COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NO. 2282-CR-00117

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff**	)
V.	)
KAREN READ, **Defendant**	)

DEFENDANT KAREN READ'S OPPOSITION TO COMMONWEALTH'S OPPOSITION TO DEFENDANT'S REQUEST FOR EVIDENTIARY HEARING ON MASS. R. CRIM. P. 17

Now comes the defendant, Karen Read ("Ms. Read", or "the Defendant"), and respectfully moves this Honorable Court to deny the Commonwealth's "Opposition to Defendant's Request for Evidentiary Hearing on Mass. R. Crim. P. 17." This Court, on May 3, 2023, already scheduled a May 25, 2023 evidentiary hearing regarding Ms. Read's "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." As grounds for this motion, The Defendant states that Assistant District Attorney Adam Lally ("ADA Lally") had previously agreed to this hearing and therefore should be judicially estopped from now opposing the hearing that has already been scheduled, to which he had agreed. She further states that the Commonwealth is challenging the factual basis for the Defendant's Rule 17 motion, so this Court can only rule on the motion after hearing evidence and making findings of fact based upon that evidentiary hearing.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2023, Ms. Read filed her "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." This motion seeks the following documentary evidence:

1. The production of all cell phone(s) in the possession of and/or used by Brian Albert between January 28, 2022, and present, so that defense expert Richard Green may conduct a forensic examination of the respective cell phone(s) for the purpose of recovering incoming and outgoing text messages, voice calls, voicemails, emails, location data, web searches, photographs, and/or other communications sent and/or received by Brian Albert on any other messaging platforms between January 28, 2022 and February 5, 2022.

2. A copy of all information contained on any cloud-based accounts used to store the above-referenced information from Brian Albert's cell phone(s) between January 28, 2022 and February 5, 2022.

3. Any access codes and/or passwords necessary to access and/or forensically download the cell phones and/or cloud-based information.

Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T[1], at p. 1-2. This motion was filed following forensic analysis of Ms. Jennifer McCabe's cell phone by defense expert, Richard Green ("Mr. Green"), which revealed that Ms. McCabe had searched "ho[w] long to die in cold" at 2:27 a.m. on January 29, 2022 — more than three hours before Officer John O'Keefe's body was discovered outside of Mr. Albert's residence at 34 Fairview Road in Canton, Massachusetts. In support of this motion, Ms. Read further noted that data from the Apple Health application on Officer O'Keefe's iPhone shows that he took 80 steps and climbed the equivalent of three floors, between 12:21:12 a.m. and 12:24:37 a.m. Given that Officer O'Keefe's cell phone "pinged" in the location of 34 Fairview Road at 12:19:33 a.m, Ms. Read asserted in her motion that this data confirms that Officer O'Keefe entered Mr. Albert's residence.

None of the above information had been provided or revealed by the Commonwealth. Specifically, Massachusetts State Police Trooper Nicholas Guarino's May 31, 2022 extraction report of Ms. McCabe's cell phone omits *all* web search history associated with her phone. As set forth in the "Affidavit of Richard Green"[2] in support of this motion, Mr. Green's analysis suggests that "there were significant deletions of call data by the user of Jennifer McCabe's iPhone 11." In fact, Ms. McCabe deleted 18 call entries between 5:33:47 a.m. and 8:50:15 a..m. on January 29, 2022. Saliently, Ms. McCabe deleted a 6:23:00 a.m. call to Mr. Albert, her

[1] The "Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" is incorporated herein by reference.
[2] "Affidavit of Richard Green in Support of Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" is incorporated herein by reference.

brother-in-law, and deleted a screen shot of Mr. Albert's contact information at 12:53:23 p.m. That screenshot had been taken at 6:08:35 a.m. that morning.

The above information was discovered by Ms. Read's defense team well after the September 19, 2022 denial of Ms. Read's initial Rule 17 Motion directed to Brian Albert, Julie Albert, Colin Albert, and Brian Higgins[3]. Upon discovering this exculpatory evidence, Ms. Read filed the above-mentioned "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." This new motion contains a trove of new information that was not available to the defense team when Ms. Read's initial Rule 17 motion was filed. This new motion is not a motion to reconsider the Court's September 19, 2022 ruling on the first Rule 17 Motion.

On May 1, 2023, the Commonwealth filed an opposition to the Defendant's April 12, 2023 "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" — only two days before Ms. Read's scheduled motion hearing. Additionally, the defense received for the first time (in the Commonwealth's Notice of Discovery XIV, Dated May 3, 2023) an April 24, 2023 report by Trooper Nicholas Guarino, asserting that Ms. McCabe did not search any form of "how long to die in cold[4]" until 6:23:51 a.m. on January 29, 2022.

Previously, on April 13, 2023, Attorney Elizabeth Little ("Attorney Little") emailed Assistant District Attorney Lally ("ADA Lally") in an effort to determine if the Commonwealth intended to dispute the accuracy of Mr. Green's findings with regard to Ms. McCabe's phone, which would necessitate an evidentiary hearing on this motion:

---

[3] The Commonwealth provided a full forensic image of Ms. McCabe's phone in its February 8, 2023 Notice of Discovery VIII. This production followed numerous attempts and motions to compel this critical evidence.

[4] Per Trooper Guarino's report, Ms. McCabe searched "How long ti die in cikd" at 6:23:51AM, and "Hos long to die in cold" at 6:24:37AM.

Elizabeth Little April 13, 2023 at 2:45 PM

Commonwealth v. Karen Read Details

To: Lally, Adam (DAA), Cc: Alan Jackson, David Yannetti, Ian Henchy

Siri found new contact info Elizabeth Little elittle@werksmanjackson.com add...

Dear Mr. Lally:

You should have received an electronic copy of our Rule 17 Motion and accompanying Affidavits and Exhibits yesterday. We also overnighted a hard copy in the mail for you. **Please provide confirmation in writing by tomorrow, Friday April 14, 2023, that you have provided notice to the record holders—namely, Brian Albert, Jennifer McCabe, Verizon, and AT&T—as required by law, indicating that our Motion will be heard on May 3, 2023 at 2:00 p.m. in Norfolk County Superior Court.**

According to various news outlets, your office has indicated that it will be responding to the Motion on or before May 3, 2023. Please confirm that to be true. Further, please advise as to whether you intend to dispute the validity of our expert's findings. If so, we will have our expert available to testify on May 3. Please bear in mind that our expert lives out of state and will be required to fly in for the hearing should it be necessary. As a professional courtesy, let us know as soon as possible if you believe that (1) you will be calling any witness or witnesses with regard to the data at issue; or (2) you plan to otherwise dispute the defense expert's findings such that it would necessitate an appearance in court.

Thanks,
Elizabeth

Elizabeth S. Little
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017

ADA Lally responded the following day, on April 14, 2023:

Lally, Adam (NFK) April 14, 2023 at 3:43 PM

RE: Commonwealth v. Karen Read Details

To: Elizabeth Little, Cc: Alan Jackson, David Yannetti & 2 more

Hello, yes, I did receive a copy, thank you very much! I sent notices to all involved partiers in the mail yesterday morning. I'm sorry, but I don't really pay any attention to any news outlets or press releases, but I certainly expect to have an answer by our next court date on 5/03. The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. I will certainly let you know if the information is disputed and you are free to do whatever you like as far as witnesses are concerned. if it is a disputed issue, I would likely be looking to call witnesses of my own in regard to that. I'll certainly let you know as soon as possible, so both you and the Court can make whatever necessary accommodations to conduct an evidentiary hearing. Thanks, Adam

(Emphasis added). Attorney Little sent a follow-up email on April 19, 2023, requesting the names of any witnesses ADA Lally intended to call at the evidentiary hearing on this motion, and the specific information the Commonwealth intended to contest. Having received no reply, Attorney Little emailed ADA Lally again on April 25, 2023:

Elizabeth Little 4/25/23
RE: Commonwealth v. Karen Read Details
To: Lally, Adam (NFK) & 4 more

Dear Mr. Lally,

I am writing to follow up on the below. You indicated in your April 14 email that you would have an answer for us by last week. We still have not heard from you. Please advise.

Thank you,
Elizabeth

Elizabeth S. Little
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor

After receiving no reply, Attorney Alan Jackson ("Attorney Jackson") sent another follow-up email on April 26, 2023:

Alan Jackson 4/26/23
RE: Commonwealth v. Karen Read Details
To: Lally, Adam (NFK) & 5 more

Dear Adam,

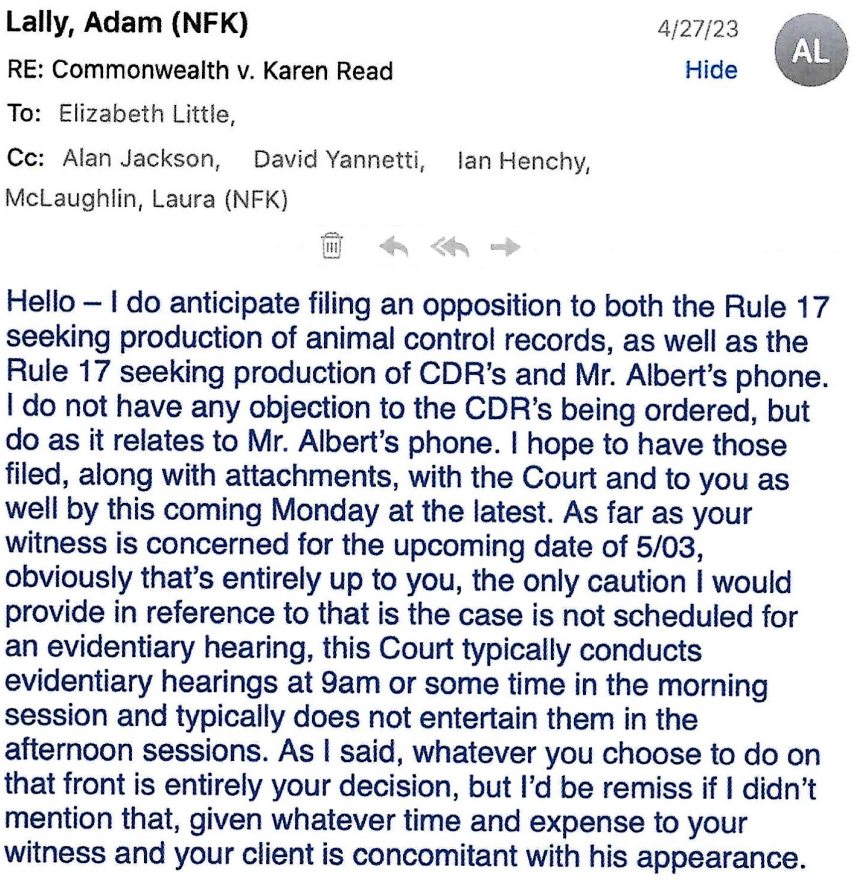
Or office has now reached out to you twice (April 19 and April 25), having been ignored both times. You indicated in your email of April 14, that, "The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. I will certainly let you know if the information is disputed..." Thus, we expected a response last week.

Can you please respond? Or if you have no intention of responding, please advise so we can deal with that in a timely manner. As you know, the May 3 hearing is quickly approaching.

Best,

AJ

ADA Lally responded on April 27, 2023:



Lally, Adam (NFK) 4/27/23

RE: Commonwealth v. Karen Read Hide

To: Elizabeth Little,

Cc: Alan Jackson, David Yannetti, Ian Henchy, McLaughlin, Laura (NFK)

Hello – I do anticipate filing an opposition to both the Rule 17 seeking production of animal control records, as well as the Rule 17 seeking production of CDR's and Mr. Albert's phone. I do not have any objection to the CDR's being ordered, but do as it relates to Mr. Albert's phone. I hope to have those filed, along with attachments, with the Court and to you as well by this coming Monday at the latest. As far as your witness is concerned for the upcoming date of 5/03, obviously that's entirely up to you, the only caution I would provide in reference to that is the case is not scheduled for an evidentiary hearing, this Court typically conducts evidentiary hearings at 9am or some time in the morning session and typically does not entertain them in the afternoon sessions. As I said, whatever you choose to do on that front is entirely your decision, but I'd be remiss if I didn't mention that, given whatever time and expense to your witness and your client is concomitant with his appearance.

In light of that information, the parties opted to schedule an evidentiary hearing on the Rule 17 Motion on May 25, 2023. The Court reorganized its schedule to accommodate this request. The emails, supplemental police report, and opposition from the Commonwealth ultimately confirmed to the defense that an evidentiary hearing on this motion was necessary. Furthermore, in light of (1) the supplemental report received by Trooper Guarino; (2) the opposition filed by the Commonwealth; (3) ADA Lally stating on April 14, 2023, "if it is a disputed issue, I would likely be looking to call witnesses of my own . . ."; and (4) the Court scheduling the evidentiary hearing, the Defendant reasonably believed that both her defense team and the Commonwealth had agreed on the necessity for such a hearing, and that — at a minimum — both Trooper Guarino and Richard Green would provide testimony.

On May 22, 2023, three days prior to the scheduled evidentiary hearing, the defense received "Brian Albert's Motion to Quash the Subpoena of Defendant Karen Read", a "Motion

to Quash Subpoena" filed by Ms. McCabe's attorney, and — most surprisingly — the "Commonwealth's Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Crim. P. 17."

LEGAL STANDARD

In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him . . . U.S. Const. Amend. VI. "We have recognized . . . that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. *See* Coy, *supra*, 487 U.S., at 1019–1020 ('It is always more difficult to tell a lie about a person to his face than behind his back')." Maryland v. Craig, 497 U.S. 836, 846 (1990).

When properly called upon by subpoena or summons, all citizens have a public obligation to aid the judicial process by appearing in court and providing testimony to the best of their ability. Hurtado v. U.S., 410 U.S. 578 (1973). The obligation to appear when summonsed into court exists even if a privilege applies. Young, Pollets and Poreda, 19 Massachusetts Practice: Evidence § 500.0 (3d ed.) (providing an introductory note on privileges); Cypher, 30 Massachusetts Practice: Criminal Practice and Procedure §§ 29:18 to 29:21 (4th ed.)

The availability of summonses for compelling witnesses to appear in court at criminal trials is constitutionally required. Com. v. Blaikie, 375 Mass. 601, 608 n.3 (1978) (noting that the "Sixth Amendment's compulsory process clause, applicable to the States through the due process clause of the Fourteenth Amendment, governs not only the right to secure the presence of defense witnesses but also the defendant's right to have the testimony of these witnesses entered in evidence"). Washington v. Texas, 388 U.S. 14, 23 (1967).

ARGUMENT

I. M.G.L. c. 233 § 1, MASS. R. CRIM. P. 17(a)(1), AND THE COMMON LAW PROVIDE AUTHORITY FOR THE DEFENDANT TO SUMMONS WITNESSES FOR AN EVIDENTIARY HEARING WITHOUT THE NEED FOR PRIOR JUDICIAL APPROVAL

M.G.L. c. 233 § 1 states: "A clerk of a court of record, **a notary public or a justice of the peace may issue summonses for witnesses in all cases pending before courts,** magistrates,

auditors, referees, arbitrators or other persons authorized to examine witnesses, and at all hearings upon applications for complaints wherein a person may be charged with the commission of a crime; but a notary public or a justice of the peace shall not issue summonses for witnesses in criminal cases except upon request of the attorney general, district attorney or **other person who acts in the case in behalf of the commonwealth or of the defendant**. If the summons is issued at the request of the defendant that fact shall be stated therein. The summons shall be in the form heretofore adopted and commonly used but may be altered from time to time like other writs." (Emphasis added) M.G.L. c. 233 § 1.

Mass. R. Crim P. 17(a)(1) provides the procedure for compelling the attendance of witnesses: "(a) Summons. (1) For Attendance of Witness; Form; Issuance. A summons shall be issued by the clerk **or any person so authorized by the General Laws**. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein." (Emphasis added) Mass. R. Crim. P. 17(a)(1).

Mass. R. Crim. P. 17(a)(1) stands in contrast with Mass. R. Crim. P. 17(a)(2), which addresses the production of documentary evidence and objects. Footnote 12 of Commonwealth v. Mitchell explains that the Defendants need not obtain leave of the Court to issue a summons commanding a witness to appear at a hearing or trial:

> As the above discussion should make clear, the requirement that a judge must be satisfied that the *Lampron* standards are met before a summons issues is applicable only when the documents being sought must be produced *prior to trial.* **Rule 17(a)(1)** of the Massachusetts Rules of Criminal Procedure, 378 Mass. 885 (1979), **provides that for a summons to issue, by the clerk or any other person authorized by statute, commanding the presence of persons into court**, and, under rule 17(a)(2), prior permission need not be obtained for a summons to command a witness to produce "books, papers, documents, or other objects designated therein." **Nor is leave of the court independently required under G.L. c. 233, § 1, for a notary public or justice of the peace to issue a summons requested by a defendant, or a defendant's counsel, commanding a witness to appear at a hearing or trial**, and, inferentially, to bring into court documents that may be needed at that hearing or trial. The pronouncements in *Lampron* were made in the context of a defendant seeking to compel the production of documents or records from a third party *prior to trial.*

(Emphasis added) Com. v. Mitchell, 444 Mass. 786, 791 n.12 (2005). This point is underscored and reiterated in Com v. Odgren, 455 Mass. 171 (2009):

> The earliest statutory authority for issuing criminal subpoenas—a precursor to G.L. c. 233, § 1—granted such power to justices of the peace. *See* St. 1783, c. 51, § 2 (justices of peace "authorized and impowered to grant subpoenas for witnesses in all criminal causes

> pending before" various courts). A subsequent version of that statute provided that, unless in connection with a "complaint brought before himself," a justice of the peace could issue a subpoena in a criminal case only at the "request" of a prosecutor or defendant for "witnesses to appear at any court ... to give evidence." St. 1791, c. 53.16 **Neither prosecutors nor defendants were statutorily required, however, to obtain leave from a justice of the peace, but merely had to "request" the issuance of a subpoena. The same is true today, under G.L. c. 233, § 1.** *See* Commonwealth v. Mitchell, 444 Mass. 786, 791–792 n. 12, (2005) . . .
>
> Rule 17 subpoenas. Rule 17(a)(1) and (2)—consistent with G.L. c. 233, § 1, and G.L. c. 277, § 68—**empower a court clerk or any person authorized by statute to issue a summons, without prior judicial approval, for a witness to "attend and give testimony"** and produce "books, papers, documents, or other objects" (collectively, records) **at a trial or evidentiary hearing.** *See* Commonwealth v. Mitchell, 444 Mass. at 791–792 n. 12; Lampron, *supra* at 270 (rule 17[a][2] authorizes issuance of summons "for a trial or evidentiary hearing"). *See also* 25 Moore's Federal Practice par. 617.02[1], at 617–6—617–7, and par. 617.08 [1], at 617–19 (3d ed. 2009) (under Fed. R. Crim. P. 17[a] and [c][1], subpoena may issue for witness's appearance, including records, "at any type of criminal proceeding in which evidence may be adduced," such as before grand jury, at trial, or at defendant's competency or detention hearing); K.M. Brinkman & G. Wiessenberger, Federal Criminal Procedure: Litigation Manual at 206 (2008) ("Rule 17 provides procedures for obtaining witness testimony and tangible evidence by subpoena for grand jury, trial, Rule 15 depositions [compare Mass. R. Crim. P. 35, 378 Mass. 906 (1979)], and pretrial and post-trial hearings such as preliminary examinations, suppression hearings, and sentencing hearings.

Com. v. Odgren, 455 Mass. 171, 178-181 (2009). Mass. R. Crim. P. 17 notes that "A summons shall be issued by . . . any person so authorized by the General Laws". Mass. R. Crim. P. 17(a)(1). When read together, Mass. R. Crim. P. 17(a)(1) and M.G.L. c. 233 § 1 provide unambiguous statutory authority for a defendant to issue a summons, compelling live testimony from a witness in a criminal case. The relevant case law is explicit that this process may be executed to compel live witness testimony for an evidentiary hearing. *See* Mitchell, 444 Mass. at 791-792, n. 12; Odgren, 455 Mass. 171 at 178-181.

Here, the Defendant has filed a motion pursuant to Mass. R. Crim. P. **17(a)(2)**, seeking production of "documentary evidence" or "objects" — i.e., Brian Albert's cell phone(s) and data from the same. The Defendant has utilized the correct procedure in seeking this production under Mass. R. Crim. P. 17(a)(2) and the Lampron-Dwyer protocol.

In seeking to satisfy the Lampron criteria, the Defendant has summonsed a number of witnesses under Mass. R. Crim. P. **17(a)(1)** and M.G.L. c. 233 § 1 to testify at the evidentiary hearing on that motion. The Defendant concedes the obvious point that a subpoena for the documentary evidence sought, served directly upon Mr. Albert, *would* have been improper and

would have no legal effect. *See generally* Mass. R. Crim. P. 17(a)(2). That, however, is not at all what the Defendant has done here. Instead, the Defendant has filed a proper Rule 17 motion with factual allegations that the Commonwealth is disputing. Given that factual dispute, both the Commonwealth and the Defendant are entitled to call witnesses to prove the facts alleged. It is in that context that the Defendant has summonsed witnesses to testify at the upcoming evidentiary hearing. It is not correct for Albert's counsel or anyone to suggest that the defense is "inventing" procedures to summons witnesses for an evidentiary hearing. Those procedures are plainly authorized by statute, the Massachusetts Rules of Criminal Procedure, and the common law.

II. SINCE ADA LALLY HAD PREVIOUSLY AGREED TO AN EVIDENTIARY HEARING ON THIS MOTION, WHICH THE COURT REARRANGED ITS SCHEDULE TO ACCOMMODATE, HE SHOULD BE JUDICIALLY ESTOPPED FROM NOW OPPOSING THIS EVIDENTIARY HEARING

Under the principle of judicial estoppel, a party may not successfully maintain a position in one court and thereafter repudiate or contradict that position in the same proceeding or in separate proceedings in that or other courts. *See* Paixao v. Paixao, 429 Mass. 307, 308–311 (1999); Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639–642 (2005). *See also* Chiao–Yun Ku v. Framingham, 53 Mass. App. Ct. 727, 729 (2002); Commonwealth v. Gardner, 67 Mass. App. Ct. 744, 747–748 & n. 5 (2006); Basis Tech. Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 43 (2008). Judicial estoppel, which applies equally to civil and criminal proceedings, *see* Commonwealth v. Prophete, 443 Mass. 548, 555 n. 10 (2005), "is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639–640 (2005), quoting from Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998); Com. v. Gardner, 67 Mass. App. Ct. 744, 747 (2006).

ADA Lally had previously indicated, in an April 14, 2023 email to Ms. Read's counsel, that — if the information presented in Ms. Read's motion was disputed — he would "likely be looking to call witnesses of [his] own in regard to that." April 14, 2023 email from ADA Lally, below. Mr. Lally further indicated that he would let the defense team know "as soon as possible, so both [the defense team] and the Court can make whatever accommodations necessary to

conduct an evidentiary hearing". *Id.* In the same email, ADA Lally stated "**you are free to do whatever you like as far as witnesses are concerned**". *Id.*

Lally, Adam (NFK) April 14, 2023 at 3:43 PM

RE: Commonwealth v. Karen Read Details

To: Elizabeth Little, Cc: Alan Jackson, David Yannetti & 2 more

Hello, yes, I did receive a copy, thank you very much! I sent notices to all involved partiers in the mail yesterday morning. I'm sorry, but I don't really pay any attention to any news outlets or press releases, but I certainly expect to have an answer by our next court date on 5/03. The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. I will certainly let you know if the information is disputed and you are free to do whatever you like as far as witnesses are concerned. if it is a disputed issue, I would likely be looking to call witnesses of my own in regard to that. I'll certainly let you know as soon as possible, so both you and the Court can make whatever necessary accommodations to conduct an evidentiary hearing. Thanks, Adam

The Commonwealth filed its opposition to the Defendant's Rule 17 Motion on May 1, 2023. Counsel for Ms. Read made repeated efforts to determine which witnesses the Commonwealth intended to call during the anticipated May 3, 2023 hearing on this motion, as detailed in the emails above. The Commonwealth filed its Notice of Discovery XIV on May 3, 2023, which included a supplemental report by Trooper Nicholas Guarino (dated April 24, 2023), disputing the information discovered by Richard Green. In its opposition, the Commonwealth repeatedly cited Trooper Guarino's report. *See* "Commonwealth's Memorandum in Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure — [Directed] to Brian Albert, Verizon, & AT&T". Clearly, the Commonwealth disputes the fact that Jennifer McCabe searched any form of "how long to die in cold" at 2:27AM on January 29, 2022.

In his reply on April 27, 2023, ADA Lally mentioned that the May 3, 2023 hearing was not scheduled as an evidentiary hearing, and reiterated that the defense team's decision to call a witness is "entirely up to [them]":

Lally, Adam (NFK) 4/27/23

RE: Commonwealth v. Karen Read Hide

To: Elizabeth Little,

Cc: Alan Jackson, David Yannetti, Ian Henchy, McLaughlin, Laura (NFK)

Hello – I do anticipate filing an opposition to both the Rule 17 seeking production of animal control records, as well as the Rule 17 seeking production of CDR's and Mr. Albert's phone. I do not have any objection to the CDR's being ordered, but do as it relates to Mr. Albert's phone. I hope to have those filed, along with attachments, with the Court and to you as well by this coming Monday at the latest. As far as your witness is concerned for the upcoming date of 5/03, obviously that's entirely up to you, the only caution I would provide in reference to that is the case is not scheduled for an evidentiary hearing, this Court typically conducts evidentiary hearings at 9am or some time in the morning session and typically does not entertain them in the afternoon sessions. As I said, whatever you choose to do on that front is entirely your decision, but I'd be remiss if I didn't mention that, given whatever time and expense to your witness and your client is concomitant with his appearance.

Your client's vehicle is evidence and we would not be consenting to its release, nor is my office going to be assuming your client's car payments.

I will get those memos and attachments to you as soon as possible. Thanks! Adam

During the May 3, 2023 hearing, the parties and Court discussed that an evidentiary hearing had been scheduled by agreement on May 25, 2023. Specifically, the Court stated "As I understand it, the parties have agreed for an evidentiary hearing, and we rearranged our schedule a bit so that we could accommodate you." May 3, 2023 Motion Hearing, Com v. Karen Read, 2:28-2:29 p.m.. At 2:39 p.m., the Court inquired about how the hearing on this Rule 17 Motion would proceed: "The second Rule 17 Motion, are we going forward on that, and then having the hearing regarding the timing

of the video? How are we going forward with this, before I hear from you on the substance Mr. Jackson? What is the next date for?" *Id.* Attorney Jackson replied "May 25th . . . to call witnesses". The Court inquired "What's it for, the evidentiary hearing?" Attorney Jackson replied in the affirmative. To further clarify, the Court asked "Do you plan on arguing the Rule 17 motion today, or that day? Not both." Attorney Jackson replied "that day. I'd rather reserve and argue the Rule 17 that day". The Court replied "that makes sense to me as well." *Id.* at 2:39 p.m.

The parties agreed (and the Court affirmed) that an evidentiary hearing during which witnesses would be called would proceed on May 25, 2023. ADA Lally did not oppose or object to an evidentiary hearing at that time; instead, he agreed. Now, in a puzzling turn of events, ADA Lally has filed an opposition to the evidentiary hearing going forward at all just three days prior to the scheduled date. The Commonwealth has delayed their newfound opposition until after: (1) the Court rearranged its scheduled to conduct the evidentiary hearing; (2) counsel for Ms. Read traveled to Massachusetts for this hearing, at Ms. Read's expense; and (3) Defense Expert Richard Green traveled to Massachusetts for this hearing, at Ms. Read's expense.

Any objection ADA Lally now has to this hearing going forward should be deemed to have been waived, as he stipulated to the hearing (and to the Defendant's intention to call witnesses) by email, in-person, and before the Court.

A stipulation submitted to a trial court in the course of litigation differs from a private contract formed by parties before litigation. *See* Restatement (Second) of Contracts § 94 (1981). It has the quality of a representation to a court. *Ibid.* The Court and other parties are entitled to rely upon it for subsequent proceedings and trial. *Ibid.* See Pastene Wine & Spirits Co., Inc. v. Alcoholic Bev. Control Commn., 401 Mass. 612, 615 (1988). A party is entitled to relief from a stipulation only if it can show (i) that it entered the stipulation improvidently or (ii) that the stipulation is "not conducive to justice." Loring v. Mercier, 318 Mass. 599, 601 (1945). *See* Ball v. Finelli, 73 Mass. App. Ct. 1118 (2009).

The principle is well settled. "A party may not disregard a stipulation given by him, nor can he revoke or escape from it at his will. His consent, once made a part of the record, binds him until he is relieved from it by judicial action". Kalika v. Munro, 323 Mass. 542 (1948),

citing Wyness v. Crowley, 292 Mass. 461 (1935); Loring v. Mercier, 318 Mass. 599, 600 (1945).

In Ne. Line Const. Corp. v. J.E. Guertin Co., 80 Mass. App. Ct. 646 (2011), the Appeals Court of Massachusetts held that the record as a whole established that the parties had entered into an oral stipulation to waive a trial by jury. *Id.* at 652. In that case, docket entries, coupled with representations in Court, led the Appeals Court to hold that the parties had orally stipulated to waive their Constitutional right to a trial by jury.

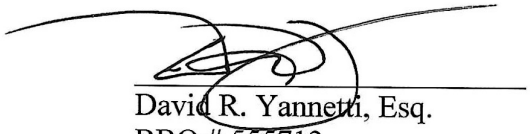
In this case, ADA Lally's repeated representations to counsel for the Defendant – and his complete lack of any objection to the scheduling of an evidentiary hearing – serve to establish that the parties had entered into a stipulation to hold the evidentiary hearing that is scheduled for two days from now before this Court. Surely, if parties can orally stipulate to waive the "sacred" Constitutional right to a trial by jury, parties can similarly waive the right to oppose an evidentiary hearing to which they had repeatedly agreed, and to which they did not object when given the opportunity at a prior hearing. *See* Cort v. Majors, 92 Mass. App. Ct. 151, 153 (2017); Ne. Line Const. Corp, 80 Mass. App. Ct. at 649; M.G.L.A. Const. Pt. 1, Art. 15; M.G.L.A. Const. Pt. 1, Art. 12; U.S. Const. Amend. VI.

Furthermore, ADA Lally should be judicially estopped from even arguing that he now opposes an evidentiary hearing. As noted above, the doctrine of judicial estoppel applies equally to civil and criminal proceedings, *see* Commonwealth v. Prophete, 443 Mass. 548, 555 n. 10 (2005), and "is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding", or in the same proceeding in that or other courts. Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639–640 (2005), quoting from Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998); Com. v. Gardner, 67 Mass. App. Ct. 744, 747 (2006). *See also See* Paixao v. Paixao, 429 Mass. 307, 308–311 (1999) (noting that judicial estoppel is also applicable in preventing a party from asserting a position contrary to a position it had previously asserted in the *same* proceeding) Here, ADA Lally previously agreed to an evidentiary hearing, and contests the information presented by Ms. Read's expert in her motion. He should not now — three days prior to the scheduled hearing, and after Ms. Read has arranged (at her expense) for her attorneys and her expert witness to be present— be able to oppose a hearing to which he had previously agreed. The Commonwealth should be judicially estopped from even presenting such an argument.

CONCLUSION

The Commonwealth clearly disputes the findings of defense expert Richard Green. In order to assist the Court in determining whether a summons should ultimately issue for the production of Brian Albert's phone and accompanying data, an evidentiary hearing on this motion is necessary. One has been scheduled. Ms. Read anticipated that, at a minimum, ADA Lally intended to call Trooper Guarino to present his findings to the Court. As he indicated in his April 14th email, if the information was disputed, he would "likely be looking to call witnesses of [his] own." It was not unreasonable to assume, given his reliance on Trooper Guarino's April 24, 2023 report in the Commonwealth's opposition, that Trooper Guarino would be amongst the witnesses ADA Lally intended to call. The Commonwealth should have no objection — and should be deemed to have waived any objection, based on his representation that the defense was "free to do whatever [it] like[s] as far as witnesses are concerned" — to this evidentiary hearing going forward as planned on May 25, 2023. For these reasons, the Defendant respectfully requests that this Honorable Court denies the "Commonwealth's Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Cirm. P. 17".

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



David R. Yannetti, Esq.
BBO # 555713
Ian F. Henchy, Esq.
BBO # 707284
44 School St.
Suite 1000A
Boston, MA 02108
(617) 338-6006
law@davidyannetti.com

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

May 23, 2023

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NO. 2282-CR-00117

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff**	)
V.	)
KAREN READ, **Defendant**	)

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT KAREN READ'S OPPOSITION TO COMMONWEALTH'S OPPOSITION TO DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING ON MASS. R. CRIM. P. 17

I, David R. Yannetti, do hereby depose and state that the following is true to the best of my knowledge, information, and belief:

1. I am an attorney licensed to practice in Massachusetts since December 20, 1989. My office address is: Yannetti Law Firm, 44 School St., Suite 1000A, Boston, MA 02108. I represent Karen Read ("Ms. Read") regarding the above-captioned matter.
2. On May 22, 2023, I received the Commonwealth's "Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Crim. P. 17".
3. The information contained in Ms. Read's "Opposition to Commonwealth's Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Crim. P. 17" is true and accurate to the best of my knowledge, information, and belief.

Signed under the pains and penalties of perjury this 23rd day of May, 2023.

David R. Yannetti

CERTIFICATE OF SERVICE

I, Attorney David R. Yannetti, do hereby certify that I served the "Defendant Karen Read's Opposition to Commonwealth's Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Crim. P. 17", along with the accompanying affidavit of counsel, upon the Commonwealth by emailing a copy on May 23, 2023 to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

5/23/23

Date

David R. Yannetti
Yannetti Criminal Defense Law Firm
44 School Street
Suite 1000A
Boston, MA 02108
law@davidyannetti.com
(617) 338-6006
BBO #555713