



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

May 13, 2021

Supreme Judicial Clerk's Office for the Commonwealth
John Adams Courthouse
1 Pemberton Square, Suite 1400
Boston, MA 02108

**Re: *Graham v. District Attorney for Hampden County*, No. SJ-2021-0129,
Letter Motion Seeking Leave to File Amicus Curiae Letter in Support of Petitioners**

Dear Clerk of the Court,

The Institute for Constitutional Advocacy and Protection at Georgetown University Law Center (ICAP) and the Law Enforcement Action Partnership (LEAP) respectfully request leave to participate as amici curiae and to file a letter in support of Petitioners' petition for relief pursuant to Massachusetts General Law chapter 211, section 3, in *Graham v. District Attorney for Hampden County*, No. SJ-2021-0129.

Proposed amici are non-profit organizations that seek to improve the criminal justice system through reforms that advance justice and promote public safety. They have particular expertise in the obligations of prosecutors and law enforcement to provide exculpatory and impeachment information in the possession of the police under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The proposed amicus curiae letter offers the Court additional perspectives about the critical role that prosecutors and law enforcement play in ensuring that criminal convictions are obtained fairly and in preserving the integrity of the criminal justice system. It also provides information about how the federal government's policies for obtaining potential impeachment information concerning law enforcement witnesses differ significantly from the Hampden County District Attorney's Office's existing practices. Amici believe that these views will aid the Court in its consideration of Petitioners' request for relief.

For the foregoing reasons, ICAP and LEAP respectfully request that this Court grant leave to file a letter in support of Petitioners' petition for relief pursuant to Massachusetts General Law chapter 211, section 3.

Respectfully submitted,

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INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

April 6, 2021

VIA ELECTRONIC MAIL

Honorable Frank M. Gaziano
Associate Justice
Massachusetts Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square
Boston, MA 02108

Re: SJ-2021-0129, *Graham v. District Attorney for Hampden County*

Dear Justice Gaziano,

The Institute for Constitutional Advocacy and Protection at Georgetown University Law Center (ICAP) and the Law Enforcement Action Partnership (LEAP) urge this Court to grant the petition for relief pursuant to Massachusetts General Law chapter 211, section 3. Investigation and disclosure of egregious police misconduct is critical to ensuring that criminal convictions are obtained fairly and to preserving the integrity of the criminal justice system.

ICAP and LEAP are non-profit organizations that seek to improve the criminal justice system through reforms that advance justice and promote public safety. ICAP's mission is to use the power of the courts to defend American constitutional rights and values. To that end, ICAP has litigated and filed amicus curiae briefs in cases advocating for criminal justice system reform in areas including police misconduct on the street and in schools; unfair bail, fines, and fees; *Brady* violations; and constitutionally excessive punishments. Among other litigation victories, ICAP has obtained federal court injunctions against the use of cash bail in St. Louis, Missouri, and Hamblen County, Tennessee; secured, on behalf of a local public defender's office, the unsealing of an expert report exposing widespread misconduct in the Prince George's County, Maryland, Police Department; and ensured that victims of police misconduct in Baltimore, Maryland, could receive compensation from the City for the harms they suffered because of that misconduct. ICAP draws on the experience and expertise of its team of attorneys, many of whom previously worked at the U.S. Department of Justice. ICAP's Executive Director served as a federal prosecutor for over 20 years, including in leadership positions at the U.S. Attorney's Office for the District of Columbia and the National Security Division at the U.S. Department of Justice.

LEAP's mission is to unite and mobilize the voice of law enforcement in support of drug policy and criminal justice reforms that will make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations. LEAP draws on the expertise of police, prosecutors, judges, corrections officials, and other law enforcement officials to call for more practical and ethical policies from a

public safety perspective through speaking engagements, media appearances, testimony, and support of allied efforts.

ICAP and LEAP believe that the criminal justice system works best when the due process rights of defendants are respected, prosecutions are conducted fairly, and innocent individuals are not convicted while the guilty go free. We therefore urge this Court to recognize the need for the Commonwealth to investigate and, as appropriate, remedy the systemic problems identified in the petition and the U.S. Department of Justice's recent report. The use of excessive force by the Springfield Police Department's Narcotics Bureau (and perhaps more broadly within the Police Department)—and the Department's practice of submitting false reports to conceal that activity—undermine the fair administration of justice and the public's faith in the criminal justice system. See U.S. Dep't of Justice, *Investigation of Springfield, Massachusetts Police Department's Narcotics Bureau 2* (July 8, 2020), <https://www.justice.gov/opa/press-release/file/1292901/download> (concluding that "Narcotics Bureau officers engage in uses of excessive force without accountability").

Furthermore, in the wake of the Department of Justice's report detailing these egregious practices, the failure of the Hampden County District Attorney's Office to take meaningful action to investigate and disclose that activity or any similar activity by other members of the Springfield Police Department compounds the harms to the integrity of the criminal justice system. This Court's recognition of the need to investigate and remedy the practices of the District Attorney's Office and the Springfield Police Department would provide valuable clarification about prosecutors' responsibility to investigate and disclose exculpatory and impeachment evidence in the possession of police under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. This Court's intervention also would reassure the public that the courts will enforce this critical procedural safeguard of the criminal justice system.

More than 80 years ago, a unanimous Supreme Court memorialized the unique role of the prosecutor in *Berger v. United States*, 295 U.S. 78, 88 (1935):

The [prosecutor] is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Because of this unique role, prosecutors bear a special responsibility to strive for a fair and just result in all criminal prosecutions, and prosecutors' *Brady* obligations are an important element of that responsibility. *Brady* and its progeny have firmly established that a criminal defendant's constitutional right to due process is violated when the government "withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). The *Brady* line of cases draws no distinction between evidence that is material for purposes of impeachment and evidence that is otherwise exculpatory. *Id.* at 676 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

In advance of trial, it is often difficult for a prosecutor to know with certainty whether information ultimately will be favorable and material to the defense of a criminal case. It is therefore well established that the “careful prosecutor” should resolve any doubts in favor of disclosure, even if a failure of disclosure ultimately would not result in a constitutional violation, as such an approach “will serve to justify trust in the prosecutor.” *Id.* at 439; *see also In re Grand Jury Investigation*, 485 Mass. 641, 650 (2020) (requiring Massachusetts prosecutors to disclose all exculpatory information and to “err on the side of caution and disclose” potentially exculpatory information due to this uncertainty). That is why the U.S. Department of Justice explicitly directs federal prosecutors to “take a broad view of materiality” in advance of trial and “err on the side of disclosing exculpatory and impeaching information.” Justice Manual § 9-5.001(B)(1).

Moreover, a prosecutor’s *Brady* obligation extends not only to information known to the prosecutor, but also to its duty “to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Thus, federal prosecutors are obligated to “seek all exculpatory and impeachment information from all the members of the prosecution team,” including “federal, state, and local law enforcement officers . . . participating in the investigation and prosecution of the criminal case.” Justice Manual § 9-5.001(B)(2); *see also* Am. Bar Ass’n, Criminal Justice Standard for the Prosecution Function 3-5.4 (4th ed. 2017) (prosecutors “should diligently seek to identify all information in the possession of the prosecution *or its agents* that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted” (emphasis added)). Prosecutors must take a broad view of their resulting duty to investigate when they become aware of information indicating that further inquiry is required.

The U.S. Department of Justice has further implemented a “*Giglio* policy” to ensure that prosecutors obtain potential impeachment information concerning law enforcement agency witnesses. *See* Justice Manual § 9-5.100. That policy requires federal prosecutors to have a “candid conversation with each potential investigative agency witness . . . regarding any on-duty or off-duty potential impeachment information”; directs law enforcement officers to “inform prosecutors with whom they work of potential impeachment information as early as possible” in an investigation; and encourages prosecutors to separately “request potential impeachment information” through the investigative agency. *Id.* § 9-5.100(1). Under the Department of Justice’s guidelines, “potential impeachment information” includes, at a minimum, findings or pending allegations of misconduct that bear “upon the truthfulness or possible bias of” an officer witness, as well as “any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence . . . or that might have a significant bearing on the admissibility of prosecution evidence.” *Id.* § 9-5.100(5)(c)(5). After receiving this information, federal prosecutors “assess the information in light of the role of agency witnesses, the facts of the case, and known or anticipated defenses, among other variables,” in order to determine what information should be disclosed to the defendant. *Id.*

By contrast, as evidenced by its responses to public information requests, the Hampden County District Attorney’s Office appears to lack any internal policies to ensure that potential impeachment information is collected, reviewed, and disclosed as *Brady* requires. Pet. 17. This apparent lack of procedures—combined with the Department of Justice’s conclusion that the

Springfield Police Department engaged in a pattern of serious misconduct—makes it likely that the Hampden County District Attorney’s Office has failed to meet its *Brady* obligations in a large number of cases over many years. Especially where a case turns significantly on an officer’s testimony, information about that officer’s past misconduct and actions bearing on the officer’s credibility can make a critical difference in whether a defendant is convicted. *See In re Grand Jury Investigation*, 485 Mass. 641 (requiring the disclosure in unrelated criminal cases of grand jury testimony showing that police officers had made false statements in police reports to conceal the unlawful use of force by another officer and to support a “bogus criminal charge of resisting arrest”); *cf. Kyles*, 514 U.S. at 446 (suggesting that *Brady* disclosures may appropriately assist a defendant in “attacking the reliability” of a police investigation).

Moreover, the Springfield Police Department’s failure to inform the District Attorney’s Office of the pervasive misconduct that has occurred within its ranks would not excuse the prosecutors’ failure to seek out such information when its existence became reasonably apparent. *See id.* at 438 (insisting that, although “police investigators sometimes fail to inform a prosecutor of all they know,” nonetheless “procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it” (quoting *Giglio*, 405 U.S. at 154)).

The Hampden County District Attorney’s Office has made some recent efforts to gather and disclose the information uncovered by the Department of Justice. Pet. 15–16. But those efforts have not sufficiently sought to address the scope of misconduct within the Springfield Police Department and therefore may not satisfy the prosecutors’ disclosure obligations in light of the evidence of egregious misconduct available to the District Attorney’s Office. *See Moore v. Illinois*, 408 U.S. 786, 810 (1972) (Marshall, J., concurring in part) (explaining that prosecutors should be held responsible for disclosing information in the files of police on the prosecution team because “[i]t is the State that tries a man, and it is the State that must insure that the trial is fair”).

The need for this Court’s intervention is clear. By recognizing the need to investigate and remediate the problems identified in the petition, the Court would provide greater clarity about the District Attorney’s Office’s duty to uncover and disclose officer misconduct when presented with reason to believe that pervasive wrongdoing is occurring. In doing so, the Court would effectuate critical protections that *Brady* intended for criminal defendants and sustain “the public’s faith in the integrity of our criminal justice system.” *Commonwealth v. Daniels*, 445 Mass. 392, 401 (2005). ICAP and LEAP therefore urge the Court to grant the petition.

Sincerely,

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