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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.
DEPARTMENT

SUPERIOR COURT

NO. 2282-CR-00117

RECEIVED & FILED
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CLERK OF THE COURTS
NORFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff

V.

KAREN READ,
Defendant

DEFENDANT'S MOTION FOR RECUSAL AND DISQUALIFICATION OF JUSTICE BEVERLY CANNONE

Now comes the defendant, Karen Read ("Ms. Read", or "the Defendant"), by and through her counsel of record, Werksman Jackson & Quinn LLP, and respectfully files the instant request for the recusal and/or disqualification of Justice Beverly Cannone. The defense has uncovered disturbing extrajudicial statements by family members of material witnesses in this case alluding to their family's personal connection and ability to influence Justice Cannone, which when viewed in light of recent procedural irregularities engaged in by this Court to the great detriment of Ms. Read, undermine public confidence in the outcome of these proceedings and create the appearance of partiality such that a reasonable, disinterested observer might question whether Justice Cannone can be fair and impartial in this case, and requiring her recusal and/or disqualification.

The instant Motion is based on the information set forth herein and the supporting declarations filed herewith, and is made pursuant to the due process clause of the Fourteenth Amendment of the United States Constitution, article 29 of the Massachusetts Constitution Declaration of Rights, and various provisions of the Supreme Judicial

Court's Code of Judicial Conduct, which mandate disqualification when a judge cannot be fair or impartial, *or* where her impartiality might reasonably be questioned by a disinterested third party. This Motion was timely filed pretrial upon discovery of the facts and information giving rise to this motion and in advance of any further proceedings in before this Court. (*Commonwealth v. Dane Entertainment Servs.*, 18 Mass. App. Ct. 446, 448 (1984); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 79 (1979); *Edinburg v. Cavers* (22 Mass. App. Ct. 212, 217 (1986); *see* Affidavit of Alan Jackson; ¶3.)

I. INTRODUCTION

The protection of an accused's right to an impartial adjudicator is deeply enshrined in both the United States and Massachusetts Constitutions. (*See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"); Mass. Const., Decl. of Rights, art. 29 ("It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.").) In keeping with that precept, the rules governing disqualification of judges are codified in the Code of Judicial Conduct, S.J.C. Rule 2.11, which mandates the disqualification of a judge in any proceeding in which either "the judge cannot be impartial or the judge's impartiality might reasonably be questioned[.]" (Code of Judicial Conduct, S.J.C., Rule 2.11.) "Actual impartiality alone is not enough. 'Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding.'" (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) In other words, an accused's constitutional right to due process demands that "justice . . . satisfy the appearance of justice." (*Offutt v. United States*, 348 U.S. 11, 14 (1954).) Setting aside the issue of whether Justice Cannone has the ability to be fair in this case, the appearance of justice has already been irreparably compromised in this case.

Ms. Read stands charged with the following crimes arising out of the death of her late-boyfriend, John O'Keefe ("O'Keefe"): Murder in the Second Degree in violation of M.G.L. c. 265, s. 1 (Count One); Manslaughter while under the Influence of Alcohol in violation of M.G.L. c. 265, s. 13 ½ (Count Two); and Leaving the Scene of Personal Injury and Death in violation of M.G.L. c. 90, s. 24(2)(a ½)(2) (Count Three). As set forth herein, the following facts and circumstances attendant to this case provide more than a reasonable basis for a knowledgeable disinterested member of the public to doubt Justice Cannone's ability to be fair and impartial in this case, requiring her disqualification: (1) Sean McCabe, a family member of the seminal witnesses (and third party culprits) in this case whom Ms. Read has publicly accused of murdering O'Keefe, made extrajudicial statements to a local investigative reporter that his family has a relationship with Justice Cannone and the ability to influence her; (2) Justice Cannone has routinely refused to rule in a timely manner on defense motions, while advancing and prioritizing motions filed by the Commonwealth and the very witnesses who have claimed an ability to influence her; (3) Justice Cannone denied Ms. Read a full and fair opportunity to be heard on a critical discovery motion requesting records from members of the same family that claim to have a relationship with her; and (4) Justice Cannone has now indicated through the Clerk of Court, in writing, that she intends to deviate from procedure in Norfolk County Superior Court by choosing to keep this case with her so that she can rule on the Commonwealth's Motion to Prohibit Extrajudicial Statements by the Defense (in which she and the third party culprits have a personal interest) in spite of the fact that *she was reassigned to civil court* and this case is properly heard by the judicial officer currently assigned to the criminal session. As such, Ms. Read's constitutional right to due process and a fair and impartial judge require that Justice Cannone be disqualified from these proceedings.

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II.
STATEMENT OF FACTS

A. A BRIEF RECITATION OF FACTS RELATING TO THIS CASE

Ms. Read sets forth a brief recitation of the facts attendant to this case for the purpose of giving context to the disturbing extrajudicial statements made by Sean McCabe in connection with this case, which support Ms. Reads request for the disqualification of Justice Cannone.[1] At approximately 6:00 a.m. on January 29, 2022, John O'Keefe ("O'Keefe") was found dead on the front lawn of Boston Police Officer Brian Albert, a highly trained boxer and fighter with deep familial and personal ties to the Canton Police Department and the Massachusetts State Police.

The events that transpired the night before O'Keefe's death on January 29, 2022, are largely undisputed. The evidence incontrovertibly establishes that on the evening of January 28, 2022, the decedent O'Keefe, his girlfriend Karen Read, Brian Albert, Nicole Albert, Jennifer McCabe (Brian Albert's sister-in-law and friend of O'Keefe), Matthew McCabe, and several other individuals, met and enjoyed drinks at the Waterfall Bar and Grille in Canton, Massachusetts.

As the bar was closing around midnight, the parties discussed going to Nicole and Brian Albert's residence located close by at 34 Fairview Road to continue the party and celebrate their son, Brian Albert, Jr.'s, birthday. Although O'Keefe and Ms. Read were not well acquainted with the Alberts, the invite was extended to them by O'Keefe's longtime friend, Jennifer McCabe. Shortly after midnight, the Alberts (Brian, Nicole, and Caitlin), the McCabes (Jennifer and Matthew), and Brian Higgins (close friend of Brian Albert and Federal agent with the Massachusetts Bureau of Alcohol, Tobacco, Firearms and Explosives, with an office inside the Canton Police Department), left the bar in their respective vehicles and drove to the Albert Residence for the after-party.

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[1] The facts surrounding the allegations in this case are set forth more fully in Ms. Read's Rule 17 Motion for Cell Records. In the event that this or some other Court, requires additional information regarding the state of the evidence in this case, the facts set forth in Ms. Read's Rule 17 Motion for Cell Records are incorporated herein by reference.

Witnesses gave conflicting accounts regarding whether O'Keefe actually existed the vehicle and made his way into the Albert Residence on January 29, 2022. Ms. Read has maintained that she dropped O'Keefe off at Brian Albert's residence located at 34 Fairview Road ("the Albert Residence") just after midnight on January 29, 2022, and frustratedly left without him when he failed to answer any of her calls, presuming that he had proceeded into the house for the party. Conversely, the Alberts and McCabes have maintained that O'Keefe never entered the Albert Residence.

The theory advanced by the Commonwealth in support of the filing of the instant charges against Ms. Read is that she became suddenly angry with O'Keefe outside the home of Boston Police Officer Brian Albert, placed her car into reverse, struck O'Keefe with her vehicle at 27 miles per hour, and shattered the right taillight of her vehicle, before fleeing the scene. However, the photographs of O'Keefe's injuries, which are attached hereto as Exhibit A, speak for themselves and are completely inconsistent with the Commonwealth's theory of the case. (Affidavit of Alan J. Jackson at ¶6, Exhibit A.) Photographic evidence of the injuries in this case clearly suggest that O'Keefe was beaten severely and left for dead, having sustained blunt force injuries to both sides of his face as well as to the back of his head. (*See id.*)

Moreover, in addition to suffering numerous defensive wounds on his hands consistent with a brutal fight, O'Keefe also suffered a cluster of deep scratches and puncture wounds to his right upper arm and forearm, which appear to be consistent with bite and/or claw marks from an animal (and are clearly inconsistent with a vehicular homicide). (*See id.*) Indeed, significant circumstantial evidence suggests that Brian Albert's K-9 German Shepherd "Chloe" was actually responsible for the injuries to O'Keefe's right arm. Although Brian Albert's attorney made representations in Court and in filings falsely claiming that Mr. Albert's dog, "Chloe," had no history of attacking human beings, newly obtained records from Canton Animal Control and the Canton Town Clerk, establish that counsel's representations to the public and this Court were false. In fact, records obtained from the Canton Town Clerk establish that Brian Albert's K-9 German Shepherd "Chloe" escaped the Albert Residence mere months after

O'Keefe's death and attacked not one, but two, separate human beings. One woman was bitten on the arms, neck, and leg in broad daylight. The other woman was bitten on the left hand. Both individuals were taken to a hospital for treatment as a result of the German Shepherd's vicious attack.

As set forth in lengthy prior court filings, Ms. Read has also unearthed shocking evidence implicating third parties Jennifer McCabe and Brian Albert in O'Keefe's death.[2] Indeed, an analysis of the *complete* forensic image of Jennifer McCabe's cell phone by Computer Forensics Expert Richard Green—which the Massachusetts State Police and Norfolk County District Attorney's Office withheld from the defense for more than a year—establishes that **Jennifer McCabe, one of the Commonwealth's seminal witnesses, Googled, "hos [sic] long to die in cold" at 2:27 a.m. on January 29, 2022, three hours before she supposedly "discovered" O'Keefe's hypothermic body in the cold snow on her brother-in-law's front lawn.** (Affidavit of Alan J. Jackson at ¶7; Exhibit B.) Ms. McCabe subsequently took steps to purge this search from her phone before turning it over to law enforcement three days later. (*Id.*) The revelations from Jennifer McCabe's cell phone, alone, make Jennifer McCabe and Brian Albert prime suspects in this case. This is just the tip of the iceberg. Significant other evidence (too lengthy to discuss here) further implicates Jennifer McCabe and Brian Albert in O'Keefe's murder.

Regardless, Ms. Read's defense is clearly predicated on a third-party culpability defense, in which Ms. Read will (and has) presented significant evidence to establish that Jennifer McCabe and Brian Albert are implicated in O'Keefe's murder. (Affidavit of Alan J. Jackson at ¶8.) Suffice it to say, even the *appearance* of ties between Justice Cannone and the Alberts and McCabes families would undermine public confidence in

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[2] The facts and evidence supporting Ms. Read's third party culpability defense are set forth more fully in Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T, and are incorporated herein by reference. Because the sheer volume of evidence implicating Brian Albert and Jennifer McCabe in O'Keefe's murder is overwhelming, only the most pertinent and inculpatory facts are discussed here.

the outcome of these proceedings and would violate Ms. Read's constitutional right to due process and a fair trial by an impartial judge.

B. RECENT CLAIMS BY A MEMBER OF THE MCCABE FAMILY THAT THEY ARE CONNECTED TO JUSTICE CANNONE AND CAN INFLUENCE HER DECISIONS IN THIS PROCEEDING

On May 28, 2023, Jennifer McCabe's brother-in-law, Sean McCabe, made some extremely disturbing statements to a local investigative reporter ***insinuating that he has a close-knit relationship with Justice Beverly Cannone and an alarming ability to influence her decision-making in this case***. (*See* Affidavit of Aidan Kearney at ¶5, Exhibit 1.) Aidan Kearney, also known as "Clarence Woods Emerson" and "Turtleboy," is a local investigative blogger in Boston, who much to the dismay of Brian Albert and Jennifer McCabe, has reported significantly on this case (nearly 70 blog posts to date) and published numerous articles opining that Ms. Read was framed for O'Keefe's murder by the McCabes and Alberts. (*Id.* at ¶1, 3.) A true and correct copy of Facebook messages exchanged between Mr. Kearney and Sean McCabe (Matthew McCabe's brother and Jennifer McCabe's brother-in-law) between May 26, 2023, and June 1, 2023, are attached hereto as Exhibit 1. (*Id.* at ¶5; Exhibit 1.) Throughout the exchange, Sean McCabe repeatedly threatens Mr. Kearney, for writing nearly 70 blog posts about this case, and for, *inter alia*, exposing connections between members of the McCabe and Albert family and the lead detective assigned to investigate this case, Massachusetts State Trooper Michael Proctor. (*Ibid.*)

However, on May 27, 2023, Sean McCabe took his threats and taunts a step further, and began intimating that his family has a relationship with Justice Cannone (the Justice actively assigned to Ms. Read's case in May 2023). Indeed, on May 27, 2023, Sean McCabe posted a public comment on "Clarence Woods Emerson's" Facebook page, which has nearly 30,000 followers, stating: "I just called in an order asking Judge Bev to institute a Trial By [sic] Combat order against you. They'll be coming to bring you to me any minute now Clarence." (*Id.* at ¶5; Exhibit 1, at 8.).In response, Mr. Kearney took a

screenshot of Sean McCabe's comment, and sent it to him in a private Facebook message asking, "Do you really have a line to judge cannone?" (*Id.* at ¶5; Exhibit 1, at 8.) The next day, on May 28, 2023, Sean McCabe, knowing full well that he was speaking to an investigative reporter, unabashedly responded: "***Auntie Bev??? Whose seaside cottage do you think we're going to bury your corpse under?***" (*Id.* at ¶5; Exhibit 1, at 9.) Thus, in the same breath that Sean McCabe threatened to murder a local investigative reporter because he was unhappy with the bad press coverage his family has been receiving, he refers to Justice Cannone as being part of the McCabe family and intimates personal knowledge about the location of her home that only someone close to her would know.

The mere suggestion that the judge assigned to this case is somehow related to and aligned with the same individuals, which credible evidence suggests are the actual third party culprits in this case, should be deeply disturbing to this Court, the public, and Ms. Read. To be clear, Sean McCabe is related to Jennifer McCabe and Brian Albert—the very family Ms. Read has shown, through credible evidence, is responsible for O'Keefe's murder. Moreover, Sean McCabe's insinuation that he and his family have a personal relationship with Justice Cannone is further legitimized by the fact that his threat contains accurate personal identifying information about Justice Cannone that absent some relationship would otherwise be unknown to Sean McCabe. Shockingly, it appears that the seminal witnesses in this case (i.e. the McCabes and Alberts, or at the very least, their family member) ***possess intimate knowledge about Justice Cannone, including the fact that she owns a seaside cottage on the Cape***. Indeed, as set forth in the attached Declaration of Alan Jackson, notarized deeds filed with the Barnstable Registry of Deeds confirm that both Sean McCabe and Justice Cannone own property on the Cape in Centerville, Massachusetts, **and live less than four miles apart**. (Affidavit of Alan J. Jackson at ¶9, Exhibit C.) Copies of the deeds confirming the same are filed herewith under order of impoundment. (*Ibid.*) Thus, Sean McCabe's suggestion that he has a relationship or connection with Judge Cannone appears at least facially credible, given that they both own homes in a small town on the Cape less than four miles apart.

Moreover, although McCabe's residence is located further inland, the closest beach access for both homes appears to be the very same, very small, beach. (*Ibid.*)

There are only two reasonable explanations as to why Sean McCabe would know that Justice Cannone owns a "seaside cottage": (1) Sean McCabe either knows Justice Cannone or has crossed paths with Justice Cannone on the Cape; or (2) the McCabes have taken steps to locate and obtain personal identifying information about the judge presiding over this case and communicated that knowledge publicly for the purpose of intimidation. This threat was not limited to Mr. Kearney. Rather, Sean McCabe sent this message to Mr. Kearney knowing full well that Mr. Kearney is an investigative reporter and his conversations and comments about Justice Cannone would be widely publicized on Mr. Kearney's website. In fact, at the very start of his conversation with Mr. Kearney, Mr. McCabe encouraged Mr. Kearney to publicly share their conversation on his website, writing: "So if you want to talk to me, you're gonna hear what I have to say first. Cut & paste this shit all you want sally, but you don't have the stones to look me in the eye." (See Affidavit of Aidan Kearney at ¶5, Exhibit 1, at 1-2.) Thus, Sean McCabe's threat to murder Mr. Kearney and bury him under "auntie bev's" seaside cottage was meant to suggest to Ms. Read and the public at large: Justice Cannone is family; she will back our play.

As set forth in further detail below, whether it be out of fear, intimidation, relationship, or for some other reason, significant procedural irregularities engaged in by Justice Cannone have prejudiced Ms. Read and benefitted the Alberts and McCabes, such that any disinterested third party would have to question Justice Cannone's impartiality in this case.

C. FACTS RELATING TO THE PROCEDURAL HISTORY OF THIS CASE

Ms. Read has engaged in significant pretrial litigation with the Commonwealth in an effort to obtain additional critical discovery, which will further implicate the McCabes and Alberts in O'Keefe's murder. Notwithstanding any issues relating to the substance of the Court's rulings, Justice Cannone has substantially (and increasingly) delayed her

decisions on motions filed by the defense and denied Ms. Read a full and fair opportunity to be heard. A brief summary of the procedural history in this case as it relates to those claims is detailed below.

1. MAY 3 HEARING

Ms. Read, through her counsel, timely filed three significant discovery motions in advance of the May 3, 2023, pretrial hearing scheduled in this case. All of these motions were targeted at uncovering additional evidence, which law enforcement had neglected to obtain during the course of their investigation and Ms. Read had reason to believe would exculpate her and implicate the McCabes and Alberts in O'Keefe's death. First, on February 2, 2023, Ms. Read filed a Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Canton Animal Control and the Canton Town Clerk ("Motion for Animal Control Records"), requesting records and information concerning a violent skin-piercing incident involving Brian Albert's K-9 German Shepherd and his hasty decision to rehome that dog mere months after O'Keefe's death.[3] (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 53-55.) Subsequently, on April 12, 2023, Defendant Karen Read filed a Motion for Order Pursuant to Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T ("Rule 17 Motion for Cell Records), requesting Jennifer McCabe and Brian Albert's cell phone carrier records during the relevant period along with any cell phones belonging to Brian Albert for the same period. (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 64-66.) Finally, on April 26, 2023, Ms. Read filed Defendant's Renewed Motion to Compel Discovery; Affidavit of David R. Yannetti in Support of Defendant's Renewed Motion to Compel Discovery with Certificate of Service; and Supporting Exhibits ("Renewed Motion to Compel"), requesting defense access to critical items of evidence that have (and continue to be) withheld by the Commonwealth and that the Court impose

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[3] Notably, no reference to Brian Albert's German Shepherd was *ever* made in any of the police reports turned over in connection with this case. Information regarding the skin-piercing incident and Brian Albert's decision to rehome his dog was discovered by defense investigators after interviewing witnesses in the Town Clerk's Office.

dates by which the Commonwealth would need to comply. (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 67-69.)

On May 2, 2023, the day before the hearing was set to take place, the Commonwealth filed its Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Production of Records from Canton Animal Control and the Canton Clerk's Office; and its Memorandum in Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Directed to Brian Albert, Verizon, and AT&T on May 2, 2023 ("Commonwealth's Opposition to Rule 17 Motion for Cell Records"). (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkt. 71.) At the hearing, Brian Albert, by and through his counsel of record Gregory Henning, also filed an Opposition to Defendant's Rule 17 Motion for Cellular Devices and Records.[4] (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkt. 73.)

On May 3, 2023, at 2:00 p.m., this Court held a widely publicized pretrial hearing, which was covered by national and local news media outlets. At the hearing, the Court heard argument on the Motion for Animal Control Records and the Renewed Motion to Compel, but reserved ruling on both motions. The parties agreed to defer argument on the Rule 17 Motion for Cell Records until a later hearing because the issues raised in the motion involved significant factual disputes, which would need to be resolved through an evidentiary hearing. As the Court explained on the record, "the parties have agreed for [sic] an evidentiary hearing, and [the Court] rearranged [its] schedule a bit so that we could accommodate you." (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT at 24:21-24.) Because the Commonwealth's objections to the Defendant's Rule 17 Motion were largely borne out of *factual disputes*, this Court set an evidentiary hearing for May 25, 2023, and ordered that the parties argue the merits of the Motion for Cell Records on that day. (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT 33:20-34:12.) The Court reserved ruling on the Defendant's Motion for Animal Control

[4] Although the title of Brian Albert's Opposition does not reflect such, Brian Albert opposed both the release of any cell records *and* the release of any records from Animal Control and the Canton Town Clerk about his dog.

Records and the Renewed Motion to Compel and clearly set this case for an evidentiary hearing on May 25, 2023, at 9:30 a.m. (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT 51:4-7.)

In spite of the fact that the hearing on the Motion for Animal Control Records was heard and argued on May 3, 2023, it took Justice Cannone 16 days to finally issue her ruling allowing Defendant's Request for Animal Control Records.[5] (*Compare* Exhibit E, *with* Exhibit D, Dkt. 79.) Indeed, on May 19, 2023, Justice Cannone allowed the motion, and issued an order for production of records from Canton Animal Control and the Canton Town Clerk's Office. (Exhibit D, Dkt. 79.) Notably, those records contained exculpatory information, which substantiated Ms. Read's third party culpability defense and further tied Brian Albert to O'Keefe's death. Since then, Justice Cannone's rulings have become increasingly dilatory.

To date, it has been 72 days since the May 3 hearing, and in spite of reminders to the Court's Clerk, Ms. Read still does not have a decision on the Renewed Motion to Compel. (See Exhibit D.) In addition to this Court's apparent refusal to rule on properly noticed motions before the Court, Justice Cannone has denied Ms. Read the ability to be heard.

2. THE COURT'S DECISION TO COMPLETELY VACATE THE MAY 25 HEARING ON THE RULE 17 MOTION FOR CELL RECORDS WITHOUT NOTICE TO THE DEFENDANT

As detailed above, this Court and the respective parties agreed to set the instant case for an evidentiary hearing on May 25, 2023, to resolve factual disputes related to Defendant's Rule 17 Motion for Cell Records. Ms. Read expended significant funds subpoenaing witnesses in preparation for the hearing (including Brian Albert, Jennifer McCabe, and the Commonwealth's computer forensics expert Trooper Guarino), flying in an out-of-state expert to testify regarding his findings on Jennifer McCabe's cell

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[5] Notably, those records contained exculpatory information, which substantiated Ms. Read's third party culpability defense and further tied Brian Albert to O'Keefe's death. Since then, Justice Cannone's rulings have become increasingly dilatory.

phone, and preparing for the examination of witnesses at the evidentiary hearing that was stipulated to by the parties and placed on calendar by this Court. (Affidavit of Alan J. Jackson, at ¶12.)

However, on May 22, 2023, three days before the scheduled hearing—without any advanced notice to Ms. Read or her counsel—the Commonwealth, Brian Albert, and Jennifer McCabe (clearly acting in concert), filed a flurry of motions requesting, *inter alia*, that the evidentiary hearing set for May 25, 2023, suddenly be cancelled. Specifically, on May 22, 2023, Brian Albert and Jennifer McCabe both filed motions to quash the subpoenas, which had been served on them by Ms. Read's counsel to testify at the evidentiary hearing. (Exhibit D, Dkts. 81-85.) That same day, the Commonwealth, in a shocking reversal of its position with respect to the evidentiary hearing *it previously asked be put on calendar*, filed an Opposition to Defendant's Request for Evidentiary hearing on Mass R. Crim. P. 17. (Exhibit D, Dkt. 83.) Shortly thereafter, Brian Albert's counsel emailed the Court's Clerk requesting that the hearing on the motions to quash be advanced to a date before the May 25 hearing. (Affidavit of Alan J. Jackson, at ¶13; Exhibit F.) After coordinating schedules, the clerk then set the case for a hearing on the Motions to Quash on May 24, 2023, and indicated that "[Justice Cannone] want[ed] to address [the Commonwealth's] motion, at least initially." (*Id.*) Thus, the Court then set a hearing on May 24, 2023, to determine whether the motions to quash should be granted and to hear "at least initially" the Commonwealth's Opposition to Defendant's Request for Evidentiary Hearing, which ironically was agreed upon by the Commonwealth in the first place.[6] Notably, the Rule 17 Motion for Cell Records *and* evidentiary hearing were still scheduled to be heard on May 25, 2023. (Exhibit D.)

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[6] The Commonwealth's complete reversal regarding its position on the evidentiary hearing (and decision to capitulate to the requests of Jennifer McCabe and Brian Albert, who were both clearly desperate to avoid testifying in connection with this case) was diametrically opposed to the position it had been taking for over a month. As set forth in the attached email correspondence between counsel for Ms. Read and Attorney Lally, the Commonwealth was well aware that our office was flying in an expert from out-of-state and would need to make arrangements in advance. Mr. Lally repeatedly and explicitly

Upon appearing in Court for the May 24 hearing, the Court heard argument regarding the motions to quash the subpoenas served on Brian Albert and Jennifer McCabe and (while still sitting on the bench), allowed both motions, precluding Ms. Read from calling them to testify at the evidentiary hearing. (Affidavit of Alan J. Jackson ¶16, Exhibit H.) The Court then heard argument with regard to the Commonwealth's opposition to cancel the evidentiary hearing in total, *which was clearly both necessary and appropriate because, as the Commonwealth argued later during that hearing, the Commonwealth disputed nearly every evidence-based assertion set forth by the defense in its Rule 17 Motion for Cell Records, including whether Jennifer McCabe googled "hos long to die in cold" at 2:27 a.m. hours before she claimed to have found O'Keefe's hypothermic body in the snow of her brother-in-law's front lawn.* (Exhibit H.) Immediately following argument, the Court quickly issued a ruling allowing the Commonwealth's motion to cancel the evidentiary hearing, adopting the Commonwealth's legally *incorrect* theory that there was "no authority for it," and effectively denied Ms. Read the ability to prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true. (Exhibit H, RT 14:19-24.) Thereafter, the Court then announced to counsel that she would "hear argument on the Rule 17 Motion for Cell Records." (Exhibit H, RT 14:19-24.) Significantly, Ms. Read and her counsel were **never** notified that there was even a remote possibility that the Rule 17 Motion for Cell Records was going to be heard that day. (Affidavit of Alan J. Jackson,

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reaffirmed his intention to move forward with an evidentiary hearing. On April 27, 2023, he wrote: "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. [I]f 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." (Affidavit of Alan J. Jackson, at ¶14, Exhibit G.) At the hearing on May 3, 2023, Mr. Lally indicated to us that the Commonwealth disputed the facts at issue in the Rule 17 Motion for Cell Records, and that we would need to set the case for an evidentiary hearing. (Affidavit of Alan J. Jackson, at ¶15.)

¶17.) Thus, Ms. Read's counsel was forced to argue an extraordinarily factually complex and lengthy legal motion, which was not on calendar for that day—*without any notes or advance notice*, denying her a full and fair opportunity to be heard on a motion with a very real and consequential impact on her ability to defend herself against murder charges. The Court then set the case for another pretrial hearing on July 25, 2023.

Although Justice Cannone acted with the utmost alacrity in ensuring that the May 24 hearing concluded as quickly as possible (and Ms. Read was denied the ability to call the very witnesses necessary to prove the disputed facts set forth in her motion), she was in no such hurry to rule on the motion after the proceedings concluded. ***Justice Cannone waited 27 days before ultimately denying Ms. Read's Rule 17 Motion for Cell Records on June 20, 2023.*** (*See* Exhibit D, Dkt. 97.)

3. THE COURT HAS NOW MADE THE UNILATERAL DECISION TO DEVIATE FROM PROCEDURE AND PREVENT THE CRIMINAL SESSION JUDGE FROM HEARING THE COMMONWEALTH'S MOTION TO GAG MS. READ'S ATTORNEYS

On June 9, 2023, the Commonwealth filed a Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rule of Professional Conduct 3.6 (a) ("Motion for Gag Order"), requesting that defense counsel for Ms. Read be gagged and prohibited from making *any statements about this case whatsoever* to the press. (*See* Exhibit D, Dkt. 93.) The Commonwealth's Motion for Gag Order was noticed for July 25, 2023, and thus, was requested to be heard at the next pretrial hearing, which was already on calendar in this case.

On June 15, 2023, a mere six days after receiving the Motion for Gag Order, counsel for Ms. Read received an email from Mr. McDermott with the Norfolk Superior Court stating "[t]he Court needs a response to the Commonwealth's . . . Motion to Prohibit Extrajudicial statements." (Affidavit of Alan Jackson, ¶18, Exhibit H.) The clerk further indicated that Justice Cannone wanted to unilaterally advance the hearing on the Motion for Gag Order (which was properly noticed for July 25) to June 27 or June 28.

(*Id.*) Notably, on the same day Justice Cannone sought to advance the hearing on the Commonwealth's Motion for Gag Order, which clearly benefits Brian Albert and Jennifer McCabe, she still had not ruled on Ms. Read's Rule 17 Motion for Cell Records, which had already been under advisement for 22 days. (*See* Exhibit D.) When counsel for Ms. Read pushed back and indicated that our office would need time to respond to the Motion for Gag Order, intended to appear in person, and were unavailable on the dates proposed by the Court, Justice Cannone indicated, through the court clerk, that her efforts to advance the hearing were done because she "was looking to hear this while she was still sitting in a Criminal session." (Exhibit I.) Thus, because the defense requested to have the motion heard on the date that was already on calendar (and the date noticed on Attorney Lally's motion), the Court indicated, through her court clerk, that "She [would] hear [the Motion for Gag Order on 7/25 in [the civil] session rather than have the Criminal session hear this." Notably, the press (and court of public opinion) have not been friendly to Justice Cannone, Jennifer McCabe, or Brian Albert. (Exhibit I.) Notably, Justice Daniel J. O'Shea is currently assigned to the criminal session, and appears listed on the docket as the justice assigned to this case. (Exhibit K.)

Indeed, the public has *already* lost confidence in this Court's ability to be fair and impartial in this case. Attached hereto for the Court's review as Exhibit J, are examples of comments culled from various articles about this case published by local and national news outlets, all of which establish that the regular, disinterested people following this case are *already* questioning Justice Cannone's ability to be fair in this case. (Affidavit of Alan J. Jackson, ¶19.)

II.
ARGUMENT

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (*Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (citing and quoting from *In re Murchison*, 349 U.S. 133, 136 (1933)); *Weiss v. United States*, 210 U.S. 163, 178 (1994) [same].) "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the

probability of unfairness. . . . In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable. Among those cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." (*Withrow v. Larkin*, 421 U.S. 35, 47 (1975).)

Moreover, as the United States Supreme Court has explained, our system has an obligation to do more than simply protect against proven bias or unfairness on the part of a judge; rather, "[j]ustice must satisfy the appearance of justice[.]" (*Offutt v. United States*, 348 U.S. 11, 14 (1954).) Therefore, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." (*Tumey v. Ohio*, 273 U.S. 510, 532 (1927).) So important is the appearance of fairness that it may require a judge to disqualify herself even though she has no actual bias or prejudice and would in fact do her "very best to weigh the scales of justice equally." (*Taylor v. Hayes*, 418 U.S. 488, 501 (1974).)

The same guiding principle of impartial justice is also expressly enshrined in article 29 of the Massachusetts Constitution's Declaration of Rights:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

"A rigid adherence to that principle is essential to the maintenance of free institutions. . . . It may never be relaxed." (*Thomasjanian v. Odabshian*, 272 Mass. 19, 23 (1930).) Article 29 is "at least as rigorous in exacting high standards of judicial propriety" as the due process clause of the Fourteenth Amendment. (*King v. Grace*, 293 Mass. 244, 247 (1936)). Thus, the protection of an accused's right to an impartial adjudicator is deeply enshrined in both the United States and Massachusetts Constitutions.

The Massachusetts Code of Judicial Conduct similarly recognizes that "An independent, fair, and impartial judiciary is indispensable to our system of justice." (Code of Judicial Conduct, Preamble.) In keeping with these precepts, the rules governing disqualification of judges are codified in the Code of Judicial Conduct, S.J.C. Rule 2.11. Pursuant to Canon 3(E)(1)(a) of the Code of Judicial Conduct, S.J.C. Rule 2.11, "A judge **shall disqualify** himself or herself in a proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned[.]" (Code of Judicial Conduct, S.J.C., Rule 2.11.) Thus, the ethical rules provide that a judge must be disqualified unless the judge can satisfy both a subjective and objective standard of impartiality. (S.J.C., Rule 2.11, cmt. 1.)

"The subjective standard requires disqualification if the judge concludes that he or she cannot be impartial." (*Ibid.*) Conversely, "[t]he objective standard requires disqualification whenever the judge's impartiality might reasonably be questioned by a fully informed disinterested observer, regardless of whether any of the specific provisions [mandating disqualification] apply." (*Ibid.*) Thus, in reaching a determination on a motion for disqualification, judges must follow a two-prong test. First, in ruling on a motion seeking recusal, a judge must "consult first [her] own emotions and conscience" to determine whether she can be fair and impartial. (*Commonwealth v. Eddington*, 71 Mass. App. Ct. 138, 143 (2008) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).) If she cannot satisfy this subjective standard, then the judge must recuse herself.

However, even if the judge determines she is impartial, "then she must next attempt an objective appraisal of whether this [is] a proceeding in which [her] impartiality might reasonably be questioned." (*Id.*; *Demoulas v. Demoulas Super Markets, Inc.* (1998) 428 Mass. 543, 547, n. 6.) If the judge determines that she cannot be impartial *or* that her impartiality in a case might reasonably be questioned by an objective observer, then the judge is ethically required to recuse herself. (*See id.*) Furthermore, a judge is ethically required to "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for

disqualification, even if the judge believes there is no basis for disqualification." (S.J.C., Rule 2.11, cmt. 5.)

As set forth below, Ms. Read cannot and will not speculate as to whether Justice Beverly Cannone can be subjectively impartial in this case. However, Ms. Read is on trial for her life. The suggestion—not by Ms. Read, but by a family member of the third party culprits themselves—that they have a relationship with and the ability to influence Justice Cannone, when considered in light of the significant procedural irregularities that have inured to Ms. Read's great detriment (and to the benefit of Jennifer McCabe and Brian Albert)—cast a shadow over this case so large that *any* disinterested third party would have to question Justice Cannone's impartiality in this case. In point of fact, they already have. Thus, as set forth below, Ms. Read respectfully requests that Justice Beverly Cannone disqualify herself from these proceedings.

A. IF THIS COURT BELIEVES SHE CANNOT BE IMPARTIAL IN THIS CASE, THEN SHE MUST RECUSE HERSELF

First, as explained above, under the subjective standard of disqualification set forth in Supreme Judicial Court Rule 2.11 of the Code of Judicial Conduct, a judge is required to recuse herself if she cannot be impartial. (Code of Judicial Conduct, S.J.C., Rule 2.11.) Thus, the Court must endeavor to "consult first [her] own emotions and conscience" to determine whether she can be fair and impartial. (*Commonwealth v. Eddington*, 71 Mass. App. Ct. 138, 143 (2008) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).) If the Court subjectively believes she can no longer be fair and impartial, she must recuse herself.

Although Ms. Read will not speculate as to whether Justice Cannone *can subjectively* be fair and impartial in this case, she requests that this Court consult her emotions and conscience to determine whether recusal is required on this ground.

B. THE FACTS AND CIRCUMSTANCES ATTENDENT TO THIS CASE CLEARLY SUGGEST THAT AN OBJECTIVE DISINTERESTED OBSERVER MIGHT REASONABLY QUESTION JUSTICE CANNONE'S IMPARTIALITY IN THIS CASE, NECESSITATING HER DISQUALIFICATION

Regardless of whether the Court subjectively believes that she can be fair and impartial, the state and federal constitutions and Massachusetts Code of Judicial Conduct require that a judge disqualify herself where her "impartiality might reasonably be questioned." (Code of Judicial Conduct, S.J.C., Rule 2.11.) "Actual impartiality alone is not enough. 'Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding.'" (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) "In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided." (*Id.*) The Code of Judicial Conduct, S.J.C. Rule 2.11, sets forth five non-exhaustive circumstances explicitly necessitating disqualification, which include the following:

> (1) The judge has a personal bias or prejudice about a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them,[7] or the spouse or domestic partner of such a person is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
>
> (b) acting as a lawyer in the proceeding;
>
> (c) a person who has more than a *de minimis* financial or other interest that could be substantially affected by the proceeding; or

[7] The "third degree of relationship" includes great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Code, Terminology.

> (d) likely to be a material witness in the proceeding.
>
> (3) The judge know that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.
>
> (4) The judge, while a judge or a judicial applicant or judicial nominee, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
>
> (5) The judge:
>
> (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
>
> (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
>
> (c) was a material witness concerning the matter; or
>
> (d) previously presided as a judge over the matter in another court.

(Code of Judicial Conduct, S.J.C. Rule 2.11(a)(1-5).) However, this list is non-exhaustive and the objective standard mandates "disqualification whenever the judge's impartiality might reasonably be questioned by a fully-informed disinterested observer, regardless of whether" any of the five examples set forth above are at issue. (*Id.*, cmt. 1.)

1. SEAN MCCABE'S PUBLIC COMMENTS, ALONE, REQUIRE DISQUALIFICATION

As explained above, in order to protect public confidence in the judiciary, it is not enough to prevent actual bias, rather "even the appearance of partiality must be avoided." (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) Here, the appearance of partiality cannot be

avoided because Sean McCabe—a family member of the very individuals Ms. Read's third party culpability defense is predicated on—has claimed that his family has a relationship with Justice Cannone and has the ability to influence her decision-making. Indeed, the Court's failure to disqualify herself based on Mr. McCabe's claims alone, would fly in the face of numerous rules set forth in the Code of Judicial Conduct, which are meant to protect erosion of public confidence in the impartiality of the judiciary. In addition to Rule 2.11(A) of the Code of Judicial Conduct, which requires disqualification of a judge where her impartiality might reasonably be questioned, Rule 1.2 similarly requires that "[a] judge . . . act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Similarly, Rule 2.4(C), sets forth that a judge "**shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge**."

In exceptional circumstances like this, where a third party culprit's family member is openly threatening an investigative reporter by claiming a relationship with the judge that is responsible for deciding whether their family member's privacy interests outweigh a criminal defendant's right to defend herself in a murder case, that creates the *appearance of impropriety and partiality*. Here, Sean McCabe responded to a direct question about whether he has the ability to influence Justice Cannone in reference to this case with a threat that relayed personal information about the judge, namely— "Auntie Bev?? Whose seaside cottage do you think ***we're*** going to bury your corpse under? This statement was clearly meant to convey the impression that his family knows the judge and is in a position to influence her. Moreover, this suggestion is further corroborated by the fact that the threat contains accurate personal identifying information about Justice Cannone that absent some relationship would otherwise be unknown to Sean McCabe. Significantly, the Code of Judicial Conduct comments to Rule 2.11 sets forth that "**[a] judge must also bear in mind that social relationships [or the appearance thereof] may contribute to a reasonable belief that the judge cannot be impartial**." (S.J.C., Rule 2.11, cmt. 1.) Regardless of whether Sean McCabes claims are true or not, these

threats clearly provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting Justice Cannone's impartiality, requiring disqualification. (*Com v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 10 (2013).)

2. FAILURE TO PERFORM DUTIES FAIRLY AND DILIGENTLY ON MOTIONS MADE BY MS. READ

Canon 2 of the Supreme Judicial Court's Code of Judicial Conduct requires its judges to perform the duties of judicial office impartially, competently, and diligently. (S.J.C. Code of Judicial Conduct, Rule 2.2.) Indeed, S.J.C. Code of Judicial Conduct, Rule 2.5, subdivision (A), explicitly sets forth that a judge is required to "perform judicial and administrative duties competently, diligently, *and in a timely manner*." (S.J.C. Code of Judicial Conduct, Rule 2.5(A), emphasis added.) Indeed, "[t]imely disposition of the court's business **requires a judge to . . . [be] expeditious in determining matters under advisement**" and to "demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay." (*Id.*, cmts. 3-4.) Further, "**A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs**." (*Id.*, cmt. 4.) The failure of a judge to abide by these basic ethical requirements clearly suggests at least the appearance of partiality.

Here, without even reaching the substance of the Court's rulings in this case, there is no question that, for some reason unknown to the defense, Justice Cannone has been dilatory in issuing rulings on defense motions that are under advisement. The Court's new and escalating practice of delaying her rulings on defense motions which have already been argued and heard by this Court first by 16 days on Ms. Read's Motion for Animal Control Records; then by 27 days on Ms. Read's Rule 17 Motion for Cell Records; and in one instance 72 days on Ms. Read's Renewed Motion to Compel Discovery, even in spite of a reminder by counsel that the motion remains under advisement, does not give rise to the appearance of justice or impartiality. (*See, e.g., In re Powers*, 465 Mass. 63, 78 [finding clerk magistrate violated rules of professional

responsibility and should be removed from office for failing to issue decisions on matters for 30 to 45 days].) It would certainly make a reasonable person wonder *why* the Court is suddenly motivated to stall these proceedings and delay Ms. Read's ability to seek and obtain evidence in her case. Furthermore, this Court's significant delays in deciding defense motions under advisement (and in one instance a complete refusal to rule on Ms. Read's properly noticed Renewed Motion to Compel) clearly appears to be one-sided (i.e. partial), *as evidence by the Court's recent attempts to unilaterally advance and hasten a decision on a motion filed by the Commonwealth to gag Ms. Read's counsel.*

Moreover, by failing to rule on the Renewed Motion to Compel Discovery, Ms. Read is forced to patiently wait with the weight of false murder charges hanging over her head, in litigation purgatory, unable to access the remainder of the critical evidence she needs in order to prepare her defense, announce ready for trial, or avail herself of any remedies, should they be needed, on appeal. The objective metrics establishing recent and escalating delays in rulings as evidenced by the Court's own docket, alone, clearly provide what an impartial member of the public would find to be a reasonable basis for doubting Justice Cannone's impartiality, requiring disqualification.

3. JUSTICE CANNONE'S DENIAL OF MS. READ'S ABILITY TO BE HEARD

Indeed, as set forth in S.J.C. Rule 2.6, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard." As the Supreme Judicial Court has made clear, "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." (Code of Judicial Conduct, S.J.C., Rule 2.6, cmt. 1.) In keeping with that precept, a judge's decision to deny a defendant the ability to be heard suggests a lack of fairness and impartiality.

Here, as set forth in more detail above, Justice Cannone denied Ms. Read a full and fair opportunity to be heard on her Rule 17 Motion for Cell Records relating to

Jennifer McCabe and Brian Albert--whose family member (Sean McCabe) has publicly claimed to have a relationship with and the ability to influence Justice Cannone. As detailed above, this Court and the respective parties agreed to set the instant case for an evidentiary hearing on May 25, 2023, to resolve factual disputes related to Defendant's Rule 17 Motion for Cell Records. Ms. Read expended significant funds subpoenaing witnesses in preparation for the hearing (including Brian Albert, Jennifer McCabe, and the Commonwealth's computer forensics expert Trooper Guarino), flying in an out-of-state computer forensics expert to testify regarding his findings on Jennifer McCabe's cell phone, and preparing for the examination of witnesses at the evidentiary hearing that was stipulated to by the parties and placed on calendar by this Court.

The Court's decision to cancel the May 25 evidentiary hearing, adopting the Commonwealth's legally incorrect theory that there was "no authority for it," and effectively denying Ms. Read the ability to prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true smacks of partiality *towards the McCabes and Alberts.* By advancing the Commonwealth's untimely motion (filed a mere three days before the previously scheduled May 25, 2023, hearing) to cancel a legally necessary and appropriate evidentiary hearing served only to deny Ms. Read the ability to be heard and present *evidence necessary to prove she was entitled to the records sought.* The Court's hasty decision to allow the Commonwealth's motion to cancel the evidentiary hearing, while still sitting on the bench, and adopt the Commonwealth's legally incorrect theory that there was "no authority for it," effectively denied Ms. Read the ability to be heard and prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true.

Moreover, aside from the Court's decision to cancel, wholesale, the evidentiary hearing scheduled for the next day, the Court then forced the defense to argue an extremely complex, factually dense motion on the spot, without any advanced notice that the argument on the Rule 17 Motion for Cell Records was going to be heard on that day. Significantly, Ms. Read and her counsel were **never** notified that there was even a remote possibility that the Rule 17 Motion for Cell Records was going to be heard on May 24,

2023. Thus, Ms. Read's counsel was forced to argue an extraordinarily factually complex and lengthy legal motion, which was not on calendar for that day, *without any notes or advance notice*, denying her a full and fair opportunity to be heard on a motion with a very real and consequential impact on her ability to defend herself against murder charges. A reasonable, disinterested server would certainly question whether this was done in an effort to prevent the defense from having a full and fair opportunity to argue the Rule 17 Motion for Cell Records in a crowded courtroom the next day, where major national and local news outlets were scheduled to be present and observe the proceedings. Instead, in what *at least appears to be* an attempt to act under cover of darkness, this Court advanced the proceedings, denied Ms. Read's ability to call any witnesses in support of her motion, and forced her counsel to argue a motion that was not properly on calendar that day. The procedural gamesmanship denying Ms. Read the ability to be heard, which was facilitated by Justice Cannone on May 24, 2023, would give any disinterested member of the public a reasonable basis for doubting her impartiality, requiring disqualification.

4. JUSTICE CANNONE'S DECISION TO DEPART WITH NORFOLK COUNTY SUPERIOR COURT JUDICIAL ASSIGNMENTS, AND TAKE THIS CASE WITH HER TO CIVIL COURT

Finally, the Court's decision to deviate from typical procedure in Norfolk County Superior Court, and reassign this case to herself in spite of the fact that she was reassigned to sit on a civil session so that she can hear the Commonwealth's Motion for Gag Order, which would prohibit the defense from making extrajudicial statements to the press, clearly creates the appearance of partiality.

On June 15, 2023, a mere six days after Attorney Lally filed the Commonwealth's Motion for Gag Order, counsel for Ms. Read received an email from Mr. McDermott with the Norfolk Superior Court stating "[Justice Cannone] needs a response to the Commonwealth's . . . Motion to Prohibit Extrajudicial statements." Thus, Justice Cannone was apparently ignoring the rules of procedure governing the times required for

oppositions and was requesting that the defense hurry up and respond to the Commonwealth's Motion (which was noticed to be heard a full month later), so that she could hear the motion before she was reassigned to a different courtroom. Notably, on the same day Justice Cannone sought to advance the hearing on the Commonwealth's Motion for Gag Order, which clearly benefits Brian Albert Jennifer McCabe, she still had not ruled on Ms. Read's Rule 17 Motion for Cell Records, which had already been under advisement for 22 days. A reasonable person might infer that these actions at least appear to suggest that the judge is *partial* to one side. Moreover, when counsel for Ms. Read informed the Court that we would need time to respond to the Motion for Gag Order, intended to appear in person, and were unavailable on the dates proposed by the Court, Justice Cannone indicated, through the court clerk, that she would exercise supervisory authority to take the case with her to her reassignment in civil court, rather than have the properly assigned criminal session judge hearing the Commonwealth's Motion for Gag Order.

Clearly, the totality of the facts in this case, including the threatening statements and claims made by Sean McCabe suggesting a close-knit relationship between the third party culprits in this case and the judge, the Court's recent and escalating delays in ruling on defense motions that are under advisement, the Court's denial of Ms. Read's ability to be heard on her Rule 17 Motion for Cell Records, and her decision to deviate from procedure and keep this case so that she can decide the Commonwealth's Motion for Gag Order (in which she quite clearly has a personal interest) in spite of her reassignment to civil court, would give any disinterested member of the public a reasonable basis for doubting her impartiality. As such, Justice Cannone must be disqualified from deciding any further issues of consequence in this matter.

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Respectfully Submitted,
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July 14, 2023

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CERTIFICATE OF SERVICE

I, Attorney David Yannetti, do hereby certify that I served the "Defendant's Motion for Recusal and/or Disqualification of Justice Beverly Cannone" upon the Commonwealth by emailing a copy on July 14, 2023 to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

July 14, 2023
Date

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