MEMORANDUM

TO: Middlesex Chiefs of Police

FROM: Marian T. Ryan, District Attorney

RE: Police Discovery Obligations and Disclosure of Exculpatory Evidence

DATE: March 16, 2021

This memo outlines both my Office's legal and ethical duty to disclose "exculpatory" evidence to a defendant as well as the practices which we have adopted to fulfill those obligations. It also provides guidance to officers regarding the types of conduct that will cause a "Brady" notice to issue and result in that officer's name being added to the "Brady" list.

While we are cognizant of the perception attendant to our Office's implementation of the "Brady" list, it is important to understand that misconduct must be disclosed by my Office as a matter of law. The Middlesex District Attorney's Office has both a legal and ethical obligation to disclose any conduct that qualifies as "exculpatory" under the governing case law and Rules of Criminal Procedure. See Mass. R. Crim. P. 14(a)(1)(A)(iii); Mass. R. Prof. Conduct 3.8(d).

The "Brady" rule, see Brady v. Maryland, 373 U.S. 83, 87 (1963), requires disclosure by the prosecution of a finding of untruthfulness or evidence "which, if made available, would tend to exculpate [a defendant] or reduce the penalty." As discussed below, in addition to untruthfulness or criminal conduct, under Massachusetts law, various procedural, legal and ethical rules obligate prosecutors to disclose several additional categories of misconduct. Massachusetts Rules of Criminal Procedure, Rule 14(a)(1)(A)(iii), and guidance from the Massachusetts Supreme Judicial Court "defines exculpatory evidence to include (but not necessarily be limited to) all information that is material and favorable to the accused because it

tends to cast doubt on defendant's guilt as to any essential element of the crime charged, including the degree of the crime; **or tends to cast doubt on the credibility of a Commonwealth witness**, or on the accuracy of scientific evidence, that the government anticipates offering in its case in-chief." See the Reporter's Notes to Rule 14 (emphasis added). Thus, any evidence "tending to impeach the credibility of a key prosecution witness is clearly exculpatory," regardless of whether the underlying conduct implicates truthfulness. Matter of a Grand Jury Investigation, 485 Mass. 641, 647 (2020), quoting Commonwealth v. Hill, 432 Mass. 704, 715 (2000). All police officers who testify are potentially key prosecution witnesses because my Office routinely prosecutes cases where a lone officer's testimony can be determinative of guilt or innocence.

The law requires prosecutors to "err on the side of caution and disclose" evidence in the event of uncertainty as to its exculpatory nature. Matter of a Grand Jury Investigation, 485 Mass. 641 (2020). And, as noted, my Office's disclosure obligations are mandatory; prosecutors do not have discretion to withhold such information once it has been deemed exculpatory. Such conduct may include, but is not limited to, information that:

(a) An officer is charged with a crime, has admitted to sufficient facts or been convicted of a crime, whether a felony or a misdemeanor;

(b) A finding of untruthfulness in connection with an internal administrative process such as an internal affairs (IA) investigation or a proceeding before a Hearing Officer or arbitrator or other administrative body or appeal;

(c) A judicial finding that an officer knowingly provided false testimony or lied in an affidavit in support of a search warrant (Franks hearing);

(d) A finding that an officer engaged in conduct, whether criminal or not, that shows a lack

of truthfulness or adversely impacts his/her credibility. Specific examples of this category, which encompasses a broad array of conduct, include:

i. On-duty conduct or lack thereof that suggests failure to follow police protocols, where such conduct adversely impacts an officer's credibility as a witness (including, but not limited to, not working or working a detail while also being on duty; improper reporting/manipulation of overtime; improperly changing a police report; conducting personal or union[1] business while on the clock; and failure to supervise);[2]

ii. Any misconduct finding that either casts a substantial doubt upon the accuracy of any evidence — including witness testimony — that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence (including, but not limited to, failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consent to search or to record communications; failure to comply with agency procedures for supervising the activities of a cooperating witness or confidential informant);

iii. Racial/gender profiling of motorists or others stopped on suspicion of criminal conduct;

iv. Sexual harassment or other discrimination against co-workers or civilians;

[1] This category of misconduct would not include collectively-bargained union work or representation authorized by a union contract with the police department.

[2] Such conduct generally does not include more mundane violations such as the failure to wear one's uniform correctly, persistent tardiness, or damage to a police cruiser. However, in the event an investigation into such conduct resulted in a finding of untruthfulness by the officer, we would likely be obligated to issue a notice.

v. Mishandling/tampering with evidence; and

vi. Excessive use of force.

In most instances, my Office learns of misconduct and drafts a discovery notice following either the completion of a thorough IA investigation or the initiation of criminal charges against an officer. Though far less common, there are occasions where notices may issue absent a formal internal investigation or adverse findings. For example, my Office may possess independent evidence – such as surveillance footage, text messages, or misleading police reports – that trigger disclosure. Alternatively, a prosecutor may receive a decision on a motion to suppress in which a judge determines that an officer was untruthful.

Upon learning of adverse findings following an IA investigation or other misconduct, my Office's Police Discovery Team, which consists of several experienced trial and appellate prosecutors, will review the underlying facts and determine if disclosure is required. Where appropriate, we will issue and disseminate a draft discovery notice to the relevant department's chief or IA designate to ensure factual accuracy. Given my Office's ongoing discovery obligations, we will not await the disposition of any administrative appellate process. However, upon circulation of the draft notice, my Office will accept submissions from the officer in question and/or the police department – such as a document outlining the officer's version of events – for a period of seventy-two hours as to why a notice should not issue. In the event the officer in question is scheduled to testify in that time period, we will immediately provide the notice to opposing counsel. Be advised that these submissions may themselves be deemed discoverable if my Office determines they contain exculpatory information. Because my Office is legally obligated to inform the defense of such information, there is no process for appealing

our determination to issue a notice/place an officer on the "Brady" list beyond this "review" period.

If, after this review period, our Office decides to place the officer on the "Brady" list, we will provide a copy of the discovery notice, along with a notification letter, to the relevant department's chief and the officer in question. Typically, our discovery notices include the following information: (a) a brief summary of the misconduct, (b) any adverse findings generated by the internal affairs or independent investigation, (c) the details of any punishment imposed, (d) whether the officer remains employed with the department, and (e) where applicable, that we possess pertinent documents, potentially including any submissions outlining the officer's version of events.[3] The notification letter briefly outlines my Office's legal and ethical obligations, the steps we will take to limit further dissemination or admission of the misconduct at any subsequent trial, and our concurrent obligations to disclose the misconduct in response to a public records request.

With limited exceptions, a discovery notice will continue to issue in all future cases in which the officer is a potential witness regardless of the age of the underlying conduct. If my Office later learns that adverse findings precipitating the notice's issuance were undermined or reversed pursuant to an appeal or arbitration, we will reassess whether to issue the notice and may stop issuing it and remove the officer's name from the list. In the case of an officer charged with a crime that results in a disposition of a CWOF, we will not cease issuing a notice, or remove an officer from the list, upon the successful completion of the period of probation. Where, however, an officer goes to trial and is found not guilty we generally cease issuing a

[3] My Office generally does not request copies of IA materials (interview transcripts, investigatory reports, written findings, etc.) when drafting discovery notices.

notice concerning that crime and remove the officer from the "Brady" list although we may continue to issue an amended Brady notice if a concurrent IA investigation finds violations deemed to be "exculpatory," notwithstanding the favorable resolution of criminal charges.

In most instances, my Office will continue to call officers for whom we issue a discovery notice as witnesses. Moreover, issuance of a notice does not necessarily mean that a defendant will succeed in discovering additional information contained within an officer's personnel or IA file. A defendant must make a showing of "good cause" pursuant to Massachusetts Rule of Criminal Procedure 17 in order to access these materials.[4] See Commonwealth v. Wanis, 426 Mass. 639, 643-644 (1998). Prior to any ruling on such a motion, my Office and/or legal counsel for the police department in question will be afforded an opportunity to argue against further production of IA documents. My Office will also make all available and appropriate arguments in court that the defense should not be able to inquire into such conduct at any trial where the officer testifies.

Finally, because my Office is subject to the Public Records law, it is important to note that a "Brady" list and notices issued are subject to disclosure to individuals making records requests under that Law, including members of the media. Once "Brady" list information is provided to the media in response to a public records request, my Office cannot control how it is reported or further disseminated. As my Office recognizes that a broad array of conduct – some more egregious than others – can trigger the issuance of a notice, our responses to such requests delineate the officers on our "Brady" list by the specific category of misconduct that precipitated

[4] The recently-passed "Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth," eliminates the "privacy exemption" to the Public Records Law for records relating to a "law enforcement misconduct investigation." See Section 2, Chapter 253 of the Acts of 2020; G.L. c. 4, § 7(26)(c). As such, defendants and members of the public may now be able to access an officer's IA file without filing a motion in conjunction with a criminal case.

their inclusion in order to provide context and ensure that officers are not painted with the same brush.