . .] included the right to develop the factual basis necessary to support [a] claim of selective prosecution, and the prosecutor's refusal to comply with the judge's discovery order essentially denied him the opportunity to evaluate and present this claim." *Id*. at 216. Dismissal was the right sanction "to grant the juvenile the relief he potentially could have obtained had he received the ordered discovery and demonstrated that he was a victim of selective prosecution." *Id* at 217.

The Commonwealth's attempt to distinguish *Washington W.* "fall[s] short." [CA199, Add.78] As in *Washington W.*, the Commonwealth here argued that the Court should ignore its non-compliance with the bitmoji discovery because, in its view it had "already provided" other discovery related to Mr. Dilworth's anticipated selective enforcement defense. [CA199, Add.78] But as Judge Ullmann explained, "it is not for the Commonwealth to decide how much discovery the defendant needs to pursue his defense; that is for the court to decide." [CA199,

Add.78][16] The Commonwealth's position — as Judge Ullmann recognized — amounts to a suggestion that "the case proceed as if the June 2021 Order never issued." [CA199, Add.78] The court was well within his discretion to reject that approach.

For the same reason, the court was right to reject that Commonwealth's complaint that complying with the court-ordered discovery would supposedly "compromise ongoing investigations" or place a police officer or informant in harm's way [CA200, Add.79] Those arguments were fully aired, and roundly rejected, in the context of the discovery litigation. And they were presented to the single justice, who declined to vacate the order.[17] In any event, the Commonwealth's renewed invocation of the rejected privileges lacked any "factual support," and "without factual information," Judge Ullmann could "not

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[16] The discovery order at issue in this appeal seeks information that is different in kind than the discovery already received under the previous orders, such as the Form 26 data. The latter — mostly statistical data — is a basis for inferences about selective enforcement under the Supreme Judicial Court's equal protection jurisprudence. The former is a "specific fact" about investigative choices deliberately made by the officers relevant to the "totality of the circumstances." *Long*, 485 Mass. at 723, 715. All of this discovery is "information that would substantiate," *Dilworth* , 485 Mass. at 449, an anticipated selective enforcement claim that the social media surveillance targeting was "motivated (whether explicitly or implicitly) by race," *Long*, 485 Mass. at 724, albeit in different ways.

[17] The Commonwealth chose not to appeal from the judgment of the single justice denying its petition filed pursuant to G.L. c. 211, § 3, see [Add.73], as it did in *Dilworth*, 485 Mass. 1001 (2020).

accept the argument" about the alleged harms from disclosure, in the service of excusing the Commonwealth's non-compliance. [CA199-200, Add.78-79] That too, was a proper exercise of the motion judge's discretion.

The Commonwealth's "alternative . . . to dismissal" was wholly inadequate. In the Commonwealth's view, it was entitled to disregard the discovery order "as if [it] was never issued." [CA199, Add.78] It proposed to move forward with the prosecution, "and if [Mr.] Dilworth is convicted he can raise on appeal the Commonwealth's failure to provide discovery." [CA199, Add.78] That approach makes little sense as matter of equity or judicial efficiency. Cf. *Washington W.*, 462 Mass. at 217 ("opportunity eventually to present his claim would not cure the loss of the earlier opportunity to present it"). The motion judge was well within his discretion to reject it.

On appeal (and below) the crux of the Commonwealth's argument is that the discovery which it refuses to disclose is "not relevant" [CB48] because in the Commonwealth's view Mr. Dilworth "has failed to establish any viable argument" for selective [enforcement]" [CB52] and therefore "suffered no prejudice from the Commonwealth's failure to produce it." [CB48] The courts below, the single justice, and the Supreme Judicial Court, have roundly rejected these arguments. The Commonwealth's prediction about the "substantive merits of [Mr.] Dilworth's [anticipated] selective [enforcement]" defense, *Dilworth,* 485 Mass. at

1003, cannot permit it to disregard discovery orders "as if [they] never issued." [CA199, Add.78] See *Dilworth* , 485 Mass at 1003, 1003 n.5.

There was no error, let alone an abuse of discretion, in dismissing the indictments.

CONCLUSION

For all the reasons above, Judge Ullmann did not abuse his broad discretion in dismissing the case in response to the Commonwealth's deliberate and egregious failure to comply with court-ordered discovery. The order dismissing the case must be affirmed.

Respectfully submitted,

Richard Dilworth

By his attorney,

/s/ Joshua Raisler Cohn
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November 20, 2023

ADDENDUM[18]

[18] The Commonwealth declined to seek review of the single justice's denial of its G.L. c. 211, § 3 petition pursuant to S.J.C. Rule 2:21. It appealed solely from the order allowing the motion to dismiss as a sanction for its refusal to provide the court ordered discovery. [CA193-194] Although the Superior Court and single justice orders addressing the discovery are not "appealed judgement[s] or order[s]," under Mass. R. App. P. 16(a)(13)(B), and 16(b)(3), the defendant includes them in his Addendum for the Court's convenience.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH

vs.

RICHARD DILWORTH

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

Reducing gun violence in Boston is a law enforcement priority and an important matter of public safety and health.[1] In this endeavor, social media can serve as a valuable law enforcement tool.[2] 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.[3]

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

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[1] 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).

[2] 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).

[3] See infra at Section A.

additional discovery that he believes may support a claim of racial discrimination in police use of Snapchat.[4]

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[5]

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

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

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

[5] For purposes of this motion only, the parties stipulate to the facts set forth herein.

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

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

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

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

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

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

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

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

DISCUSSION

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

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

[6] "Comm. Br." refers to the Commonwealth's opposition brief, and "BPD Br." refers to BPD's opposition brief.

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

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

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

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

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

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

To obtain documents under Mass. R. Crim. P. 17(a)(2), the party seeking the documents must make a threshold showing that the evidence sought is material and relevant. Thomas, 451 Mass. at 456. Consistent with federal case law under the analogous federal rule of criminal procedure, the Supreme Judicial Court has adopted a four-part test, which requires the defendant to show "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" Commonwealth v. Lampron, 441 Mass. 265, 269 (2004), quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974) (internal quotation marks omitted). If these four

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] The Court recognizes that it has no authority to compel BPD to create any policy, procedure or protocol.

[12] See Comm. Br. at 6, 10. BPD also relies on Betances in its opposition brief. See BPD Br. at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND ORDER

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

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

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

Robert L. Ullmann
Justice of the Superior Court

Dated: January 18, 2019

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH

vs.

RICHARD DILWORTH

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

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

BACKGROUND

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

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

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

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

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

Commonwealth then sought review by the full court. On June 16, 2020, the Supreme Judicial Court rejected the Commonwealth's further appeal and upheld the Single Justice's ruling. Commonwealth v. Dilworth, 485 Mass. 1001, 1003 (2020) (rescript).

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

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

a. Notice of any documentation that exists, in addition to the previously provided "Form 26'" reports and the associated video recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1, 2017 and July 31, 2018 (i.e., a spreadsheet or list of people being monitored, officer notes, screenshots, etc.).

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

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

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

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

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

DISCUSSION

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

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

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

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

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

I am satisfied that the information defendant seeks in Requests 1 and 4 is relevant and material to his defense. Defendant contends that the materials responsive to Request 1 will provide race and demographic information that did not appear in the Form 26 reports he received in response to his Rule 17 request, and that such information is necessary to generate meaningful statistical evidence. I agree and the Commonwealth does not meaningfully contest this.[2] Defendant also argues Requests 4(a)-4(d) will yield information that will allow him to compile statistical evidence and explore the demographic composition of the total population the Boston Police targeted for Snapchat surveillance during the relevant time period; and the information sought in Request 4(e) is relevant to future discovery requests concerning the mechanics and oversight of the Boston Police Department's use of Snapchat in investigations.

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

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

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

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

ORDER

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

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

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

(ii) To direct each officer to disclose in writing the initials (e.g. "William Smith" would be listed as "W.S."), perceived race, gender, and age of each individual they monitored during the relevant time period, and identify with reasonable specificity the sources of information from which they derived their conclusions for each individual; and

(iii) To produce all information collected in response to (i) and (ii) to defendant by May 5, 2021.

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

Dated: March 30, 2021

Peter B. Krupp
Justice of the Superior Court

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH

vs.

RICHARD DILWORTH

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

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

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

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

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

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

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

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

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

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

ORDER

Defendant's Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User Name is **ALLOWED**.

Dated: June 24, 2021

Peter B. Krupp
Justice of the Superior Court

Endorsement on Motion to Reconsider, (#53.0): DENIED

12/8/21 After review, the Commonwealth's Motion to Reconsider the Court's Order to Compel Disclosure of Snapchat Usernames and Bitmojis (Docket #53 in 1884CR453 and Docket #56 in 1884CR469) is **DENIED**. The Commonwealth has not cited any changed circumstances, newly discovered evidence or information, or any development in the relevant law. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470 (2012). The additional affidavit contains no such information. The additional affidavit, which is unsigned and undated, could have been presented when the motion was being litigated, and is only now being submitted more than five months after the Court's decision without explanation for the delay. To the extent the Commonwealth's motion contends the Court erred in its original ruling, it generally rehashes arguments previously presented and that I rejected. See Memorandum and Order on Defendant's Motion for Discovery of Snapchat User Icon/Bitmoji and User Name (Docket #52). /s/ Peter B. Krupp

SUPREME JUDICIAL COURT
for Suffolk County
Case Docket

COMMONWEALTH v. RICHARD DILWORTH
SJ-2022-0049

CASE HEADER

Case Status	Decided: petition denied	Status Date	03/31/2022
Nature	Superintendence c 211 s 3	Entry Date	02/03/2022
Sub-Nature	Discovery dispute	Single Justice	Georges J.
TC Ruling		TC Ruling Date	
SJ Ruling		TC Number	
Pet Role Below		Full Ct Number	
Lower Court		Lower Ct Judge	Peter B. Krupp, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Petitioner	Cailin M. Campbell, Chief, App. Div.
Richard Dilworth Defendant/Respondent	Joshua Raisler Cohn, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
02/03/2022		Case entered.
02/03/2022	#1	Commonwealth's Motion/Petition to Vacate an Order of Discovery Pursuant to G. L. c. 211, § 3 with Certificate of Service and attachments filed by ADA Cailin Campbell.
03/11/2022	#2	Defendant's Opposition to the Commonwealth's Petition for Extraordinary Relief Pursuant to G. L. c. 211, sec. 3 with Certificate of Service filed by Atty. Josh Raisler Cohn.
03/11/2022	#3	Defendant's Record Appendix to Paper #2 filed by Atty. Josh Raisler Cohn.
03/21/2022		Under advisement. (Georges, Jr., J.).
03/31/2022	#4	JUDGMENT: "This matter came before the Court, Georges, J., on a petition pursuant to G. L. c. 211, § 3, filed by the Commonwealth. The Commonwealth seeks relief from orders of the Suffolk Superior Court dated June 24, 2021, allowing the defendant's motion for discovery of snapchat user icon/bitmoji and username, in docket numbers 1884CR00453 and 1884CR00469. After careful review of the petition and opposition, it is ORDERED that the petition be, and the same hereby is, DENIED without hearing." (Georges, J.)
03/31/2022	#5	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 4 filed.

As of 05/23/2022 2:25pm

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH
vs.

RICHARD DILWORTH

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

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

PROCEDURAL HISTORY

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.

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

[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

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 1 Massachusetts Declaration of Rights

Art. I. All people 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. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Art. 10 Massachusetts Declaration of Rights

Art. X. 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.

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of the court that pertain to the filing of briefs, including those specified in Rule 16(k) of the Massachusetts Rules of Appellate Procedure. This brief complies with the type-volume limitation of Rule 20 because it contains 8,575 words, excluding the parts of the brief exempted by the rule. This brief complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Altheas font.

/s/ Joshua Raisler Cohn
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November 20, 2023
&
February 5, 2024

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I hereby certify that on November 20, 2023, I have made service of this brief upon the attorney of record for the Commonwealth by Electronic Filing System on:

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/s/ Joshua Raisler Cohn
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