



MONTGOMERY COUNTY, MARYLAND DEPARTMENT OF POLICE

EXCULPATORY EVIDENCE

DIRECTIVE NO:

FC 0650

EFFECTIVE DATE:

December 20, 2023

REPLACES:

N/A

ACCREDITATION STANDARDS:

CALEA Standards: 6th Edition, 42.1.6

PROPONENT UNIT:

Investigative Services Bureau
Administration

AUTHORITY:

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If a provision of a regulation, departmental directive, rule, or procedure conflicts with a provision of the contract, the contract prevails except where the contract provision conflicts with State law or the Police Collective Bargaining Law. (FOP Contract, Article 61).

I. POLICY

It is the policy of the Montgomery County Department of Police (MCPD) to conduct fair and impartial investigations. MCPD will disclose incriminating or exculpatory evidence as well as any information that may adversely affect the credibility of a witness that is reasonably known. This policy establishes guidelines for identifying and releasing potentially exculpatory or impeachment information (so-called "Brady information") to a prosecuting attorney for evaluation and disclosure of the information to the defense.

II. PURPOSE

The purpose of this policy is to provide guidelines and procedures for department personnel to fulfill the government's constitutional duty to affirmatively disclose specific information that may be viewed as favorable to the accused.

III. DEFINITIONS

For purposes of this directive, the following terms have the meanings indicated.

- A. Brady Material: Exculpatory or impeachment information that is material to a defendant's guilt or innocence or punishment. This includes any finding of misconduct that reflects on an officer witness's truthfulness; any finding of misconduct that indicates that the officer-witness may be biased; or previous conduct or action in which the officer witness's honesty or integrity was compromised; any credible allegation of misconduct, subject of a pending investigation, that reflects on the truthfulness or possible bias of the officer-witness; and any past criminal charge or pending criminal charge brought against the officer-witness who will testify in a case before the court or who was involved in the investigation of the case
- B. Duty to Disclose: The landmark decision of Brady v Maryland (1963) places an affirmative constitutional duty on a prosecutor to disclose exculpatory evidence to a defendant. This duty has been extended to police agencies through case law, requiring law enforcement agencies to notify the prosecutor of any potential exculpatory information/evidence.
- C. Employee: All departmental personnel, sworn and non-sworn.
- D. Exculpatory Evidence: Evidence that might exonerate a defendant. This includes evidence in the police possession that is material to guilt, innocence, or punishment of an accused, as well as information that may impact the credibility of a government witness. Exculpatory evidence must be disclosed even if the accused has made no request.
- E. Giglio Information: Information that could affect the credibility of a government witness. This includes information that may affect the credibility of a law enforcement officer in testifying, especially if any sustained findings establish a record of untruthfulness, bias, and/or commission of a crime. This information also includes information relating to any deals entered into or promises made to a witness in a criminal case by a government official.
- F. Impeachment Evidence: Evidence that demonstrates that a witness is not trustworthy in a criminal case; this can include evidence that a witness is biased or prejudiced against a party, has some motive to fabricate testimony, has a poor reputation for truthfulness, has made prior inconsistent statements about an event, or has past specific incidents that are indicators of the witness's truthfulness or untruthfulness. Evidence that might be used to impeach a witness is exculpatory and must be disclosed to the defense by the prosecutor. The courts determine the admissibility of impeachment evidence on a case-by-case basis. Therefore, even evidence likely to be inadmissible can still be considered Brady information and thus must be submitted to the prosecutor.
- G. Officer: A commissioned (sworn) police officer.

IV. BACKGROUND

- A. The Brady Rule (Brady v. Maryland, 1963) requires prosecutors to disclose any materially exculpatory evidence in the government's possession to the defense. This duty to disclose is applicable even if there has been no request by the accused and encompasses material exculpatory evidence, including impeachment evidence. Evidence is considered material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result

of the proceeding would have been different.” Prosecutors must proceed on the side of disclosure to ensure compliance with these rules, as violations can occur whether the State willfully or inadvertently suppressed the evidence. Suppression of material exculpatory evidence violates due process where the evidence is material either to guilt or punishment, irrespective of the prosecution's good or bad faith.

- B. An agency and its personnel could be liable in Federal and State courts for failing to disclose to a prosecutor any evidence that may be favorable to a defendant.

V. INVESTIGATIVE MATERIAL DISCLOSURE PROCEDURES

- A. Officers should include adequate investigative information/activity in their case file and reference to all material evidence to which they become aware, and facts reasonably believed to be either incriminating or exculpatory to any individual in the case.
- B. All official case items (e.g., statements, CAD printouts, search warrant information, etc.) involving an investigation shall be made available to the prosecuting authority before the actual prosecution of the case. The prosecutor will determine what information in the case file will be provided to the defense counsel for discovery.
- C. If an employee becomes aware of potentially incriminating or exculpatory information or of information affecting the credibility of a witness any time after submission of a case, pre- or post-conviction, that employee or the handling investigator must prepare and submit a supplemental report documenting such information as soon as practicable. Supervisors will monitor these supplemental reports and shall promptly process and transmit them to the prosecuting attorney for the Office of the States Attorney (SAO).
- D. If information is believed to be privileged or confidential (e.g., confidential informant, protected personnel files, or information related to other active cases that have not yet been charged or are still being investigated), the officer should discuss the matter with a supervisor, and/or prosecutor to determine the appropriate manner to proceed, including any notice requirements to the officer.
- E. Evidence or facts are considered material if there is a reasonable probability that material would affect the outcome of a criminal proceeding or trial. Determining whether evidence or facts are material often requires legal or judicial review. SAO has an affirmative obligation to release that information once that information is disclosed. If an employee is unsure whether evidence or facts are material, a supervisor will make a determination.
- F. Supervisors uncertain about whether evidence or facts are material should address the issue in a written memo to the prosecutor on the case or their supervisor. A copy of the memo should be forwarded to their assigned District Commander/Director or Bureau Chief. A copy of the memo should be retained in the case file.
- G. Continuing Obligations:
The duty to disclose exculpatory information under this policy to the defense continues throughout the case's prosecution and remains after the defendant's conviction.

VI. POST-CONVICTION INVESTIGATIONS

- A. Once notified by the SAO, post-conviction investigations involving claims of omitted exculpatory evidence must be thoroughly documented on an incident or supplemental report by the handling investigator as soon as practicable. The report will be forwarded to the SAO. This information will include:
 - 1. Details related to when information was received,
 - 2. Who received the information, and
 - 3. If or when it was provided to prosecuting authorities.
- B. Postconviction investigations where claims of omitted exculpatory evidence are the result of the initial investigation by the agency should not be conducted by investigative personnel involved in the initial investigation.
- C. Claims of intentionally omitted exculpatory evidence will be assigned to the appropriate investigative unit.