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Frequently Asked Questions: Brady Disclosure List

District Attorney Timothy J. Cruz, and the prosecutors in the Plymouth County District Attorney's Office ("PCDAO"), work diligently to adhere to constitutional, ethical, and criminal procedure rules regarding the disclosure of evidence. Every day, prosecutors disclose "any facts of an exculpatory nature," in compliance with the Massachusetts Rules of Criminal Procedure Rule 14. Furthermore, prosecutors, bound by the Massachusetts Rules of Professional Responsibility, make timely disclosures of known evidence that tends to mitigate the offense or negate guilt (Mass. R. Prof. C. 3.8 (d)); pursue evidence that may aid the accused (Mass. R. Prof. C. 3.8 (g)); and disclose post-conviction exculpatory evidence (Mass. R. Prof. C. 3.8 (i)).

Moreover, the PCDAO also recognizes its constitutional duty under *Brady v. Maryland*, 373 U.S. 83 (1963) to disclose exculpatory evidence, including evidence that may impeach the credibility of a government witness, such as a police officer. Disclosure of exculpatory evidence occurs daily for prosecutors and is part of the normal trial process. The following questions and answers are provided to assist in understanding this issue.

1. **How does the PCDAO acquire exculpatory evidence that may impeach the credibility of a police officer?**

All law enforcement and government agencies are required to inform PCDAO of Brady information regarding an officer. The PCDAO has published a Brady Disclosure Policy on our website which outlines the types of information that an agency is required to turn over to PCDAO. In addition to making the PCDAO Brady Disclosure Policy publicly available, the PCDAO has sent a letter to each police department in Plymouth County, the Plymouth County Sheriff, and the Massachusetts State Police, informing them of the shared constitutional duty to

disclose exculpatory and impeachment information, as well as what types of information needs to be disclosed, and how to disclose it to the PCDAO. The PCDAO also may obtain exculpatory evidence from prosecutors who acquire such evidence during the pre-trial and trial process.

2. **Who at the PCDAO is responsible for accepting *Brady* information related to a police officer, and who is responsible for determining whether such information is disclosed to a defendant?**

All Brady disclosure information shall be forwarded to Assistant District Attorney Richard Linehan, Chief of the PCDAO's Conviction Integrity Unit. In this role, ADA Linehan will review claims of wrongful conviction, lead office-wide trainings for prosecutors, and review claims of misconduct by police officers for potential disclosure to defendants and inclusion in PCDAO's secure database. ADA Linehan can be reached at (508) 584-8120 or Richard.Linehan@state.ma.us.

After providing the officer with an opportunity to be heard, the PCDAO Brady Disclosure Review Team will decide as to whether the information provided shall be disclosed to the defendant, taking into consideration the constitutional, ethical, and criminal procedure rules regarding the disclosure of evidence. An officer may petition the PCDAO to be removed from the PCDAO's file of witnesses who require Brady Disclosure notices to be sent to defense. The decision to remove an officer from the file of witnesses requiring Brady Disclosure notice will rest solely with the PCDAO and the burden of production is on the officer.

3. **What are Brady Disclosure Lists and does PCDAO maintain a Brady Disclosure List?**

Some law enforcement agencies compile lists of names in an effort to track various forms of misconduct by police officers. Prosecutors use these lists to determine whether they should deem listed officers as unqualified to serve as witnesses due to damaged credibility. Practices vary widely throughout the country.

The PCDAO does track the police officers for whom Brady Disclosures are required. Once the PCDAO learns of any information favorable to the accused (including misconduct or the reliability of a given witness), such information is immediately disclosed to the defense, and in some instances to the court. Such disclosures are handled every day on a case-by-case basis

under the Massachusetts Rules of Criminal Procedure, as well as state and federal appellate decisions. The regularity of such disclosures should not be misunderstood to conclude there is widespread misconduct. To the contrary, the disclosure obligation sweeps very broadly and includes not just instances of suspected misconduct, but also any information that may be helpful to the accused. Also, this obligation is not limited to police witnesses and includes all witnesses.

The PCDAO will publicly make available information about individuals for whom Brady Disclosures are required because of criminal convictions and/or continuances without a finding.

4. **Is the PCDAO required by law to maintain a Brady Disclosure List or make the list public?**

No. The Supreme Court cases of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), are often cited as the genesis for the so-called Brady List or Brady/Giglio List. Those cases, however, do not mandate the creation of any such list and do not even reference such a list. In both cases, the Supreme Court addressed the conduct of a prosecutor, not a police officer.

5. **Does the PCDAO give police officers an opportunity for a hearing before making a Brady Disclosure?**

Yes. A Brady Disclosure has serious ramifications regarding an individual's employment status. Therefore, after PCDAO receives Brady information, but before a decision is made as to whether to disclose the information, the PCDAO Brady Disclosure Review Team will provide the police officer an opportunity to be heard. The PCDAO recognizes that due process rights are implicated when the government impairs a person's "opportunity to engage at all in a particular occupation, or a particular aspect of an occupation." *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 496 (1965) (emphasis added). Due process of law mandates the exercise of sound discretion only "after fair investigation, with such a notice, hearing and opportunity to answer...." *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 123 (1926).