ESSEX DISTRICT ATTORNEY POLICY ON POTENTIAL IMPEACHMENT MATERIAL CONCERNING LAW ENFORCEMENT WITNESSES[1]

This policy addresses the handling of potential impeachment material ("PIM") concerning law enforcement agency witnesses in Essex County criminal prosecutions. The criminal justice system relies upon the integrity of law enforcement officers. Essex County law enforcement has a long and proud history of upholding the highest standards of integrity and intends to maintain those standards. The goal of this policy is to ensure that disclosures are made to defense counsel in criminal cases in accordance with prosecutors' constitutional, rule-based, and ethical obligations. Meeting this goal is essential to preserving the hard work that prosecutors and their law enforcement partners engage in daily to pursue justice and protect the citizens of Essex County.

I. The obligation to disclose potential impeachment material

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Thereafter, in Giglio v. United States, 405 U.S. 150, 154 (1972), it held that the Brady obligation encompasses material that may be used to impeach key government witnesses: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]." In United States v. Bagley, 473 U.S. 667 (1985), it held that prosecutors are obligated to disclose this material whether or not defense counsel has specifically requested it. And in Kyles v. Whitley, 514 U.S. 419, 437-438 (1995), it held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

[1] This policy is not intended to have the force of law or to create or confer any rights, privileges, or benefits to witnesses or defendants. Matter of A Grand Jury Investigation, 485 Mass. 641, 660 (2020).

State law imposes even greater obligations. Under Mass. R. Crim. P. 14 (a) (1) (A)(iii), the prosecution must disclose, as part of mandatory discovery, "any facts of an exculpatory nature," an obligation that extends to information in the hands of "persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case," Mass. R. Crim. P. 14 (a) (1) (A). The Supreme Judicial Court has made clear that, under this rule, the obligation to disclose exculpatory information does not depend on whether withholding the information would necessarily deprive a defendant of a fair trial, or even whether the information would be admissible at trial. Matter of A Grand Jury Investigation, 485 Mass. 641, 650-653 (2020) ("[U]ltimate admissibility of the information is not determinative of the prosecutor's Brady obligation to disclose it."). "Rather, once the information is determined to be exculpatory, it should be disclosed -- period." Id. at 650.

This duty is also an ethical one, imposed on the prosecution by the Massachusetts Rules of Professional Conduct. Mass. R. Prof. C. 3.8(d)("Special responsibilities of a prosecutor")("The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"); Mass. R. Prof. C. 3.8 (i) (obligation to disclose exculpatory evidence postconviction).

The obligation is clear: where a prosecutor is aware of PIM[2] relative to a certain officer or trooper, the information must be disclosed to defense counsel in any case in which the officer "is a potential witness or prepared a report in [a] criminal investigation." Matter of A Grand Jury Investigation, 485 Mass. at 658.

II. What constitutes potential impeachment material?

In general, and depending on individual circumstance, information that may constitute PIM requiring disclosure includes, but is not limited to:

1. Any convictions and continuations without a finding of any criminal offense in which the officer was a defendant;

2. Any open criminal cases against an officer;

[2] This policy uses the term potential impeachment material ("PIM") to encompass exculpatory material required to be disclosed under Giglio v. United States, 405 U.S. 150, 154 (1972); Matter of A Grand Jury Investigation, 485 Mass. at 650-653; Mass. R. Crim. P. 14 (a) (1) (A)(iii); and relevant ethical rules. The Brady obligation of course also broadly encompasses "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Commonwealth v. Ellison, 376 Mass. 1, 22 & n. 9 (1978).

3. Any final findings of untruthfulness or other misconduct implicating credibility;

4. Any final findings that an officer has engaged in bias, racial or ethnic profiling, or discrimination;

5. Any final findings that an officer has utilized excessive or unreasonable force.

Mere allegations of misconduct, or preliminary or speculative information, are generally not within the obligation of disclosure. United States v. Agurs, 427 U.S. 97, 110 n. 16 (1976). However, exceptions may include, for instance, where an allegation is particularly serious and supported by strong evidence (e.g., conduct admitted by officer, captured by video, etc.) or where an officer's resignation in response to an allegation obviates the need for any departmental findings regarding the misconduct. Each situation will be carefully evaluated on its own facts.

In cases where the exculpatory nature of information is uncertain, the Supreme Judicial Court has cautioned prosecutors to err on the side of disclosure. "'Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.'" Matter of A Grand Jury Investigation, 485 Mass. at 650, quoting Agurs, 427 U.S. at 108; see also Commonwealth v. St. Germain, 381 Mass. 256, 262 n. 10 (1980) (urging prosecutors to "become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it").

III. Meeting the disclosure obligation

On a biannual basis, this Office will submit a letter to all police departments in Essex County and the Massachusetts State Police, reminding them of our joint and continuing obligation under law to ensure that potential impeachment material is disclosed in criminal cases. The letter requests that specified staff members be notified if the department is in possession of information outlined above, or similar information, concerning an officer. A copy of this letter is attached.

In turn, when information is received from our law enforcement partners or from other sources, the information will be collectively and carefully evaluated by a Brady-Giglio Committee consisting of the District Attorney, the First and Deputy First Assistants, the Chief of the Victim/Witness services, Chief of the Superior Court Trial Team, Deputy Chief of Appeals, and other senior staff members at the discretion of the District Attorney. Where disclosure is deemed necessary, a written disclosure is drafted. A copy of the disclosure will be provided to the Chief of the relevant police department for distribution to the officer. The disclosure is entered into the ECDAO "Brady-Giglio" database. Prosecutors in this Office are provided access to this database and, where required (i.e, where the officer is a potential witness or prepared a report), will make disclosures to defense counsel from it.

IV. Admissibility and confidentiality

The fact that a disclosure must be made in a case is not a concession that the information is admissible. To the contrary, "in the absence of a conviction, '[i]n general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility.'" Matter of A Grand Jury Investigation, 485 Mass. 641, 651 (2020), quoting Mass. G. Evid. § 608(b) (2020). A "narrow exception" to this rule exists where the credibility of the officer is a "critical issue" and the information may have a "significant impact" on the outcome; factors include the age of the misconduct, the strength of the evidence of it, the simplicity of establishing it, and whether it is probative of how the officer conducts investigations. Matter of A Grand Jury Investigation, 485 Mass. at 652. The cases that fall within this narrow rule will be few, and prosecutors will oppose the introduction of evidence that is not probative and would merely divert the factfinder from consideration of the genuine issues.

Furthermore, prosecutors are cautioned that information in the database is solely for use in meeting our duties to disclose PIM in individual criminal cases where required under law, and the information in it is not to be disclosed except in connection with those duties. [3] The information in the database will be disclosed only where and to the extent required under law.

As a result of a disclosure made by this Office to defense counsel concerning departmental/ internal affairs findings, defense counsel may seek to summons the internal affairs records from the department pursuant to Mass. R. Crim. P. 17 and Commonwealth v. Wanis, 426 Mass. 639 (1998) (detailing procedure and showing required to obtain police internal affairs records).[4] As holder of these records, the department must be provided notice of the summons, an opportunity to be heard in opposition, or in support of a protective order. Id. Where internal affairs records are ordered produced by the department, in view of the significant confidentiality interests that may apply to such records,[5] the prosecutor, in consultation with municipal counsel, will seek an appropriate protective order pursuant to Mass. R. Crim. P. 14(a)(6).

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[3] Certain information in the database may be subject to statutory protection against public release; for example, disclosures that reflect arraigned criminal charges or convictions and constitute Criminal Offender Record Information (CORI). G.L. c. 6, § 167, et. seq.

[4] Individual police departments hold custody of internal affairs records, which are usually not accessible by prosecutors. Absent a "showing that the prosecutor had access to these materials, or that the police department was obliged to provide its investigative files to the prosecution . . . [an order under Rule 14 (a) (1)] direct[ing] the prosecution to produce the records of the internal affairs division cannot stand." Wanis, 426 Mass. at 643.

[5] Such records may contain, for example, private or medical information pertaining to the officer and/or private citizens, G.L. c. 4 § 7, cl. 26 (c); CORI pertaining to unrelated defendants, G.L. c. 6, § 167, et. seq.; investigatory information pertaining to witnesses in unrelated criminal cases,

V. Petitioning to be removed from the database

While legal and ethical obligations must take precedence, the District Attorney is cognizant of the significant professional and reputational stake officers or troopers have in these matters. Officers may petition to be removed from the database on grounds including that the information is outdated, the finding or findings were later overturned, or on other meritorious grounds. Any such submission will be carefully reviewed by the ECDAO Brady-Giglio Committee. The letter may be sent by email and hard copy to:

Essex County District Attorney's Office Brady-Giglio Committee, C/O David O'Sullivan
10 Federal Street
Salem, Massachusetts 01970
David.O'Sullivan@Mass.gov

G.L. c. 4, § 7, cl. 26(f); sexual assault or domestic violence records, G.L. c. 41, § 97D and G.L. c. 265, § 24C; undercover operations G.L. c. 4, § 7, cl. 26(f); confidential source information, G.L. c. 4, § 7, cl. 26(f), Roviaro v. United States, 353 U.S. 53, 60 (1957); surveillance location information, Commonwealth v. Hernandez, 421 Mass. 272, 274 (1995); or material whose public release would prejudice an ongoing, unrelated criminal proceeding, G.L. c. 4, § 7, cl. 26(f); Mass. R. Prof. C. 3.6, 3.8(f).