COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13227

BRISTOL COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

WILL TATE

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BRIEF FOR AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and BOSTON BAR ASSOCIATION

In support of neither affirmance nor reversal; urging the Court to hold that incriminating information counsel obtains from third parties is confidential for purposes of Mass. R. Prof. C. 1.6 and that counsel has no obligation to disclose such information to the Commonwealth

APPEAL FROM THE JUDGMENT OF THE BRISTOL SUPERIOR COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. P.17(c)(1) and Supreme Judicial Court Rule 1:21, Amici Curiae make the following disclosures:

The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, § 1.

Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL.

The Boston Bar Association (BBA) is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has more than 15,000 members. There is no parent corporation or publicly held corporation that owns 10% or more of the BBA's stock.

STATEMENT REGARDING PREPARATION OF BRIEF

Pursuant to Mass. R. App. P.17(c)(5), Amici make the following declarations:

No party of party's counsel authored this brief in whole or part;

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;

No person or entity—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief; and

Nether Amici nor their counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF INTEREST OF AMICI CURIAE

Committee for Public Counsel Services

Amicus curiae Committee for Public Counsel Services is a statutorily created statewide agency established by G. L. c. 211D, §§ 1 *et seq*., whose responsibility is "to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including those charged with crimes. G. L. c. 211D, §1, 2, 4.

This brief addresses the confidential status of incriminating information that attorneys obtain in the course of client representation and these attorneys' obligation, if any, to disclose such information to the Commonwealth. Because CPCS represents indigent defendants charged with crimes, and because such representation frequently results in the receipt of information that at least arguably incriminates such defendants, the Court's decision in this case will affect the interests of CPCS's present and future clients and the manner in which counsel who deliver CPCS-coordinated legal services represent those clients and advocate for their interests. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated").

Massachusetts Association of Criminal Defense Lawyers

Amicus curiae Massachusetts Association of Criminal Defense Lawyers represents more than 1,000 trial and appellate lawyers who are members of the Massachusetts Bar and devote a substantial part of their practices to criminal defense. MACDL files amicus briefs in cases raising questions important to the criminal justice system, such as that presented here. See, e.g., *Commonwealth v. Delgado-Rivera*, 487 Mass. 551 (2021).

Boston Bar Association

Amicus curiae Boston Bar Association, with more than 15,000 members, traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. Its mission is to advance the highest standards of excellence for the legal profession, facilitate access to justice, foster a diverse and inclusive professional community, and serve the community at large. The BBA's interest in the case relates most strongly to the sanctity of the attorney-client relationship. Beyond that, this Court's decision could have repercussions on access to justice, by affecting clients' trust in their lawyers, and lawyers' preparation of their cases.

ISSUE PRESENTED

Attorneys have duties of loyalty and confidentiality to the clients they represent. The only exceptions to those duties contemplated by the Rules of Professional Conduct are designed to prevent fraud upon the court or to permit disclosures necessary to avoid substantial harm or injury that is reasonably certain. When a third party shares incriminating information about a client with an attorney, the disclosure of which is not necessary to avoid fraud on the court or substantial harm or injury to another, is the lawyer obliged to disclose that information to the Commonwealth or instead required to treat it as confidential?

INTRODUCTION

Each year, thousands of people in Massachusetts face criminal charges and rely on an attorney for their defense. Individuals, businesses, and other entities rely on the advice and assistance of counsel to navigate the complex and varied legal landscape of the contemporary world. These clients act under the pressure of pending prosecution or other governmental action, civil litigation, contractual or other economic obligations, and familial and social demands. To effectively serve and represent the interests of clients with such diverse needs, attorneys must first investigate to be able to understand the strengths and weaknesses of their clients' position. But clients will not grant their lawyers access to the intimate and potentially damaging information necessary to effective representation if the price of that access is turning over incriminating evidence about themselves to the government—in a criminal case, the very party prosecuting the client. And lawyers cannot effectively assist and advocate for clients and will not seek out the information necessary to do so if their work carries with it a concomitant requirement to inform on and facilitate the prosecution of those whose interests they represent.

Obliging counsel to give the government information that incriminates their clients would discourage clients from seeking and confiding in counsel, prevent attorneys from effectively understanding clients' situations and representing their interests, and undermine the functioning of the adversary system of justice on which our society substantially depends for dispute resolution. The Court should resoundingly reject the idea that such an obligation exists or can exist consistent with the Rules of Professional Conduct and the role they envision for attorneys.

SUMMARY OF THE ARGUMENT

Comments to the Rules of Professional Conduct indicate that information obtained from third parties in the course of representation must be treated as confidential if it has the potential to harm a client's interests. Information that incriminates a client meets this definition, especially if disclosed to a prosecuting authority, and therefore must be kept confidential. Treating such information as confidential is consistent with the overarching principle that just outcomes are most likely when clients trust and feel they can confide in counsel. [18-22].

Counsel's duties of loyalty and confidentiality are foundational to the attorney-client relationship. Obliging counsel to turn over to the Commonwealth information that incriminates his or her client would create an inherent conflict of interest in defense counsel and make fulfillment of the duties of loyalty and confidentiality impossible. Damage to the attorney-client relationship would be particularly severe in the context of indigent defense, where many clients already perceive assigned counsel to be an agent of the prosecuting state. [22-28].

An obligation to disclose incriminating information would effectively turn counsel into an agent of the prosecution and discourage

full investigation of clients' cases. This inhibitory effect would not be restricted to the realm of criminal defense, and would impact the work of counsel in all practice areas. [28-33]. Such a disclosure obligation would also undermine the functioning of the adversary system of justice, within which criminal defense counsel's constitutionally mandated role is not to assist in a search for the objective truth of events underlying a criminal charge but to hold the Commonwealth to its high burden of proof. [33-37].

Existing law and rules effectively balance attorneys' obligations to clients and the justice system as a whole. Duties of candor to the tribunal and honesty in dealing with adverse parties protect the integrity of proceedings and guard against frauds on the court, and the discretion lawyers have to disclose confidential information when necessary to prevent serious, enumerated harms ensures counsel can act in the limited circumstances where other interests trump client confidentiality. The Court should not upset this existing balance or undermine the adversary system by recognizing a novel, destabilizing obligation to disclose incriminating information to the Commonwealth. [37-42].

ARGUMENT

1. Information an attorney receives from a third party that incriminates the attorney's client is confidential for purposes of Rule 1.6 of the Rules of Professional Conduct

Massachusetts Rule of Professional Conduct 1.6 ("Rule 1.6") provides that, subject to limited exceptions, "[a] lawyer shall not reveal confidential information relating to the representation of a client." Neither the text of Rule 1.6 nor any other Rule of Professional Conduct ("Rules") defines "confidential information." Comment 3A to Rule 1.6, however, does:

> '[c]onfidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential.

See also Restatement (3d) of Law Governing Lawyers §59 and Comment b thereto ("Confidential client information consists of information relating to representation of a client [and includes] information gathered from any source, *including sources such as third persons whose communications are not protected by the attorney-client privilege*") (emphasis supplied), and *id.* at §60 Comment c ("use or disclosure of confidential client information is generally prohibited if there is a

reasonable prospect that doing so will adversely affect a material interest of the client").[1]

The plain language of these comments indicates that third-party information with the potential to harm client interests must be treated as confidential, and—like information relevant to the representation obtained from any other source—may not be disclosed except as contemplated by the plain language of Rule 1.6.[2] There can be no

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[1] Comments to Rules of Professional Conduct are "instructive (though not controlling) in determining" counsel's duties and obligations. *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347, 353-54 (2002) (parenthetical in original); see also Mass. R. Prof. C., Scope 9 ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative").

[2] Rule 1.6(b) states:

> "A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:
>
> (1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;
>
> (2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

question that incriminating information about a client would "likely . . . be . . . detrimental to the client if disclosed" to a government agent tasked with prosecuting crimes. And attorneys conducting investigations necessary to client representation, either on their own or through agents, routinely offer assurances of confidentiality to potential witnesses or other sources of information in order in incentivize full disclosure on relevant matters. Under the scenarios presented by

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> (3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to the extent permitted or required under these Rules or to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comment 3A(b) and (c) to illustrate the meaning of Rule 1.6, incriminating information about a client received by an attorney from a third party qualifies as "confidential."

Treating incriminating information obtained during client representation as confidential for purposes of Rule 1.6 is both true to the Rules' larger purposes and necessary to prevent profound and negative disruptions to attorney-client relationships and the functioning of the justice system more generally. See *Malloy v. Department of Correction*, 487 Mass. 482, 498 (2021) (when interpreting discrete portion of a statutory regime, courts should consider "over-all objective" sought to be accomplished by statute as a whole). The Rules' overarching vision of a lawyer is as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." Mass. R. Prof. C. Preamble 1. That role is predicated in part on the idea "that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations," when they know counsel will closely protect "even . . . embarrassing or legally damaging" information about them. Mass. R.

Prof. C. Preamble 7; Rule 1.6 Comment 2. As discussed in detail below, an obligation to disclose incriminating information to the Commonwealth is fundamentally and irreconcilably at odds with this essential vision of the purpose and function of an attorney, would prevent counsel from effectively representing clients in an adversary system, and should therefore be rejected.

2. An obligation to disclose incriminating information to the Commonwealth would drive a wedge between clients and their attorneys, prevent counsel from conducting the wide-ranging investigations necessary to their work, and undermine the functioning of our adversary system of justice

A. The undivided duty of loyalty owed by attorney to client is incompatible with an obligation to disclose confidential incriminating information to the Commonwealth

"A lawyer owes a duty of undivided loyalty to his or her client." *Commonwealth v. Allison*, 434 Mass. 670, 694 (2001). This duty "forms the bedrock of the attorney-client relationship," *Bryan Corporation v. Abrano*, 474 Mass. 504, 511 (2016), and is "perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Also "among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information." *Commonwealth v. Perkins*, 450 Mass. 834, 851 (2008). A "defendant must be able to seek

the advice and guidance of his attorney and must be able to rely on the undivided loyalty of his counsel to present the defense case with full force and zealousness." *Commonwealth v. Downey*, 65 Mass. App. Ct. 547, 551-52 (2006).

As these authorities make clear, counsel's duties of loyalty and confidentiality are foundational to the vigorous representation of client interests. An obligation to disclose to the Commonwealth incriminating information about a client learned in the course of representation would preclude vigorous representation by dividing counsel's allegiances and making counsel balance duties of loyalty and confidentiality owed to the client against a duty of disclosure owed to a third party (the Commonwealth), thereby giving rise to a conflict of interest. See *Perkins*, 450 Mass. at 851 ("A conflict of interest arises whenever an attorney's regard for one duty, such as that owed to a third party . . . leads the attorney to disregard another duty, such as that owed to his client"). In criminal matters, this division of loyalties would be especially stark, since it would create a duty in defense counsel not to just any third party but to the very party who is prosecuting his or her client. By effectively making defense counsel an agent of the

prosecution, this new disclosure duty would eviscerate our historical understanding of the role of an attorney and turn our adversarial model on its head.

Although the issue of a freestanding disclosure obligation presented by this case is novel, this Court has previously acknowledged the destructive effect that compelled disclosure to the Commonwealth can have on the attorney-client relationship. This Court has said that the "disturbing practice" of subpoenaing a party's counsel—a tactic so ethically fraught that it may only be used with prior judicial approval, see Mass. R. Prof. C. 3.8(e)—risks "the chilling of the attorney-client relationship [and] the creation of conflicting interests between an attorney and his or her client," with implications including "threatening the keystone of the attorney-client relationship, most notably the trust placed by clients in their attorneys." *In re Grand Jury Investigation*, 407 Mass. 916, 918 (1990) (quotations and alterations omitted). Indeed, "[t]urning members of the defense team into government witnesses may undermine a client's trust in, and his willingness to communicate with, his attorney." *Id.* at 919; see also *Commonwealth v. Shraiar*, 397 Mass. 16, 21 (1986) ("the very nature of an attorney's duty of allegiance and

undivided loyalty to his client forecloses him from simultaneously serving as both defense counsel and prosecution witness, where the attorney's testimony will prejudice the defendant"). A freestanding obligation to disclose any incriminating information obtained from third parties would be orders of magnitude more damaging to attorney-client relationships than the subpoena process that has troubled this Court in the past.

The Court has also acknowledged that attorneys may be reluctant to make the discretionary disclosures permitted by Rule 1.6(b) (see *supra* n.2) if doing so will harm the interests of a client to whom he or she owes a duty of undivided loyalty. For example, in *Purcell v. District Attorney for the Suffolk Dist.,* 424 Mass. 109 (1997), this Court noted that "[l]awyers will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients," and that prosecutorial "use of such disclosures" might "chill[] free discourse between lawyer and client and reduc[e] the prospect that the lawyer will learn of a serious threat to the well-being of others." *Id*. at 114. *Purcell* concerned information counsel obtained directly from his client, but its observations apply just as much to

information from third parties: mandating disclosure of information relevant only to the prosecution of crimes already committed could have the perverse effect of limiting attorneys' access to information whose discretionary disclosure could help prevent future harms like those contemplated in the Rule 1.6(b) exceptions.

The risk that an affirmative obligation to disclose incriminating information will inhibit the trust and information sharing necessary to effective representation is particularly acute for the indigent population that makes up Amicus CPCS's client base, and a significant portion of all criminal defendants.[3] Notwithstanding the fact that the government's payment of a lawyer's fee does not give it power to control or direct a representation, see Mass. R. Prof. C. 1.8(f), many indigent clients do, in fact, perceive government-provided counsel as laboring under a conflict of interest. See *People v. Canfield*, 12 Cal. 3d 699, 705 (Cal. 1974) ("The problem [of trust and perceived loyalty] is particularly serious with respect to indigents represented by the public defender, there apparently being a tendency on the part of many such defendants

[3] "It is widely estimated that 60 to 90 percent of all criminal cases involve indigent defendants." United States Department of Justice Office of Justice Programs, Contracting for Indigent Defense Services: A Special Report (2000) at 3 n.1.

to regard the public defender as an arm of the state working closely with the prosecutor"); see also Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 Colum. L. Rev. 9, 53 (1986) ("indigents often believe that their assigned counsel owe allegiance to the state").

And while "[c]onvincing an indigent client to trust the defense lawyer provided and paid for by the state is never easy[, i]f an indigent defender offers a weak pledge of confidentiality detailing a long list of exceptions that permit or require counsel to disclose a client's confidences, then it becomes virtually impossible to secure the client's trust." Uphoff, *Handling Physical Evidence: Guidance Found in ABA Standard 4-4.6*, 26 Crim. Just. 4, 8 (2011) ("Uphoff"). An obligation to disclose to the Commonwealth incriminating information received from third parties would presumably require the attorney "to warn a client in advance that the disclosure of certain information may not be held confidential," *Purcell*, 424 Mass. at 114, thereby doing double damage to the attorney-client relationship in criminal cases: it would create in counsel a conflicting duty owed to an adverse party to make disclosures harmful to a client's interests, and at the same time create in clients a

perception that counsel could not be trusted with the information necessary to fully understand and defend a case. See Uphoff, 26 Crim. Just. at 8 ("A sound attorney-client relationship is based on trust and absent that trust, few criminal defendants will fully disclose all relevant facts to counsel").

B. An obligation to disclose incriminating information to the Commonwealth would discourage counsel from fully investigating their clients' cases

When his or her client is charged with a crime, "counsel has a professional obligation to investigate all potentially substantial defenses." *Commonwealth v. Epps*, 474 Mass. 743, 758 (2016). This duty includes "an independent investigation of the facts" of the client's case, *Commonwealth v. Baker*, 440 Mass. 519, 529 (2003), and use of and consultation with investigators and experts where appropriate. *Commonwealth v. Alcide*, 472 Mass. 150, 160 (2015). The duty to investigate is rooted in the constitutional right to assistance of counsel, since without knowing the facts of a client's case counsel cannot "subject [the Commonwealth's evidence] to [the] adversarial testing" that "is a cornerstone of a fair trial." *Commonwealth v. Hampton*, 88 Mass. App. Ct. 162, 166 (2015) (quoting *Strickland*, 466 U.S. at 685).

Particularly in a criminal case, a duty to disclose to the Commonwealth incriminating information learned from third parties would make it impossible to investigate without risk of harming the exact interests whose protection is the focus of counsel's representation. The Court implicitly recognized this principle in *Commonwealth v. Haggerty*, 400 Mass. 437 (1987), when it held that because the reciprocal discovery provisions of Mass. R. Crim. P. 14 only command disclosure of information obtained through pretrial investigation when that information will be introduced at trial, counsel can, and indeed must, investigate a client's case without concern about turning up information or identifying witnesses unfavorable to the client's position. See *id.* at 440-41. It has also recognized that in the presence of a potential disclosure requirement created by Commonwealth subpoenas,

> [a] cautious attorney may be discouraged from hiring an investigator to investigate thoroughly his client's case for fear of producing evidence that will be used against the client. Similarly, an attorney who does hire an investigator may find that he had been instrumental in collecting evidence that ensures his client's indictment.

In re Grand Jury Investigation, 407 Mass. at 919; see also Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L. Rev. 671, 716 (1997) ("Crystal") ("Consider also the

incentive effects of a disclosure rule. Attorneys would be wary of gathering adverse evidence for fear of triggering a disclosure obligation").

For an attorney investigating a criminal case after charges have been filed, when by definition there almost always exists probable cause to believe the client committed an offense, see *Commonwealth v. Stirlacci*, 483 Mass. 775, 780 (2020), there is an especially high risk of turning up incriminating evidence—particularly when this concept is understood to include not only such obviously damaging matters as a client's confession or the location of a weapon, but also information that *might* be incriminating, e.g., evidence of flight or concealment, inconsistent statements, and other consciousness of guilt. See *Commonwealth v. Woods*, 466 Mass. 707, 714-16 (2014) (discussing wide variety of consciousness of guilt evidence). It is virtually impossible to imagine a disclosure obligation applicable to such evidence that would not transform investigating counsel from advocate for the accused to agent of the prosecution. Every time a defense attorney talks to a client's family member or an expert, or sends an investigator to take photographs of a scene or seek out video evidence, or asks an

investigator to interview potential witnesses, there is a chance that information that incriminates the client will be obtained.

This Court's amicus solicitation does not specify whether any contemplated requirement to provide the government with incriminating evidence obtained in the course of representation would be limited to criminal rather than civil litigation counsel, or to litigation rather than transactional or advisory counsel. Certainly there is no rational basis to impose an ethical duty only on attorneys working in specific practice areas, and the inhibitory effect of a requirement to disclose incriminating information would hardly be restricted to the realm of criminal defense. Attorneys working in a wide variety of practice areas would be discouraged from seeking out all the information necessary to their work, and clients of these attorneys would be hesitant to provide access to such information in the hands of third parties, if they knew anything incriminating that surfaced would have to be provided to the Commonwealth.

Imposition on lawyers of a duty to give over to the government incriminating information about clients would inject uncertainty into all areas of legal practice. In all but the most obvious cases, by what

standard would attorneys assessing clients' regulatory obligations and compliance, conducting due diligence on business acquisitions or transactions, or engaging in civil litigation determine whether information they learned in the course of representation was "incriminating" such that it had to be turned over to the government? Would this disclosure obligation apply only to incriminating information related to the subject matter of the representation, or to anything that even potentially exposed a client to prosecution on any basis? To what agency or representative of the Commonwealth would counsel turn over the incriminating information in question? And how would counsel advise his or her client about the risks of prosecution the client was running by engaging counsel? However these questions might theoretically be answered, creation of a duty to disclose incriminating information would inhibit attorneys' representation of clients in almost all practice areas, whether because the client did not feel comfortable granting counsel access to the information necessary to the representation, because counsel chose not to investigate the client's position thoroughly, or some combination of the two.

C. An obligation to disclose incriminating information would undermine the functioning of the adversary system of justice

Imposing an obligation to disclose incriminating information obtained from third parties would damage more than attorney-client relationships and the quality of lawyers' work, as significant as such harms would be. It is no exaggeration to say that, if the Court were to recognize such a duty, the adversary system as we know it would cease to function and would be replaced by something altogether different and far less compatible with the American conception of justice.

Particularly in the context of criminal prosecution and defense, our system pursues justice not through a dispassionate search for truth, but by a mechanism of adversarial testing. See *Commonwealth v. Leiva*, 484 Mass. 766, 779 (2020) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free") (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). The Rules are in accord. See Mass. R. Prof. C. Preamble 7 ("when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice

is being done"). In this construct, the government assumes all responsibility for establishing the truth of a defendant's guilt, if it can, and the defense's role is to "hold the prosecution to its heavy burden of proof beyond reasonable doubt." *United States v. Cronic*, 466 U.S. 648, 656 n.9 (1984). These differing roles and corresponding duties are constitutionally grounded. See *id.* at 656-57 ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated"). Again, the Rules are in accord. See Mass. R. Prof. C. 3.1 (notwithstanding requirement that attorney not "defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so . . . [a] lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established" by the prosecution) and Comment 3 thereto ("The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel").

Constitutional criminal procedure in fact places defense counsel in a role largely agnostic as to objective truth, and instead focused nearly entirely on placing a meaningful barrier between the individual and the overwhelming force of the prosecuting government. See *United States v. Wade*, 388 U.S. 218, 229 (1967) (right to counsel means "the accused is guaranteed that he need not stand alone against the State"). Thus,

> [d]efense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case . . . . Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

Id. at 257-58 (White, J., dissenting in part and concurring in part). Requiring defense counsel to disclose incriminating information to the prosecution is inherently inconsistent with counsel's constitutionally envisioned role and antithetical to the values underlying the adversary system of criminal justice, as many commentators have noted. See, e.g., Uphoff, 26 Crim. Just. at 10 ("Although counsel may not unfairly or illegally obstruct access to evidence, a defense lawyer certainly ought

not be in the business of knowingly aiding the prosecutor to secure evidence that implicates the client") and Crystal, 32 Wake Forest L. Rev. at 716 ("imposing such a duty [of disclosure] on defense counsel would violate fundamental rights").

Viewed in this light, the adversary system is properly understood not as a search for "mere truth"—that is, the ascertaining of a complete and factually accurate understanding of events underlying an alleged crime—and instead as the pursuit of justice through a process that seeks to find facts while balancing the varying interests and relative power positions of those involved. This Court has recognized that this larger conception of justice requires "'the satisfaction of [all] those concerned' that a verdict is reached fairly." *Leiva*, 484 Mass. at 778 (quoting Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 12 (1951)). For the criminal defendant whose freedom is at stake, such satisfaction is only possible if he or she has had the benefit of counsel's undivided loyalty and zealous advocacy. Obliging counsel to disclose incriminating information about his or her client to the prosecution except in the limited circumstances contemplated by the existing Rules would necessarily undermine any client's satisfaction that a verdict has been

fairly reached and make the concept of justice at the heart of our adversarial system impossible to achieve.

D. The Rules of Professional Conduct now in place properly balance counsel's duties of loyalty and confidentiality with the prevention of frauds on the court or other obstructions of justice and disclosures necessary to avoid significant harms

Though treating incriminating information received from third parties as confidential for purposes of Rule 1.6 and not subject to disclosure consistent with counsel's ethical obligations may, in limited circumstances, mean the prosecution will not have access to certain facts, that outcome is a necessary consequence of the longstanding principle that the "social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence." *Commonwealth v. Goldman*, 395 Mass. 495, 502 (1985). It is also important to note that the lack of a requirement that attorneys hand over incriminating information will not result in fraudulent or misleading evidentiary presentations, undermine the legitimacy of judicial outcomes, or preclude disclosure when necessary to prevent

significant harm. Existing law and the Rules as they presently stand effectively guard against these dangers.

Consistent with their dual emphasis on the duties of loyalty and confidentiality on one hand and an attorney's responsibility for the quality of justice on the other, the Rules carefully distinguish between a lawyer's possession and nondisclosure of information and the representations he or she makes to courts or other parties.[4] See, e.g., Mass. R. Prof. C. 4.1 and Comment 1 thereto (prohibiting "false statement[s] of material fact . . . to a third person" but clarifying that, although "[a] lawyer is required to be truthful when dealing with others on a client's behalf, [counsel] generally has no affirmative duty to

[4] Because this case (and the Court's amicus solicitation) concerns only the receipt of information, rather than physical evidence, Amici's arguments only address a potential obligation to disclose incriminating *information* received from third parties. While the Rules themselves do not directly address the thorny question of when an attorney may or should take possession of incriminating physical evidence, Amici note that ABA Standard for Criminal Justice §4-4.7, "Handling Physical Evidence With Incriminating Implications," sets forth a comprehensive protocol for addressing such situations consistent with counsel's duties to his or her client and the judicial system writ large. This Court has on occasion recognized ABA Standards and Guidelines as sources of guidance. See, e.g., *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 385 nn. 18-20 (2020); *Care & Prot. of Georgette*, 439 Mass. 28, 41-42 (2003); *Commonwealth v. Rodriquez*, 364 Mass. 87, 99-101 (1973).

inform an opposing party of relevant facts"). Most pertinent here is counsel's comprehensive duty of candor to the tribunal, which prohibits making false statements, failing to correct such statements when made, and knowingly offering or assisting in the presentation of false evidence. See generally Mass. R. Prof. C. 3.3 ("Rule 3.3"); see also Comment 9 thereto (duty of candor "prohibits a lawyer from offering evidence the lawyer knows to be false [and] permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false"). Here, it is important to note that even in the limited circumstances in which compliance with the Rules may "require[] disclosure of information otherwise protected by Rule 1.6"—those involving actual presentation of false evidence or criminal or fraudulent conduct related to a judicial proceeding—Rule 3.3 limits such disclosure "to the tribunal" and does not include the Commonwealth as a recipient. This limitation well illustrates the high priority the Rules place on maintaining client confidences vis-à-vis adverse parties, and that the maintaining of such confidences is consistent with the duty of candor and the fair administration of justice more generally.

Thus, while the law as it now stands makes clear that attorneys have no duty to disclose incriminating information they receive from third parties, the receipt of such information will, and must, inform the way they communicate with opposing parties and present evidence in court. And of course, counsel who actively sought to interfere with the Commonwealth's independent discovery of the incriminating information in question, rather than simply maintain its confidentiality, would be potentially vulnerable to prosecution under the "patchwork of statutes" and common law rules criminalizing obstructions of justice. *Commonwealth v. Morse*, 468 Mass. 360, 366-67 (2014) (statutes); *Commonwealth v. Triplett*, 426 Mass. 26, 28-30 (1997) (common law).

In addition to these duties to the tribunal and third parties, which protect the integrity of judicial proceedings consistent with the functioning of the adversary process, the discretionary disclosures permitted by Rule 1.6(b) ensure that counsel can disclose otherwise confidential information when truly necessary to avoid significant harms. Lawyers may make such disclosures, *inter alia*, to prevent another's death, physical injury, or wrongful incarceration; to prevent

commission of a crime or fraud likely to cause substantial injury; to prevent or mitigate harms a client used or may use the lawyer's service to bring about; and to comply with judicial orders or generally applicable law. See Rule 1.6(b)(1), (2), (3), and (6). Importantly, however, even such discretionary disclosures "adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose" permitted by Rule 1.6(b), and "should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it." Rule 1.6 Comment 16. Thus, even in the limited contexts in which they allow disclosure of confidential client information, the Rules require counsel to honor their duties of loyalty and confidentiality to the extent possible. No such honoring would be possible in connection with the duty of disclosure at issue in this case.

This existing construct—under which counsel can fearlessly investigate cases and loyally maintain the confidentiality of damaging information so obtained, must ensure their representations to courts and opposing parties are candid and not misleading, and have discretion to disclose confidential information when necessary to

prevent serious, enumerated harms—effectively balances lawyers' duties to clients and to the functioning of the justice system as a whole and is consistent with the Rules' overarching vision of attorneys' multifaceted social role. An obligation that defense counsel turn over to the Commonwealth incriminating information about his or her client received from third parties would destroy this essential balance by undermining both attorney-client trust and the adversary process. The Court should recognize the incompatibility of such a disclosure obligation with the Rules and the American legal system more generally, and reject it.

CONCLUSION

For the foregoing reasons, the Court should hold that information a lawyer receives from a third party that incriminates the lawyer's client is confidential for purposes of Mass. R. Prof. C. 1.6, and that any disclosure of such information is limited to those situations expressly enumerated in the Rules.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable provisions of Mass. R. A. P. 17 and 20. This brief complies with the applicable length limitation set forth in Mass. R. A. P. 20, because it is in Century Schoolbook, a proportional font, 14 point, and contains fewer than 7,500 non-excluded words.

/s/ Merritt Schnipper
Merritt Schnipper

CERTIFICATE OF SERVICE

I certify that on March 16, 2022 I filed Amici Curiae Committee for Public Counsel Services, Massachusetts Association of Criminal Defense Lawyers, and Boston Bar Association's brief in *Commonwealth v. Tate*, SJC-13227, with the Massachusetts Supreme Judicial Court through the Court's electronic filing service, which will automatically serve the same on Matthew H. Feinberg, Esq. (1 South Market Building, 4th Floor, Boston MA 02109, mattfein@mhf-law.com), counsel for Appellant Will Tate, and ADA Stephen C. Nadeau, Jr. (888 Purchase St., New Bedford MA 02740, stephen.nadeau@state.ma.us), counsel for Appellee Commonwealth of Massachusetts, by electronic means.

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