



The Commonwealth of Massachusetts
BERKSHIRE DISTRICT ATTORNEY



PAUL J. CACCAVIELLO
DISTRICT ATTORNEY

7 NORTH STREET - P.O. BOX 1969
PITTSFIELD, MA 01202
(413) 443-5951 FAX (413) 499-6349

July 26, 2018

Michael E. Aleo, Esq.
Lesser, Newman, Aleo & Nasser, LLP
39 Main Street
Northampton, MA 01060-3132

Re: Public Records Request

Dear Mr. Aleo:

In response to your letter dated June 29, 2018, requesting, pursuant to G.L. c. 66, § 10, certain records regarding the Berkshire District Attorney's investigation into an incident that occurred on June 10-11, 2016, at Williams College involving two named adults, I have enclosed the following documents:

1. Facsimile cover page from John P. Pucci to Gregory M. Barry, dated 08/30/2016, 1 pg.;
2. Letter from John J. Pucci to Gregory M. Barry, dated 08/30/2016, 1 pg.;
3. Letter from Gregory M. Barry to John P. Pucci, dated 09/07/2016, 1 pg.;
4. Letter from Thomas C. Frongillo to Gregory M. Barry, dated 09/14/2016, 1 pg.;
5. Letter from Gregory M. Barry to Thomas C. Frongillo, dated 09/21/2016, 1 pg.;
6. Email from James Sultan to Gregory Barry, dated 09/14/2016, 1 pg.;
7. Letter from Gregory M. Barry to James L. Sultan, dated 09/14/2016, 1 pg.;
8. Letter from John P. Pucci to Paul Caccaviello, dated 12/16/2016, 2 pp.;
9. Email from Gregory M. Barry to Kerrie Donovan, dated 12/22/2016, 1 pg.;
10. Letter from John P. Pucci to District Attorney David F. Capeless, dated 03/07/2017, 7 pp.;
11. Letter from John P. Pucci to District Attorney David F. Capeless, dated 03/20/2017, 1 pg.;
12. Email from John Pucci to Shuan William, dated 03/20/2017, 2 pp.;
13. Email from David Capeless to Mary Shogry-Hayer, et al, dated 06/16/2017, 1 pg.

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Please note that this Office has not provided you with a number of documents, including police reports, witness statements, intra-office emails, handwritten and typewritten notes, and inter-office correspondence, all of which the District Attorney respectfully claims are exempt from disclosure as public records for the reasons cited below.

First, the subject matter of this investigation was a report of a sexual assault committed by one adult upon another adult. General Laws c. 41, § 97D, prohibits the disclosure of all reports of sexual assault:

All reports of rape and sexual assault or attempts to commit such offenses, all reports of abuse perpetrated by family or household members, as defined in section 1 of chapter 209A, and all communications between police officers and victims of such offenses or abuse shall not be public reports and shall be maintained by the police departments in a manner that shall assure their confidentiality; provided, however, that all such reports shall be accessible at all reasonable times, upon written request, to: (i) the victim, the victim's attorney, others specifically authorized by the victim to obtain such information, prosecutors and (ii) victim-witness advocates as defined in section 1 of chapter 258B, domestic violence victims' counselors as defined in section 20K of chapter 233, sexual assault counselors as defined in section 20J of chapter 233, if such access is necessary in the performance of their duties; and provided further, that all such reports shall be accessible at all reasonable times, upon written, telephonic, facsimile or electronic mail request to law enforcement officers, district attorneys or assistant district attorneys and all persons authorized to admit persons to bail pursuant to section 57 of chapter 276. Communications between police officers and victims of said offenses and abuse may also be shared with the foregoing named persons if such access is necessary in the performance of their duties. A violation of this section shall be punished by imprisonment for not more than 1 year or by a fine of not more than \$1,000, or both such fine and imprisonment.

G.L. c. 41, § 97D. Although the statute specifically prohibits police departments from disclosing this information, a reasonable interpretation of the law also requires the District Attorney not to disclose reports of rape and sexual assault to the public. See also G. L. c. 265, § 24C (excluding names of sexual assault victims from public records).

Second, the Supreme Judicial Court has recognized that "the privacy exemption to the public records law 'protects from public scrutiny information that would lead to an unwarranted

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invasion of privacy of any person mentioned in the requested materials.” *In re Subpoena Duces Tecum*, 445 Mass. 685, 689 (2006), quoting *Globe Newspaper Co. v. Police Comm'r of Boston*, 419 Mass. 852, 861 (1995). The SJC offered the following guidance regarding the balancing of any claimed invasion of privacy and the interest of the public in disclosure:

In identifying the existence of privacy interests, we have suggested for consideration: whether disclosure would “result in personal embarrassment to an individual of normal sensibilities;” . . . whether the materials sought contain “intimate details” of a “highly personal” nature;” . . . and whether “the same information is available from other sources,”

Globe Newspaper Co. v. Police Comm'r of Boston, *supra* at 858 (internal citations omitted). Here, the District Attorney believes that publication of facts describing a sexual encounter between two individuals who attended a social function with their spouses would constitute an unwarranted invasion of their privacy.

Third, the District Attorney withholds intra-office communications and notes of all types from disclosure because they constitute privileged opinion work product. In *DaRosa v. New Bedford*, 471 Mass. 446 (2015), the Supreme Judicial Court “revisited” its holding in *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 801 (1999), that “materials privileged as work product . . . are not protected from disclosure under the public records statute unless those materials fall within the scope of an express statutory exemption.” Subsequently, the Court concluded “that ‘opinion’ work product that, as codified in Mass. R. Civ. P. 26 (b) (3), 365 Mass. 772 (1974), was ‘prepared in anticipation of litigation or for trial by or for [a] party or . . . that . . . party's representative’ falls within the scope of exemption (d) and therefore falls outside the definition of ‘public records’ under G. L. c. 4, § 7, Twenty-sixth.” *DaRosa v. New Bedford*, *supra* at 448. Notably, in *DaRosa* the Court addressed the disclosure of work product within the context of civil discovery between two parties, which is generally more broad in scope than public records. Here, by contrast, your request is not a function of any litigation.

Finally, although the District Attorney’s investigation did not result in a criminal complaint or indictment, records of the investigation may be withheld from public disclosure because they constitute Criminal Offender Record Information (CORI). CORI is defined as “records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, arrest . . . sentencing, incarceration, rehabilitation, or release.” G. L. c. 6, § 167 (emphasis added).

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Documents that are “specifically or by necessary implication exempted from disclosure by statute” may not be produced in response to a public records request. G.L. c. 4, § 7, cl. 26(a); *Attorney General v. Collector of Lynn*, 377 Mass. 151, 154 (1979); *Ottaway Newspapers, Inc. v. Appeals Ct.*, 372 Mass. 539, 545-46 (1977). The Criminal Offender Record Information (CORI) Act, in turn, provides that:

[e]xcept as otherwise provided . . . [CORI] . . . shall be disseminated . . . only to . . . (a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute . . . (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy No agency or individual shall have access to [CORI] under clause (c), unless the [Criminal History Systems Board] . . . determines and certifies that the public interest in disseminating such information to such party clearly outweighs the interest in security and privacy.

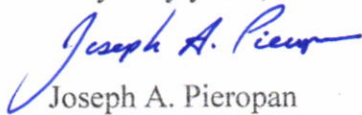
G. L. c. 6, § 172. For this additional reason, the District Attorney respectfully withholds or redacts any documents that concern an identifiable individual and relate to the nature of a criminal charge.

If you wish to challenge this response, you should contact the Supervisor of Records:

Supervisor of Records
Office of the Secretary of the Commonwealth
McCormack Building, Room 1719
One Ashburton Place
Boston, Massachusetts 02108
617-727-2832

Thank you for your patience in this matter.

Very truly yours,



Joseph A. Pieropan
Assistant District Attorney
Records Access Officer

JAP/jap
Enclosures



FACSIMILE COVER PAGE

DATE: August 30, 2016
TO: Gregory Barry
COMPANY/FIRM: Berkshire County District Attorney's Office
FACSIMILE #: 413-499-6349
FROM: John P. Pucci,
RE: [REDACTED] and [REDACTED]
TOTAL NUMBER OF PAGES INCLUDING THIS COVER SHEET: 2
MESSAGE: Please see attached document

RECEIVED
AUG 30 2016
BERKSHIRE DISTRICT
ATTORNEY'S OFFICE

If you experience any difficulty with this transmission or if you do not receive the entire document, please contact Jones, Rebecca at (413) 272-6291.

*****CONFIDENTIALITY NOTICE*****

This Fax transmission may contain confidential or privileged information. The information is intended for the individual or entity named on this transmittal cover sheet. Receipt, disclosure, copying, distribution or use of the contents of this transmission by anyone else is prohibited. NOTE: IF YOU HAVE RECEIVED THIS FAX IN ERROR, NOTIFY BULKLEY, RICHARDSON AND GELINAS, LLP IMMEDIATELY BY TELEPHONE (COLLECT IF NECESSARY) AT THIS NUMBER: (413) 781-2820.



John P. Pucci, Partner
direct: 413-272-6290
jpuccl@bulkley.com

August 30, 2016

VIA ELECTRONIC MAIL
VIA FACSIMILE

Gregory Barry
Assistant District Attorney
Berkshire County District Attorney's Office
7 North Street, P.O. Box 1969
Pittsfield, MA 01202

RE: [REDACTED] and [REDACTED]

Dear Gregory:

As you know, I represent [REDACTED] and [REDACTED] with regards to your investigation of a rape that occurred in June on Williams College campus. I am writing to now formally request for you to send as quickly as possible and hopefully electronically any reports you have. I look forward to receiving these materials. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads 'J. Pucci (RAJ)'. The signature is written in black ink.

John P. Pucci



The Commonwealth of Massachusetts
BERKSHIRE DISTRICT ATTORNEY



DAVID F. CAPELESS
DISTRICT ATTORNEY

7 NORTH STREET - P.O. BOX 1969
PITTSFIELD, MA 01202
(413) 443-5951 FAX (413) 499-6349

September 7, 2016

John Pucci, Esq.
Bulkey, Richardson, & Gelinas, LLP
1500 Main Street
Suite 2700
P.O. Box 15507
Springfield, MA 01115-5507

Dear Attorney Pucci:

As a result of your written request, enclosed please find materials related to an investigation of a rape that allegedly occurred at Williams College involving your client [REDACTED]. As has been previously stated, there has been a decision made that there is a lack of probable cause to go forward with the prosecution of this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gregory M. Barry".

Gregory M. Barry

September 14, 2016

Gregory M. Barry
Assistant District Attorney
Berkshire County District Attorney's Office
7 North Street, P.O. Box 1969
Pittsfield, MA 01202

Re: *Investigation of Incident at Williams College on June 10-11, 2016*

Dear Assistant District Attorney Barry:

I am writing to introduce myself and inform you that [REDACTED] has retained our Firm to represent her as co-counsel with John Pucci of Bulkey, Richardson, & Gelinas, LLP in connection with her allegations of a sexual assault on the campus of Williams College on June 10 and 11, 2016. We request that you preserve all evidence regarding this matter, and would like to schedule a date to inspect the physical evidence that was submitted to the Williamstown Police Department and the Berkshire County District Attorney's Office. We have been informed that the District Attorney's Office has not yet processed the evidence [REDACTED] submitted by Mount Sinai Hospital. If that is the case, we respectfully request that the evidence [REDACTED] be processed. In addition, we ask that you kindly provide us with copies of tape-recordings of all witness interviews.

We look forward to hearing from you shortly regarding a date on which we can inspect the physical evidence.

Very truly yours,



Thomas C. Frongillo

cc:

[REDACTED]
[REDACTED]
John P. Pucci, Esq.
Sergeant Scott E. McGowan, Williamstown Police Department



The Commonwealth of Massachusetts
BERKSHIRE DISTRICT ATTORNEY



DAVID F. CAPELESS
DISTRICT ATTORNEY

111 HOLDEN STREET, 2ND FLOOR
NORTH ADAMS, MA 01247
(413) 663-7306 or (413) 443-5951
FAX (413) 664-8032

September 21, 2016

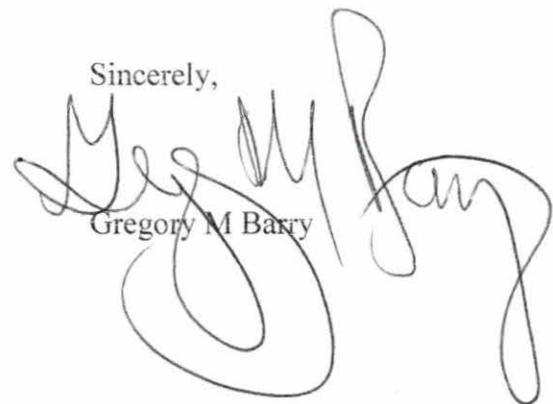
Thomas Frongillo, Esq.
Fish & Richardson, P.C.
One Marina Park Drive
Boston, MA 02210-1878

Dear Attorney Frongillo:

In terms of the investigation you referenced in your letter, involving [REDACTED] at Williams College, there has been a decision made that there is a lack of probable cause to go forward with the prosecution of the case. That being said, I have spoken to Williamstown Police Department about your requests. In doing so I learned that they have previously submitted the [REDACTED] to be processed at the State Crime lab. Any questions about that testing will have to be directed towards Sergeant Scott McGowan of the Williamston Police Department.

As for any requests in terms of viewing of physical evidence or obtaining any tape recordings of interviews, my office is not in possession of any of these items. Any requests concerning these items should also be directed towards Sergeant Scott McGowan of the Williamston Police Department.

Sincerely,



Gregory M Barry

Barry, Gregory (BER)

From: James Sultan [jsultan@rankin-sultan.com]
Sent: Wednesday, September 14, 2016 10:34 AM
To: Barry, Gregory (BER)
Cc: Scott McGowan
Subject: Incident Report ([REDACTED])
Attachments: public.records.request.form.pdf

Greg, Here is my public records request for the police report and all related materials. Please forward to me ASAP. Let me know if you need any additional information. Thank you. Jamie

James L. Sultan
Rankin & Sultan
151 Merrimac Street
Boston, MA 02114
Office (617) 720-0011
Fax (617) 742-0701
jsultan@rankin-sultan.com

Here's info
you req.

mailed

September 14, 2016

James L. Sultan
Rankin & Sultan
151 Merrimac Street
Boston, MA 02114

Dear Attorney Sultan,

Enclosed please find the information you have requested. Feel free to contact me with any questions.

Very truly yours,

Gregory M. Barry
Assistant District Attorney

GMB/mz

December 16, 2016

Paul Caccaviello, Esq.
First Assistant District Attorney
Berkshire County District Attorney's Office
7 North Street
P.O. Box 1969
Pittsfield, MA 01202

Re: [REDACTED] and [REDACTED]

Dear Attorney Caccaviello:

I represent [REDACTED] and [REDACTED]. On June 27, 2016, [REDACTED] and [REDACTED] filed sworn statements with the Williamstown Police Department describing [REDACTED] sexual assault on June 10, 2016 by [REDACTED], while all three were attending their 25th College Reunion at Williams College. Sergeant Scott McGowan of The Williamstown Police Department investigated this complaint in conjunction with ADA Greg Barry of your Office. On August 30, 2016, ADA Barry informed us that your Office was declining prosecution in this matter.

On November 17, 2016, I requested that Sergeant McGowan permit two private investigators (retired FBI Agents), who are working with me and co-counsel to further investigate this matter, have the opportunity to examine the physical evidence which was gathered as part of the Police/DA investigation. Sergeant McGowan informed me that the physical evidence had been transported to the MSP crime lab for forensic testing and remained there but would be available for inspection upon its return to the Williamstown Police Department.

On December 15, 2016, I received an email from Sergeant McGowan advising that he expected the physical evidence would likely be returned to his Department sometime in January 2017, and that it could all be returned to my clients at that time. For the reasons set forth below, I am writing now to request that the Williamstown Police Department, while making that evidence available to my investigators for inspection, retain custody of the physical evidence for the time being, and that the MSP crime lab retain the forensic evidence in this matter as well.

In the course of my exchanges with the Williamstown Police Department, an Officer working with Sergeant McGowan sent to me several forensic reports from the MSP Crime Laboratory concerning the sexual assault, more particularly, a September 30, 2016 "Toxicology Report" and an October 18, 2016 "Criminalistics Report 1", the latter of which

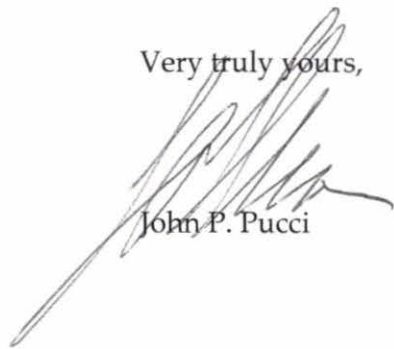
enclosed an October 6, 2016 "DNA Analysis Worksheet" (which also bears an erroneous date of January 26, 2015). The Toxicology Report states as follows on the bottom of page two – **"ALL BIOLOGICAL SPECIMENS WILL BE DISPOSED OF 6 MONTHS AFTER DATE OF REPORT, UNLESS WRITTEN REQUEST FOR RETURN OF SAMPLES IS RECEIVED."** I have enclosed copies of all these reports to this letter for your convenience.

I am writing now to formally ask your Office to request in writing that the MSP Crime Laboratory retain for a period of 24 additional months from the dates of these reports all biological specimens and any all other forensic evidence obtained as part of the Sergeant McGowan/ADA Barry Investigation into the sexual assault of [REDACTED]. I am making this request to you because the Criminalistics Report 1 is addressed to you, as well as Sergeant McGowan. I also ask that you formally request the Williamstown Police Department to retain any and all physical evidence obtained in its investigation of this incident.

This incident has had a devastating impact on [REDACTED] and [REDACTED], and on their two daughters, ages 12 and 15. Their youngest daughter, [REDACTED], has been particularly hard hit because she actually attended the June Reunion and learned about the incident while at Williams that weekend. This family will never be the same. They intend to seek justice in this matter, and retention of all the physical and forensic evidence is essential to that pursuit.

Please call if you have any questions. I would appreciate it if you would confirm to me that you will make these requests to retain the physical and forensic evidence from this criminal investigation.

Very truly yours,



John P. Pucci

JPP/hf

Enclosures

cc: Assistant District Attorney Gregory Barry
Sergeant Scott McGowan, Williamstown Police Department

RECEIVED

2322812v1

DEC 21 2016

BERKSHIRE DISTRICT
ATTORNEY'S OFFICE

Barry, Gregory (BER)

From: Barry, Gregory (BER)
Sent: Thursday, December 22, 2016 11:19 AM
To: Donovan, Kerrie (POL)
Subject: Lab # 16-19412

Hi Kerrie. In terms of above lab #, I am requesting that all specimens maintained for another 6 months. Thank you.

Barry, Gregory (BER)

From: Capeless, David (BER)
Sent: Friday, June 16, 2017 9:14 AM
To: Shogry-Hayer, Mary (BER); Eramo, Rachael (BER); Barry, Gregory (BER)
Cc: Foley, Brian (BER)
Subject: RE: please call Jennifer Snook @ A.G.'s Office RE: Human Trafficking 617-963-2375

I explained to AAG Snook that we had thoroughly reviewed the matter and concluded that the evidence did not indicate a sexual assault but rather an intoxicated consensual encounter, and that DLT Foley was in the process of making an independent review. She thanked me for the information, without any comment or questions.

From: Shogry-Hayer, Mary (BER)
Sent: Thursday, June 15, 2017 5:08 PM
To: Eramo, Rachael (BER); Barry, Gregory (BER); Capeless, David (BER)
Cc: Shogry-Hayer, Mary (BER)
Subject: RE: please call Jennifer Snook @ A.G.'s Office RE: Human Trafficking 617-963-2375

Adding DFC

This matter was investigated thoroughly, [REDACTED] recently contacted MSP alleging Sgt McGowan did not investigate the matter to their satisfaction, Lt Foley is reviewing the case. FYI

From: Eramo, Rachael (BER)
Sent: Thursday, June 15, 2017 4:29 PM
To: Barry, Gregory (BER); Shogry-Hayer, Mary (BER)
Subject: FW: please call Jennifer Snook @ A.G.'s Office RE: Human Trafficking 617-963-2375

Hello – I returned this call, and Jennifer is calling to enquire about an investigation involving an adult sexual assault that happened at Williams College on/about 6/10/16. Alleged victim is [REDACTED], alleged perpetrator is [REDACTED]. [REDACTED] met with the AG's office and made a complaint saying that charges were not followed up on appropriately by WPD/our office. I let Jennifer know I would forward this information, and someone would call her back. Thanks.

From: Bernardo, Donna (BER)
Sent: Thursday, June 15, 2017 3:07 PM
To: Eramo, Rachael (BER)
Cc: Pizzuto, Gloria (BER)
Subject: please call Jennifer Snook @ A.G.'s Office RE: Human Trafficking 617-963-2375

March 7, 2017

BY FEDERAL EXPRESS

District Attorney David F. Capeless
Berkshire County District Attorney's Office
7 North Street
Pittsfield, MA 01202

Re: Investigation of Sexual Assault of [REDACTED]

Dear District Attorney Capeless:

I represent [REDACTED] and her husband, [REDACTED]. My co-counsel on this matter are Thomas C. Frongillo of Fish & Richardson, P.C.'s Boston Office and Linda Fairstein of New York City. On June 27, 2016, [REDACTED] and [REDACTED] filed sworn statements with the Williamstown Police Department ("WPD") reporting that during their 25th Reunion at William College earlier that month, [REDACTED] had been sexually assaulted by another Williams classmate, [REDACTED]. This incident was investigated by Sergeant Scott McGowan of the Williamstown Police Department and Assistant District Attorney Gregory Barry of your Office. On August 30, 2016, [REDACTED] [REDACTED] and I attended a meeting with ADA Barry at which we were informed that your Office had decided not to prosecute this case.

I am writing now to request that you meet with me and my co-counsel to discuss your Office's reconsideration of this decision. This request is based on: (1) new evidence that was never considered by Sergeant McGowan and ADA Barry, which we developed during our own investigation of the facts; (2) material, contradictory statements made by [REDACTED] [REDACTED] regarding the sexual assault; (3) factual inaccuracies in sworn statements of defense witnesses on which law enforcement relied in deciding to decline prosecution; (4) evidence that pertains to the veracity and character of certain defense witnesses; and (5) the need to complete additional analysis of laboratory results and medical records, which already show the presence of saliva on [REDACTED] vagina following the assault, as well as a vaginal tear.

My co-counsel and I believe that there is compelling evidence establishing that [REDACTED] engaged in sexual intercourse with [REDACTED] without her consent on the night of June 10-11, 2016 in violation of G.L. c. 265, § 22. That evening, at the Williams reunion, before the sexual assault, [REDACTED] drank heavily, to the point of extreme intoxication and was incapable of consent. [REDACTED] was well aware of her state of inebriation. [REDACTED] has no memory of the events of the evening from the point at which she started drinking multiple shots of tequila at the open bar until she awoke the following

day in the hotel room of one of her reunion classmates. In fact, during a legally recorded telephone call between [REDACTED] and [REDACTED] on June 12, 2016, after [REDACTED] had returned to New York, [REDACTED] commented: "Look, you had enough to drink. I get you blacked out." In our view, this matter warrants your reconsideration, and a full and immediate investigation to prevent a miscarriage of justice.

I. OVERVIEW

By way of background, on June 10, 2016, [REDACTED] and [REDACTED] attended the Williams reunion's Family Day event with their 12-year old daughter, [REDACTED]. [REDACTED], also a member of the Class of 1991, attended the reunion without his wife and children. The Family Day event was held in a large tent at an area on campus known as Poker Flats. Well over 200 alumni and family members were at this event, which featured a buffet meal, music, dancing, and two open bars.

[REDACTED], [REDACTED], and [REDACTED] arrived at approximately 7:30 p.m. During the course of the evening, [REDACTED] and [REDACTED] separately and together, mingled with different groups of classmates, many of whom they had not seen in years. As the night progressed, widespread drinking and dancing ensued. In this context, [REDACTED] drank two glasses of wine and a margarita. Around 10 p.m., [REDACTED] joined a group of classmates near one of the open bars, where they began drinking shots of tequila. This group included [REDACTED] and several of his closest friends. In under an hour, [REDACTED] drank at least four shots of tequila. One classmate, who was part of the group, described the shots of tequila as "gargantuanly large." In addition, earlier that day, [REDACTED] had taken a prescribed dose of .5 mg of Klonopin, a drug used to treat her anxiety, which can seriously impair mental and physical capacity when combined with alcohol. By 11 p.m., various Williams classmates described [REDACTED] as "extremely drunk," "the most intoxicated person at the party," "trashed and wasted," and "wobbling and stumbling on the dance floor."

Just after 11 p.m., one classmate observed [REDACTED] and [REDACTED] standing near the open bar. [REDACTED], who was visibly drunk, was leaning on [REDACTED] and appeared unable to stand on her own. [REDACTED] had been present throughout the time during which [REDACTED] drank the shots, and was in a position to observe her obvious state of inebriation. Shortly thereafter, [REDACTED] and [REDACTED] left the tent. The sexual assault occurred between approximately 11:00 p.m. and 1:30 a.m.—a period of over two hours—in the pitch dark on a wet playing field adjacent to the tent. As noted, due to her heavy drinking, [REDACTED] has no memory of these events.

Sometime after 11:00 p.m., when the bar had closed and the event was wrapping up, [REDACTED], who had been socializing with other friends, was unable to locate [REDACTED]. Along with some classmates, [REDACTED] searched the area but could not find his wife, causing him, [REDACTED], and others to panic. Finally, at approximately 1:30 a.m., [REDACTED] was rescued

by [REDACTED] and other classmates while she was being lugged across the playing field at Poker Flats by [REDACTED]. [REDACTED] was in a drunken stupor. She could not speak coherently; she could not walk or stand without assistance. Her white pants were covered with grass stains and urine, as she had been unable to control herself. And although the night temperature had fallen into the 40s, [REDACTED] was only partially clothed. She was found barefoot, wearing only a tank top with no jacket or coat, and her pants were soaking wet and soiled. Her belt and cellphone were missing. [REDACTED], who was carrying her, was caught holding her panties, coat, and shoes.

In contrast to [REDACTED] helpless condition, [REDACTED] was sober, alert, and agile. He spoke clearly and normally, with no slurring of his words. When physically confronted by [REDACTED] and another classmate, [REDACTED] evaded several punches and kicks, and ran away.

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

After [REDACTED] and [REDACTED] reported the sexual assault to the WPD, Sergeant McGowan opened an investigation. [REDACTED] retained a criminal defense attorney, who submitted a sworn statement of [REDACTED] to the police. In that statement, [REDACTED] admitted to engaging in sexual conduct with [REDACTED], but claimed that it was consensual. He characterized [REDACTED] as an aggressive seductress who had forced him to have sex with her. He then went so far as to make the bizarre accusation that [REDACTED] and [REDACTED] had engaged in a "premeditated scheme, a set-up, by having [REDACTED] seduce me, [REDACTED] and his friends 'catch' us together, and then falsely accusing me of a crime I did not commit to extort money from me." During the investigation, neither Sergeant McGowan nor ADA Barry interviewed [REDACTED].

Contrary to [REDACTED] contrived allegation of a premeditated scheme, there is cogent proof that his sexual assault of a defenseless [REDACTED] was motivated by his near 30-year romantic obsession with her, which [REDACTED] described in a telephone call with [REDACTED] the day after the sexual assault. The call was legally recorded by [REDACTED] under the law of the State of New York. During that call, [REDACTED]

[REDACTED]

But there was no mutual interest. [REDACTED] began dating [REDACTED] in their freshman year, and they married after graduation. [REDACTED] frank statements about his ongoing obsession with [REDACTED] suggest that he attempted to fulfill his long-held sexual fantasy by exploiting [REDACTED] vulnerable condition during a cold night on a wet playing field at Williams College.

II. THE DECLINATION

Your Office's decision on August 30, 2016 to decline prosecution was a shock to [REDACTED], [REDACTED], and me. Before the meeting, ADA Barry would not indicate whether your Office would pursue criminal charges until he met with [REDACTED] and [REDACTED]. In our brief meeting, ADA Barry had no questions for them. Instead, he promptly informed us that there was no probable cause to submit the matter to a grand jury.

ADA Barry provided several bases for that determination, which we respond to below. *First*, he stated that the WPD had spoken to "27 witnesses," including reunion attendees [REDACTED], [REDACTED], and [REDACTED]. Yet, according to Sergeant

McGowan's Investigative File which we later received, the WPD did not interview [REDACTED], [REDACTED], or [REDACTED]. Nor did they interview [REDACTED] and [REDACTED], two other key witnesses whose names had been provided to Sergeant McGowan. Moreover, aside from meeting with [REDACTED] and [REDACTED], the WPD conducted no other in-person interviews. *Second*, ADA Barry claimed that "all" witnesses had indicated that [REDACTED] was not intoxicated. However, this is inconsistent with statements made by several witnesses interviewed by the WPD as well as statements made by *ten* witnesses interviewed by our private investigators. As noted, several witnesses described her as "hammered," "extremely drunk," and "trashed" before the sexual assault. *Third*, ADA Barry stated that [REDACTED], in a sworn statement submitted to the WPD, claimed that the sexual relations with [REDACTED] had been consensual, and that she was coherent and in control at all times. [REDACTED] sworn statement, however, conflicted sharply with statements he made on the day after the assault *during the recorded call* with Ms. [REDACTED]. On the call, he admitted that she was drunk and acknowledged that she had "*blacked out*." The audio recording of the call was provided to the WPD. *Fourth*, ADA Barry dismissed the possibility that the [REDACTED], which had not yet been analyzed, would yield any evidence of consequence to the investigation. But a medical examination of [REDACTED] conducted on the night of June 11 in New York City indicated that she had sustained a vaginal tear. And weeks later, I received a Massachusetts State Police Crime Lab report of a partial forensic analysis of that evidence indicating the presence of saliva on [REDACTED] vagina. If the saliva is determined to be [REDACTED], that would suggest that he had performed oral sex on [REDACTED]. Such a finding would contradict [REDACTED] insistence in his sworn statement that [REDACTED] had initiated all the sexual acts.

Without having access to any of the witness statements or the WPD Investigative File at the time of the August 30, 2016 meeting, we were unable to meaningfully discuss ADA Barry's decision to decline prosecution. Instead, we were shuffled out of your Office, dumbfounded by the decision.

Immediately after the meeting, the victim witness coordinator informed me that, upon my written request, ADA Barry would provide me with a copy of the WPD's Investigative File. On that same day, I sent an e-mail to ADA Barry requesting an opportunity to discuss the case further, stating, in part, that:

[W]ithout being able to review the witness statements and reports, my clients and I are not able to have what we think is sufficient informed dialogue about the decision not to prosecute.

Given the terrible impact here, I ask for that courtesy. However, this ends as a criminal matter, it is essential that the dialogue about your decision be fully informed on our end so that [REDACTED] and [REDACTED] are allowed the opportunity to understand it and ultimately perhaps accept it.

Otherwise they will be left with uncertainties that are likely to haunt them individually and as a couple, and as parents.

I know you and your office mean them no harm. Please give them the chance to see the reports before the matter is communicated to defense counsel.

Please advise. John

The following day, at 8:35 a.m., ADA Barry replied to my e-mail, declining my request as follows:

I already informed defense counsel yesterday. While I certainly appreciate it is a difficult decision for your clients to accept – the case has been thoroughly reviewed and as I stated yesterday the decision has been made not to prosecute the case. The case is closed.

Both ADA Barry and Sergeant McGowan have subsequently reiterated this decision. Most recently, they refused my request that they retain the physical and forensic evidence gathered in their investigation for a few additional months to preserve the chain of custody while we conducted our own investigation.

III. OUR INVESTIGATION TEAM

After reviewing the WPD Investigative File, we determined that the investigation was neither thorough nor complete. As a result, [REDACTED] and [REDACTED] decided to retain two additional former prosecutors and two former FBI Agents working as private investigators to conduct a more comprehensive investigation. The additional former prosecutors are Mr. Frongillo of Fish & Richardson, P.C.'s Boston Office, and Ms. Fairstein of New York City. Like myself, Mr. Frongillo was an Assistant U.S. Attorney for nearly a decade. Ms. Fairstein created the sex crimes unit in the New York City's District Attorney's Office decades ago. During her 30-year tenure there, she supervised the prosecution of thousands of sexual assault and rape cases, as well as trying many herself. For the past 15 years, Ms. Fairstein has been in private practice, specializing in investigations of sexual assault. Collectively, the attorneys on the investigative team have more than 70 years of experience in the criminal justice system. The two former FBI Agents, Michael Murphy and Charles Gianturco, have more than 50 years of investigative experience. I am providing this background, not to impress you, but to demonstrate my clients' continued interest to seek justice in this matter. This letter represents the collaborative efforts of the counsel and investigators comprising the investigation team.

IV. ADDENDUM SUPPORTING RE-OPENING OF INVESTIGATION

We have attached an Addendum to this letter, which includes a detailed discussion of evidence supporting our request that your Office re-open this investigation. The Addendum includes separate sections addressing:

- (1) New evidence;
- (2) Additional information from witnesses previously interviewed by the WPD;
- (3) Discussion of the incomplete analysis of forensic evidence;
- (4) Problematic witness statements submitted by [REDACTED] counsel;
- (5) [REDACTED] contradictory statements about the incident;
- (6) Legal analysis of the probable cause determination; and
- (7) The timeline of the WPD's investigation.

My co-counsel and I would appreciate your comprehensive review of this matter, and request the opportunity to meet with you. *In the interim, I request that the District Attorney's Office take whatever steps are necessary to secure and preserve all physical evidence currently held by the WPD and the Massachusetts State Police Laboratory, as ADA Barry and the WPD have declined my prior requests to do so.*

In closing, please know that the damage that this sexual assault has done to [REDACTED], [REDACTED], and their two daughters, ages 12 and 15, has been devastating. Each family member has undergone trauma therapy. Though months have passed, this incident continues to haunt them. The family will never be the same and this sexual assault will never be forgotten.

Very truly yours,


John P. Pucci

cc: Thomas C. Frongillo, Esquire
Linda Fairstein, Esquire

March 20, 2017

District Attorney David F. Capeless
Berkshire County District Attorney's Office
7 North Street
Pittsfield, MA 01202

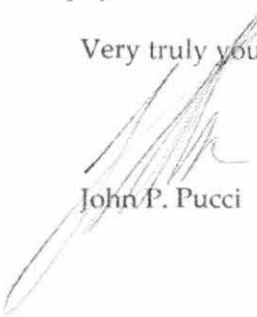
Re: Follow-up to my March 7, 2017 Submission Re: Investigation of Sexual
Assault of [REDACTED]

Dear District Attorney Capeless:

Last Friday I received an email from the Williamstown Police Department asking that I arrange to go there and collect the physical evidence, which is primarily my client's clothes, from the night of the sexual assault described in my March 7, 2017 submission to you. I enclose a copy of the email exchanges I have had with the Williamstown Police Department on this issue so as to put this in proper context.

I trust that we will hear from you at some point in the foreseeable future as to how you plan to proceed in this matter. In the meantime, I ask that you request that the Williamstown Police Department retain this physical evidence until you determine how to proceed. At the risk of stating the obvious, maintaining the chain of custody for this evidence at the Williamstown Police Department would be important for a prosecution, and that is the reason I do not want to take custody of the physical evidence at this time. Please advise.

Very truly yours,


John P. Pucci

cc: Thomas C. Frongillo, Esquire

2414120v1

Pucci, John

From: Pucci, John
Sent: Monday, March 20, 2017 11:11 AM
To: Shuan William
Subject: RE: [REDACTED] - Evidence

Thanks for your email. I will get back to you shortly. John Pucci

From: Shuan William [<mailto:swilliam@williamstownma.gov>]
Sent: Friday, March 17, 2017 4:54 PM
To: Pucci, John <jpucci@bulkley.com>
Cc: Scott McGowan <smcgowan@williamstown.net>; Shuan William <swilliam@williamstown.net>; Kyle Johnson <kjohnson@williamstown.net>; gregory.barry@massmail.state.ma.us
Subject: Re: [REDACTED] - Evidence

Hello Atty John Pucci,

I went to the MSP Crime Lab today and picked up all evidence that we had previously submitted regarding your client.

That being said, let me know a time that is good for you, when you can retrieve it here, at the Williamstown Police Department.

I work Eve shift (3p-11p), but can come if during the daytime hours if needed.

Respectfully,
Ofc, Shuan William

On Wed, Jan 11, 2017 at 10:57 AM, Pucci, John <jpucci@bulkley.com> wrote:

Shuan – Please let me know when this property gets back to your Department and I will then let you know how we plan to proceed to recover it. JPP

From: Scott McGowan [<mailto:smcgowan@williamstown.net>]
Sent: Sunday, January 08, 2017 2:29 PM
To: Pucci, John <jpucci@bulkley.com>; Shuan William <swilliam@williamstown.net>; Kyle Johnson <kjohnson@williamstown.net>; gregory.barry@massmail.state.ma.us
Subject: [REDACTED] - Evidence

Attorney Pucci,

After further reassessment of your request to maintain property at the Williamstown Police Station belonging to your client, [REDACTED], Chief of Police Kyle Johnson, with support from Assistant District Attorney Gregory Barry, has elected to respectfully decline your request.

The Berkshire County District Attorney's Office previously made the decision to not present this matter to a Grand Jury, thus, concluding the criminal investigation.

As a result, the Williamstown Police Department will no longer be responsible for the storage, care or making available this property to independent third parties as it is no longer considered evidence of a criminal investigation.

The Williamstown Police Department will assist you or [REDACTED] in recovering this property as soon as it returned to us. Please contact Officer Shuan William who oversees our evidence to determine when the property will be recovered from the State Police lab and how you wish to have it returned.

Respectfully,

Sergeant McGowan

(prior emails not included - JPP)