

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT  
NO. \_\_\_\_\_

COMMONWEALTH

v.  
  
\_\_\_\_\_

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COMMONWEALTH'S DISCOVERY NOTICE

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Now comes the Commonwealth, through the office of the District Attorney for Plymouth County, and submits the following discovery notice regarding Officer ---- of the --- Police Department.

*On ---, a complaint issued charging an individual with a number of crimes, including ---. These charges stemmed from a --- arrest in the Town of ---. The ---- charge was based on the report filed by --- that this individual ---. The----. Administrative proceedings are ongoing with the ---- Police Department.*

The Commonwealth recognizes its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) to "disclose the exculpatory information at issue to unrelated criminal defendants in cases where a petitioner [police officer] is a potential witness or prepared a report in the criminal investigation." *Matter of A Grand Jury Investigation*, 485 Mass. 641, 658 (2020).

In making this disclosure, the Commonwealth notes that, generally, under Massachusetts law, evidence of prior bad acts,

misconduct, or prior false statements, is not admissible to impeach a witness. "The well-established rule in Massachusetts [is] that '[s]pecific acts of prior misconduct of the witness . . . not material to the case in which he testifies cannot be shown by the testimony of impeaching witnesses or other extrinsic evidence to affect [the witness's] credibility.'" *Commonwealth v. LaVelle*, 414 Mass. 146, 151 (1993) (quote omitted); *Commonwealth v. Sperrazza*, 379 Mass. 166, 169 (1979) ("In general, evidence of prior false allegations [i.e. false statements] has been excluded as a consequence of the rule that evidence of prior bad acts may not be used to impeach a witness's credibility."); *Commonwealth v. Almonte*, 465 Mass. 224, 241 (2013) ("Individual bad acts of untruthfulness are for the most part inadmissible to impeach a witness."); See Mass. G. Evid. § 608(b). See also *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 65-66 (1996) (judge did not err in denying defendant's new trial motion because actions of officers convicted of embezzling money seized in drug investigations, including defendant's, did not taint "in any way" evidence against defendant); *Commonwealth v. Waters*, 410 Mass. 224, 229 (1991) ("we have never held or suggested that actions taken by such officers, not in furtherance of law enforcement but rather in pursuit of an unlawful scheme of their own, such as robbery or extortion, are attributable to the prosecution").

Even under the federal rule of evidence, which does not *per se* preclude such impeachment, prior false statements by a police officer are excluded when they are not directly material to the case on trial. *United States v. Smith*, 277 F. App'x 870, 872 (11th Cir. 2008), citing *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir.1987) ("[E]xtrinsic evidence of a witness' prior misconduct should be excluded where that evidence is probative only of the witness' general propensity for truthfulness; such evidence should be admitted, however, where it is introduced to disprove a specific fact material to the defendant's case." In other words, the rule "prohibits a party from introducing extrinsic evidence of prior misconduct merely to impeach the general credibility of a witness.").

In the *Matter of Grand Jury Investigation*, 485 Mass. at 658, the Supreme Judicial Court ruled that

where a prosecutor determines from information in his or her possession that a police officer lied to conceal the unlawful use of excessive force, whether by him- or herself or another officer, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor's obligation to disclose exculpatory information requires that the information be disclosed to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation.

In regards to the admissibility of such exculpatory information, the Supreme Judicial Court explained that the trial judge must decide "whether the credibility of a police officer is a

critical issue at trial and whether the officer's prior false statements in a separate matter might have a significant impact on the result of the trial, such that the prior misconduct should be admitted in the interest of justice." *Id.* at 651-52. When exercising this discretion, a judge may consider the following factors, "the age of the prior misconduct, the strength of the evidence of the prior misconduct and the simplicity of establishing it, and whether the prior misconduct is probative of how the officer conducts police investigations." *Id.* at 652.

Regardless of whether the exculpatory evidence is admissible, the Commonwealth nonetheless makes this disclosure in order to meet - and possibly exceed - both federal and state ethical and constitutional requirements. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003); Mass. R. Crim. P. 14; Mass. R. Prof. C. 3.8 (d) (prosecutors required to make timely disclosure of known evidence that tends to negate guilt or mitigate), as appearing in 473 Mass. 1301 (2016); Mass. R. Prof. C. 3.4 (a) (lawyer must not unlawfully obstruct access to or conceal evidence), as appearing in 471 Mass. 1425 (2015); Mass. R. Prof. C. 3.8 (g) (prosecutor must pursue evidence that may aid accused); Mass. R. Prof. C. 3.8 (i) (prosecutor must disclose post-conviction exculpatory



evidence). "[I]n the parlance of the criminal justice bar, *Giglio* information is *Brady* information . . . ." *Matter of Grand Jury Investigation*, 485 Mass. at 647. Furthermore, beyond a prosecutors' constitutional duty to disclose exculpatory evidence, "they also have a broad duty under Mass. R. Crim. P. 14 (a)(1)(A)(iii) to disclose '[a]ny facts of an exculpatory nature.'" *Id.* at 649. Exculpatory evidence required for disclosure includes that which could be used to impeach the credibility of a key prosecution witness. *Id.* citing *Commonwealth v. Collins*, 470 Mass. 255, 267 (2014). "[T]he ultimate admissibility of the information is not determinative of the prosecutor's *Brady* obligation to disclose it." *Matter of Grand Jury Investigation*, 485 Mass. at 653.

Please note that any discovery request for information pertaining to disciplinary matters, internal affairs determinations, or employment decisions made by the --- Police Department shall be subject to the filing of a motion by counsel and the issuance of a ruling by a court in accordance with Rule 17 of the Massachusetts Rules of Criminal Procedure and the decisional authority set forth in *Commonwealth v. Wanis*, 426 Mass. 639 (1998).

FOR THE COMMONWEALTH  
TIMOTHY J. CRUZ  
District Attorney

BY: \_\_\_\_\_

Assistant District Attorney  
Plymouth District

Date: \_\_\_\_\_