



Plymouth County District Attorney's Office *Brady* Disclosure Policy

I. Overview

Plymouth County District Attorney Timothy J. Cruz embraces the greater moral duties of a prosecutor as the representative of the people, recognizing that the government has a broader and deeper duty to seek justice, including remedying injustices. Prosecutors must hold themselves to the highest standards of fairness and integrity. This includes adhering to constitutional, ethical and criminal procedure rules regarding the disclosure of evidence, particularly exculpatory evidence.

“A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession’s ideals of public service . . . Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.” Mass. R. Prof. C. Preamble.

Rules of Criminal Procedure

Pursuant to Massachusetts Rules of Criminal Procedure (Mass. R. Crim. P.) Rule 14, prosecutors are required to disclose certain information related to the case including but not limited to: police reports, photographs, tangible evidence, written or recorded statements, grand jury minutes, identities of prospective witnesses including law enforcement, and disclosure of promises or inducements made to a witness. Rule 14 (a)(1)(A)(iii) specifically mandates prosecutors to disclose “any facts of an exculpatory nature.”

Rules of Professional Responsibility

Attorneys in Massachusetts must also adhere to the Massachusetts Rules of Professional Responsibility. Lawyers must not unlawfully obstruct access to or conceal evidence. Mass. R. Prof. C. 3.4 (a). In particular, prosecutors must make timely disclosures of known evidence that tends to mitigate the offense or negate guilt. Mass. R. Prof. C. 3.8 (d). Prosecutors must pursue evidence that may aid the accused. Mass. R. Prof. C. 3.8 (g). In addition, prosecutors must disclose post-conviction exculpatory evidence. Mass. R. Prof. C. 3.8 (i).

The Basics of Brady

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) “the suppression by the prosecution of evidence favorable to an accused upon request 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.” Furthermore, “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio v. U.S.*, 405 U.S. 150, 154 (1972).

Evidence that must be disclosed pursuant to Brady includes: (1) “Exculpatory evidence,” which is evidence favorable to the defendant and likely to change the result on an issue of a defendant’s guilt or his or her eventual punishment if convicted; (2) “Favorable evidence,” which includes not only exculpatory evidence but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian; and (3) “Impeachment evidence,” which is defined by Rules 607, 608, and 609 of the Massachusetts Rules of Evidence and generally includes any evidence that can be used to impeach the credibility of a witness.

As it pertains to government witnesses, *Brady* evidence tends to fall within one of five categories: criminal convictions; evidence of misconduct involving dishonesty; evidence tending to show a bias or motive to lie; evidence regarding the witness’ ability to perceive, recall, and relate information accurately; and for expert witnesses, a pattern of confirmed performance errors that could compromise the expert’s conclusions.

The prosecution does not have an obligation to disclose mere allegations, or information that is preliminary or speculative; and information that is disclosed is not necessarily admissible at a trial. Prosecutors will often disclose *Brady* material but argue against its admissibility.

Massachusetts SJC Clarification on Brady

The Massachusetts Supreme Judicial Court, recently ruled in the case of *Matter of A Grand Jury Investigation*, 485 Mass. 641 (2020), that where a police officer has lied about the unlawful use of excessive force, whether by him or herself or by another officer, or has lied to cause a false or inflated criminal charge to be prosecuted, such information must be disclosed both in that particular case and “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).

With regard 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.*

And the Court noted that, as it had earlier held in a prior case, a lie by an officer in an entirely unrelated matter five years before a trial, and unrelated to how the officer conducted police investigations, was properly ruled not admissible. *Id.* at 652.

Regardless of whether the exculpatory evidence is admissible, the Plymouth County District Attorney’s Office (“PCDAO”) recognizes that “[t]he ultimate admissibility of the information is not determinative of the prosecutor’s *Brady* obligation. *Id.* at 653. If prosecutors determine evidence requires disclosure under *Brady*, the Massachusetts Rules of Criminal Procedure, or the Massachusetts Rules of Professional Conduct, the PCDAO will disclose the exculpatory evidence to appropriate defense counsel, regardless of its admissibility.

II. Information To Be Provided to the PCDAO

The PCDAO is working with the 27 local police departments in the county, Plymouth County Sheriff Joseph D. McDonald, Jr., the Massachusetts State Police, federal law enforcement partners, and other government agencies like the Massachusetts State Police Crime Lab to request information related to officer misconduct and credibility.

Information to be provided to the PCDAO by a law enforcement or government agency about an employee includes, but is not limited to:

1. Any convictions and continuations without a finding of any criminal offense in which the officer was the defendant;
2. Any open criminal cases against an officer;
3. Any findings by a court or by internal affairs or any other internal review process: (a) of untruthfulness or other misconduct implicating credibility; (b) that an officer has engaged in any pattern of bias, racial profiling, or discrimination; or (c) that an officer has utilized excessive or unreasonable force;
4. Any instance in which an officer has fabricated information in a police report to allow a false or inflated criminal charge to be prosecuted, or to conceal the unlawful use of force, or to protect or cover up any misconduct by himself or herself or another officer;
5. Any evidence regarding the witness’ ability to perceive, recall, and relate information accurately; and

6. For expert witnesses, any patterns of confirmed performance errors that could compromise the expert's conclusions.

Law enforcement and government agencies are requested to inform the PCDAO of any new or pending investigations within 30 days of their inception. All updates, including new evidence, sustained findings, discipline, or dismissal of a proceeding, should be disclosed to the PCDAO.

III. Brady Review Team

All Brady information shall be forwarded to Assistant District Attorney Richard Linehan, Chief of the Conviction Integrity Unit (Richard.Linehan@state.ma.us). After providing the officer with a reasonable opportunity to be heard, the Brady Review Team will make a decision 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.

IV. Disclosure

The PCDAO will disclose to defense counsel in the form of a notice of disclosure.

V. Confidentiality

To the extent protected by law *Brady* information exchanged between a law enforcement or government agency and the PLYDAO shall be considered confidential and shall be maintained in a secure electronic database maintained by the PLYDAO. This information will not be released to the public unless some or all of it is not exempt from the public records laws, or except upon lawful process, or an order of the Supervisor of Public Records, or a court order, or in order to defend the office or any employee of this office in regard to any claim brought against this office or any employee.

Employees of the PLYDAO will be trained to maintain strict confidentiality regarding all information concerning *Brady* material and potential government witnesses. As stated in its personnel policy, the PLYDAO will take strong action against any employee making improper use of confidential information or contributing to a breach of confidentiality, which will include disciplinary action, up to and including termination. Defense attorneys may be asked to sign Stipulations of Non-Disclosure prior to receipt of *Brady* disclosures. Where appropriate, Assistant District Attorneys will file protective orders with the court to ensure confidentiality on the part of the attorneys.