

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellant,

v.

RAYMOND GAINES,

Defendant-Appellee.

On Appeal from Postconviction Order of the
Suffolk County Superior Court
Granting the Defendant's Motion for New Trial

**BRIEF FOR AMICUS CURIAE MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF
DEFENDANT-APPELLEE AND FOR AFFIRMANCE**

CHAUNCEY B. WOOD (BBO # 600354)
MASSACHUSETTS ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
55 Union Street, 4th Floor
Boston, MA 02108
(617) 248-1806
cwood@woodnathanson.com

KEVIN S. PRUSSIA (BBO # 666813)
MADELEINE LAUPHEIMER (BBO # 696647)
ASMA S. JABER (BBO # 707322)
KAYLEE Y. DING (BBO # 713017)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Kevin.Prussia@wilmerhale.com

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Judicial Court Rule 1:21, MACDL represents that it is a 501(c)(6) professional association incorporated under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL.

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STATEMENT OF INTEREST

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated professional association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying and attempting to avoid or correct problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice. MACDL respectfully submits this brief pursuant to the Court's solicitation of amicus briefs on June 12, 2023.

RULE 17(c)(5) DECLARATION

MACDL declares that (a) no party or party's counsel authored the brief in whole or in part; (b) no party or party's counsel, or person or entity—other than MACDL, its members, or its counsel—contributed money that was intended to fund the preparation or submission of the brief; and (c) neither MACDL nor its counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES PRESENTED

On June 12, 2023, this Court solicited amicus briefing on the following question:

Where the defendant was convicted of murder in the first degree and armed robbery in 1976, whether the motion judge properly allowed his motion for a new trial on the grounds that (1) newly discovered evidence shows that an eyewitness's identification of the defendant was produced by highly suggestive procedures and should not have been presented to the jury, (2) expert testimony concerning eyewitness identifications constitutes newly discovered evidence that would have been a real factor in the jury's deliberations, (3) the Commonwealth failed to produce exculpatory evidence in its possession, namely, an affidavit by a key witness recanting his testimony, evidence of misconduct by a police witness, and other notes and records in the possession of the Boston police department.

Massachusetts Supreme Judicial Court, Amicus Announcements From September 2022 to August 2023, <https://www.mass.gov/info-details/amicus-announcements-from-september-2022-to-august-2023>.

Amicus MACDL addresses the third part of this question.

INTRODUCTION

The duty of a prosecutor to disclose exculpatory evidence known to the Commonwealth's prosecution team is one of the most important protections that criminal defendants have to balance the broad investigatory powers of the state. This case highlights the extreme injustice that can occur when a defendant does not receive that protection. MACDL writes to encourage the Court to clarify that Article 12 of the Massachusetts Declaration of Rights (art. 12) requires prosecutors

to disclose exculpatory evidence whenever they learn of it in order to fully protect the rights of defendants to “produce all proofs that may be favorable” to them.

Raymond Gaines, a first-time offender, was sentenced to life in prison without the possibility of parole after a trial at which the prosecution failed to disclose, among other things, evidence that David Bass—the man who initially placed Mr. Gaines near the scene of the crime, and who was the impetus for detectives telling the one eyewitness to the murder that his previous identification was incorrect—had himself been arrested shortly before trial by Detective Peter O’Malley, the same detective who testified that he heard Mr. Gaines confess.

The prosecution then let Mr. Gaines languish behind bars for decades despite the fact that, following the trial, Mr. Bass signed an affidavit in which he recanted his testimony and admitted to colluding with police to provide false testimony against Mr. Gaines in exchange for his own freedom. The Commonwealth also learned after Mr. Gaines’s trial that Det. O’Malley, the lead detective on the case, had pressured witnesses to give false information in another high-profile case—the infamous Carol Stuart murder in 1989—and improperly used that coerced false information to obtain search warrants, even though he knew the witnesses had planned to recant their statements. These after-acquired pieces of exculpatory evidence—highly damaging indictments of the credibility of two

key witnesses in Mr. Gaines’s case—cast serious doubt on the fairness of Mr. Gaines’s trial and conviction years earlier.

This Court has held that a prosecutor’s duty to disclose exculpatory evidence under art. 12 of the Massachusetts Declaration of Rights is broader than the duty to disclose under the due process clause of the Fourteenth Amendment. The Court has not yet addressed, however, the specific question presented in this case—whether the prosecution’s duty to disclose exculpatory evidence under art. 12 extends to exculpatory evidence acquired by the Commonwealth postconviction. The Court should clarify that it does because (1) the text of art. 12 places no time limit on a defendant’s right to “produce all proofs that may be favorable to him” and establishes a constitutional obligation to disclose exculpatory evidence *whenever* the Commonwealth learns of it; (2) the decisions in prior cases interpreting art. 12 and other Massachusetts authorities support a broad disclosure obligation; (3) a defendant’s right to disclosure of such evidence under Massachusetts law may be separate from and broader than any analogous right under federal law; and (4) the special ethical responsibilities imposed on prosecutors under the Rules of Professional Conduct already require post-conviction disclosure such that a constitutional obligation adds little burden.

Such an obligation facilitates the accurate resolution of wrongful conviction claims and, when warranted, minimizes the unjust and often-lengthy loss of liberty

resulting from unconstitutional convictions. Furthermore, in order to incentivize prosecutors to disclose exculpatory evidence they learn of post-conviction, the Court should apply the *Tucceri* materiality standard to such evidence when the Commonwealth has suppressed it. Here, this would require disclosure of Det. O'Malley's 1989 misconduct in the Carol Stuart murder investigation and David Bass's 1990 affidavit recanting his trial testimony and affirming that he colluded with the police to avoid prosecution himself. *Infra* pp. 26-29. That evidence materially affected the fairness of Mr. Gaines's trial, especially when considered in conjunction with all of the other exculpatory evidence which the Commonwealth suppressed prior to trial, and its suppression therefore requires reversal of Mr. Gaines's conviction.

ARGUMENT

I. MASSACHUSETTS LAW REQUIRES THE PROSECUTION TO DISCLOSE EXCULPATORY EVIDENCE DISCOVERED AFTER CONVICTION.

The Federal Constitution and the Massachusetts Declaration of Rights require the Commonwealth to disclose material, exculpatory evidence in its possession or control. *Graham v. District Att'y for the Hampden Dist.*, 493 Mass. 348, 361 (2024). This Court recently expounded upon a prosecutor's pre-trial *Brady* obligations in *Graham*. However, *Graham* left open the important question of whether the Commonwealth must disclose exculpatory evidence that comes into its possession post-conviction.

The Court should hold that art. 12 requires that the prosecution disclose material, exculpatory evidence whenever they learn of it, including after conviction. Based on its text, art. 12 promotes a broad duty of disclosure independent of any disclosure requirement that may be required by the due process clause of the 14th Amendment as interpreted by the Supreme Court.¹ This Court's prior interpretations of art. 12 support the position advanced here. Furthermore, any ambiguity regarding whether *Brady* applies post-trial as a matter of federal law is no bar to the Court applying a post-conviction disclosure obligation under Massachusetts law because this Court has a long history of interpreting the Massachusetts Declaration of Rights more broadly than the Supreme Court has interpreted analogous provisions of the Bill of Rights.

¹ The Commonwealth appears to read *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 53 (2009), as having "explicitly declined to extend *Brady* obligations to the post-conviction context." Com. Br. 71. But, as explained in the letter submission from ACLUM, the defendant in *Osborne* did not fault the prosecution for failing to *disclose* evidence—he only sought *access* to evidence that had been disclosed for the purpose of further testing. *Osborne*, 557 U.S. at 60-61, 68 ("Osborne does not claim that Brady controls this case[.]"). Thus, *Osborne* should not be read to have addressed the situation in Mr. Gaines's case, where the prosecution learns of but does not disclose exculpatory evidence after conviction. But even if *Osborne* were read to limit *Brady* under the Fourteenth Amendment, that would be no bar to this Court adopting a different interpretation of the Massachusetts Declaration of Rights, for the reasons described below.

A. *Graham* Affirmed The Prosecution’s Duty To Disclose Exculpatory Evidence Of The Type at Issue Here But Left Open Whether That Duty Continues Post-Conviction.

This Court recently recognized and affirmed the important due process protection under the Federal Constitution and the Massachusetts Declaration of Rights that requires the prosecution to disclose all material, exculpatory evidence to a defendant, even when the defendant did not request this exculpatory material. *Graham*, 493 Mass. at 361. This Court reaffirmed in *Graham* that Massachusetts has a broader duty to disclose than Federal *Brady* requirements. *Id.* at 366, citing *Matter of a Grand Jury Investigation*, 485 Mass. 641, 649 (2020) (“Therefore, in Massachusetts, when we speak of a prosecutor’s *Brady* obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability.”). Moreover, “Massachusetts prosecutors must ‘err on the side of caution’ when deciding whether to disclose.” *Graham*, 493 Mass. at 362, quoting *Matter of a Grand Jury Investigation*, 485 Mass. at 650.

Both the 1990 Bass affidavit and evidence of Detective O’Malley’s 1989 misconduct would clearly be subject to required disclosure if they had been available to the prosecution before Gaines’s trial.

First, as *Graham* recognized, the prosecution’s duty to disclose evidence does not depend on the “ultimate admissibility of the information,” but only on its “tendency toward exculpating a defendant.” *Graham*, 493 Mass. at 362, citing *Matter of a Grand Jury Investigation*, 485 Mass. at 653. Under the *Brady* standard reiterated in *Graham*, 493 Mass. at 361, evidence that Bass made inconsistent statements as to whether Gaines was ever in his apartment on the day of the murder is clearly exculpatory. That is so regardless of whether that evidence was “credible,” or the Commonwealth was required to disclose it post-conviction under Mass. R. Prof. C. 3.8(i). See Com. Br. 38-43, 77-79.²

Second, the prosecution is required to disclose all exculpatory information in the possession of any member of the prosecution team, including police officers. *Graham*, 493 Mass. at 361-362. When a prosecutor, or any member of the prosecution team, learns that a police officer has lied, the prosecutor must disclose the untruthful conduct in *any* criminal case in which that officer prepared a report or may serve as a witness. *Id.* at 362, citing *Matter of a Grand Jury Investigation*, 485 Mass. at 658. See also *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the

² For the same reasons, the evidence of Bass’s arrest two months prior to Mr. Gaines’s trial should have been disclosed, despite the Commonwealth’s objection that the motion judge never assessed whether that evidence would have been admissible at trial. Com. Br. 67.

others acting on the government’s behalf in the case, including the police.”). Here, evidence that Detective O’Malley coerced false testimony and then used that false testimony in search warrants in another case goes directly to his credibility at Mr. Gaines’s trial.

Graham did not, however, address the situation where the prosecution becomes aware of such clearly exculpatory evidence after the defendant’s trial. The Court should clarify in this case that art. 12 dictates that the duty to disclose exculpatory evidence extends post-conviction.

B. This Court Should Clarify That The Massachusetts Constitution Obligates The Prosecution To Disclose Exculpatory Evidence Whenever It Learns Of It.

There is some dispute whether, as a matter of federal due process, the prosecution is obligated to disclose exculpatory evidence that it learns of after the defendant’s conviction. Com. Br. 71-72; ACLUM Letter. See Appellee Br. 62. Amicus’s view is that the Supreme Court has not addressed the question, for the reasons described in ACLUM’s amicus letter. But this Court need not decide that question to adopt MACDL’s position here: Regardless of what rights may exist under federal law, our system of judicial federalism requires this Court to undertake an independent analysis of the meaning of art. 12’s promise that “every subject shall have a right to produce all proofs, that may be favorable to him.” Mass. Decl. Rights art. 12. This Court has emphasized that “state courts are

absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution,” noting that this concept is “[f]undamental to the vigor of our Federal system.” *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 328 (2003), quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995). See also Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115, 135 (2022) (“[F]ederalism’s design cannot be achieved if states just defer or default to the federal government in those areas in which states are expected or required to act, including the enforcement of state constitutional rights.”). Indeed, this Court has previously rejected federal constitutional law governing the materiality standard applicable where the prosecution suppresses exculpatory evidence in the face of a specific defense request, and so has already interpreted art. 12 independently of the analogous due process protections in the Fourteenth Amendment. See *Commonwealth v. Gallarelli*, 399 Mass. 17, 20-21, n.5 (1987).

It is crucial that the Court address the scope of art. 12 in this case, because the prosecution obtained evidence that discredited the Commonwealth’s key witnesses and casts doubt on Mr. Gaines’s guilt after trial, and then suppressed it for over thirty years. A disclosure requirement that extends to the post-conviction

context is consistent with the text of art. 12, this Court’s prior case law interpreting art. 12, and the ethical rules that already apply to prosecutors post-conviction.

1. The Text Of Article 12 Supports A Non-Time-Limited Duty to Disclose Exculpatory Evidence.

Article 12 of the Massachusetts Declaration of Rights specifically provides, in relevant part, that “every subject shall have a right to *produce all proofs, that may be favorable* to him” (emphasis added). Mass. Decl. Rights art. 12. Article 12 thereby affirmatively grants a defendant the specific right to “produce all proofs, that may be favorable to him,” without any limitation on when these “favorable” “proofs” become available. Nothing in art. 12 suggests that this right terminates upon on conviction. Thus, by its very words, art. 12 must be read as conferring a right to “produce *all* proofs that may be favorable,” regardless of when they arise.

As this Court has recognized, that right to “produce all proofs” includes the right to have the prosecution disclose all material, exculpatory evidence in its possession. *Graham*, 493 Mass. at 361, citing Mass. Decl. Rights. art. 12. Accordingly, the text of art. 12 requires the prosecution to disclose all material, exculpatory evidence whenever it comes to their attention, including after a defendant’s conviction.

That is so regardless of whether federal law extends the *Brady* obligation post-conviction. The Fourteenth Amendment due process clause, in which *Brady*

is rooted, in contrast to art. 12, provides more generically that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. That formulation of due process is arguably ambiguous as to what process is due after a defendant has been “deprived of liberty.” But the textual differences between art. 12 and the Fourteenth Amendment due process clause allow for art. 12 to be read more broadly than the Fourteenth Amendment. See Ireland, *Tomorrow’s Issues in State Constitutional Law: How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 Val. U. L. Rev. 405, 412 (2004) (“Textual differences between the State and Federal Constitutions provide another basis for the SJC to depart from analogous Supreme Court decisions.”). See also *Commonwealth v. Amirault*, 424 Mass. 618, 624, 632 (1997) (adopting broader reading of Massachusetts Constitution than Federal, based on different language). This Court may therefore interpret art. 12 on its own terms without reference to any requirement under federal law.

2. Interpreting Article 12 To Include A Post-Conviction Disclosure Requirement Is Consistent With Existing Case Law.

Although this Court has not squarely addressed this issue before, it has already held that a prosecutor’s disclosure obligation under Massachusetts law is broader than the *Brady* obligation under Federal constitutional law and has even

approved of disclosure of exculpatory evidence that arose post-conviction. *Matter of a Grand Jury Investigation*, 485 Mass. at 645, 649. See *Gallarelli*, 399 Mass. at 21 n.5 (declining to follow U.S. Supreme Court precedent on standard of prejudice in cases where prosecutors failed to disclose evidence because Massachusetts law, developed over numerous decisions, is a “more prudent safeguard[] of defendants’ rights”).

In *Matter of a Grand Jury Investigation*, the district attorney learned of police misconduct from immunized grand jury testimony and disclosed that information to defense counsel for “all defendants of cases not yet tried *and cases now disposed* that were tried after the date of the filing of the false police reports, for which the identified officer either prepared a report or is expected to be a witness at trial” (emphasis added). 485 Mass. at 645-646. The officers involved sued the district attorney for disclosing information learned from immunized testimony that the officers argued was not constitutionally required. *Id.* at 642.

This Court approved of the disclosure. In so finding, this Court reasoned that: “Under the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material either to guilt or punishment.” *Matter of a Grand Jury Investigation*, 485 Mass. at 646. After further discussion, the Court explained: “Therefore, in Massachusetts,

when we speak of a prosecutor's *Brady* obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability." *Id.* at 649. *Matter of a Grand Jury Investigation* thus supports a broader interpretation of *Brady*-like obligations under Massachusetts law in the context of post-conviction disclosure. Moreover, in *Graham*, the Court reaffirmed its holdings in *Matter of a Grand Jury Investigation*, confirming that "Massachusetts has [a] broader duty to disclose than Federal *Brady* requirements." *Graham*, 493 Mass. at 366. *See id.* at 365 (recognizing that pending criminal investigations involving and known to members of the prosecution team are subject to automatic disclosure under the federal *Giglio*³ policy, and that Massachusetts "subscribe[s] to an even broader understanding").

At least one other state court has similarly held that its State constitution requires prosecutors to disclose exculpatory evidence post-conviction. *See People v. Sterling*, 787 N.Y.S.2d 846, 852 (N.Y. Co. Ct. 2004), *aff'd*, 37 A.D.3d 1158 (N.Y. App. Div. 2007) (noting that the due process clause of the New York State Constitution "has been interpreted to require prosecutors to disclose exculpatory

³ *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that evidence challenging the credibility of a key prosecution witness is *Brady* evidence).

evidence after conviction”). This Court has often examined other jurisdictions’ jurisprudence when interpreting the Massachusetts Constitution, see *Ireland*, *supra*, at 416-418, and the present case should be no exception.

In any event and consistent with *Matter of a Grand Jury Investigation*, this Court should hold that art. 12 requires prosecutors to disclose exculpatory evidence whenever they learn of it.

3. This Court Has Repeatedly Interpreted Art. 12 Independently From Federal Constitutional Provisions.

Regardless of what obligations may or may not exist as a matter of federal due process, there is no bar to this Court adopting a post-conviction disclosure obligation under Massachusetts law. This Court has often recognized that the Massachusetts Declaration of Rights provides broader protection of individual rights than cognate provisions in the Federal Bill of Rights. For example, the Court has previously held that art. 12 provides more expansive confrontation rights than the Federal constitution, see *Amirault*, 424 Mass. at 631-632 (“So long as an amendment stays within the general bounds drawn by the Supreme Court ... the people of the Commonwealth ... are free to amend our Declaration of Rights to permit the accommodations urged by the prosecution.”); and greater protection against self-incrimination, see *Commonwealth v. Simon*, 456 Mass. 280, 293 (2010) (“[A]rt. 12 provides broader substantive protection against self-incrimination than its Federal counterpart.”); *Commonwealth v. Vasquez*, 482

Mass. 850, 865 n.24 (2019) (“Although the United States Constitution permits the prosecution to introduce the physical fruits of a voluntary but unwarned statement to police, ... we have concluded that the broader protections of art. 12 of the Massachusetts Declaration of Rights bar the use of physical and testimonial fruits derived from an unwarned statement.”). Likewise, this Court has recognized that art. 26 provides greater protection against “cruel or unusual punishment” than the Eighth Amendment ban on “cruel and unusual punishment.” See, e.g., *District Att’y for the Suffolk Dist. v. Watson*, 381 Mass. 648, 671 (1980) (reading art. 26 more broadly than the Eighth Amendment when it abolished the death penalty in Massachusetts); *Diatchenko v. District Att’y for Suffolk District*, 466 Mass. 655, 671 (2013) (providing greater protection under art. 26 than the Eighth Amendment by prohibiting discretionary imposition of sentence of life without parole on juveniles); *Commonwealth v. Mattis*, 493 Mass. 216, 235 (2024) (extending *Diatchenko’s* holding to prohibit imposition of sentence of life without parole on individuals aged eighteen to twenty under art. 26).

This Court has repeatedly emphasized that when interpreting the scope of protection of the rights of Massachusetts citizens under the Declaration of Rights, it is “not bound by Federal decisions which are less restrictive in some aspects than our Declaration of Rights.” *Attorney Gen. v. Colleton*, 387 Mass. 790, 795 (1982). See *Commonwealth v. Mavredakis*, 430 Mass. 848, 858 (2000) (“[O]ur guiding

consideration is whether the Federal rule adequately protects the rights of the citizens of Massachusetts.”). Thus, interpreting art. 12 independently from the Federal Constitution to require the disclosure of exculpatory evidence discovered after conviction is consistent with this Court’s prevailing practice.

4. The Massachusetts Ethical Rules Specific To Prosecutors Also Support A Broader Interpretation Of Article 12.

Finally, requiring prosecutors to disclose exculpatory evidence whenever they learn of it under art. 12 is consistent with the existing “Special Responsibilities of a Prosecutor” in the Massachusetts ethical rules and therefore does not create any new or significant additional burden.

Specifically, this Court has interpreted Mass. R. Prof. C. 3.8(d)⁴ & (i)⁵ as requiring “timely disclosure” of evidence that “tends to negate the guilt of the accused” and establishing the “prosecutor’s obligation to disclose post-conviction exculpatory evidence.”⁶ In *Matter of a Grand Jury Investigation*, 485 Mass. at

⁴ Rule 3.8(d) states that a prosecutor shall “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” Mass. R. Prof. C. 3.8(d).

⁵ Rule 3.8(i) states that “[w]hen, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time” “disclose that evidence to the defendant.” Mass. R. Prof. C. 3.8(i).

⁶ The Massachusetts Rules of Criminal Procedure similarly acknowledges a prosecutor’s “continuing” duty to disclose exculpatory evidence, to the post-

647-648. See *Committee for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 729-732 (2018) (Mass. R. Prof. C. 3.8(i) requires the post-conviction disclosure of exculpatory evidence, and Mass. R. Prof. C. 3.8(d) requires a prosecutor to “make timely disclosure to the defense” of exculpatory evidence). Other State courts have likewise held that their ethical rules require prosecutors to disclose exculpatory evidence post-conviction. See, e.g., *People v. Gonzalez*, 51 Cal.3d 1179, 1261 (1990) (after conviction, prosecutor is bound by ethics of his office to disclose information materially favorable to defense).

More generally, the Supreme Court in *Imbler v. Pachtman* observed that, while due process governs the prosecutor’s pre-trial duty to disclose exculpatory evidence, “after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” 424 U.S. 409, 427 n.25 (1976). Courts have cited *Imbler* for the proposition that ethical rules require the prosecution to disclose evidence *whenever* it acquires it. See, e.g., *Runnigeagle v. Ryan*, 686 F.3d 758, 772 n.6 (9th Cir. 2012) (“[e]thical duties beyond those

conviction context. See Mass. R. Crim. P. 14(a)(4) (“*Continuing Duty*. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.”).

imposed by *Brady* and the Due Process Clause may also compel prosecutors to disclose exculpatory evidence at any time they become aware of it.”).

Given that prosecutors in Massachusetts (and elsewhere) already carry an ethical burden to disclose material exculpatory evidence whenever they acquire it, calling for post-conviction disclosure pursuant to art. 12 would not impose any significant additional burden.

II. THE DEFENDANT SHOULD BE ENTITLED TO A MORE FAVORABLE MATERIALITY STANDARD WHERE THE PROSECUTION SUPPRESSES EXCULPATORY EVIDENCE IT LEARNS ABOUT POST-CONVICTION.

This case should serve as a cautionary tale. Setting aside the fact that the Commonwealth has suppressed exculpatory evidence in its possession since before Mr. Gaines’s 1976 trial, the Commonwealth learned of the exculpatory evidence at issue here in 1989 and 1990. Yet, Mr. Gaines did not learn of it until 2021, more than thirty years later. More shocking perhaps than the fact that the Commonwealth never disclosed that evidence to Mr. Gaines in all that time is that arguably the Commonwealth violated no clearly established constitutional obligation in withholding it. That should never happen again.

Establishing a clear constitutional obligation to turn over exculpatory evidence whenever prosecutors learn of it will increase the likelihood that defendants will actually learn of any exculpatory evidence the prosecution receives. Without an affirmative constitutional obligation imposed upon

prosecutors, however, the burden will lie with defendants to continuously and independently seek out exculpatory evidence—even where the prosecution already knows of it—in the years or decades following conviction. Because there is no right to counsel after the direct appeal of a conviction, *Commonwealth v. Francis*, 485 Mass. 86, 118 (2020), indigent defendants facing years or decades in prison have no obvious means to compel disclosure of exculpatory evidence in the Commonwealth’s possession. Thus, the only way to establish any realistic possibility that defendants will receive exculpatory evidence acquired after trial in a timely manner is to extend prosecutors’ constitutional obligations to disclose exculpatory evidence post-conviction.

In order to incentivize prosecutors to disclose exculpatory evidence they learn of post-conviction, the Court should hold that where the prosecution suppresses such evidence and the defendant learns of it anyway, as in this case, the Court will apply a low materiality bar in the context of a motion for a new trial. In particular, amici request that the Court apply the materiality standard governing pretrial suppression of exculpatory evidence the defendant has specifically requested, which mandates reversal of a conviction and a new trial if “*a substantial basis exists for claiming prejudice from the non-disclosure*” of the exculpatory evidence. *Commonwealth v. Tucceri*, 412 Mass. 401, 412 (1992) (emphasis added). See also *Gallarelli*, 399 Mass. at 20-21, n.5 (declining to adopt

the “one size fits all” standard for materiality announced in *United States v. Bagley*, 473 U.S. 667 (1985), as a matter of state law, and adhering to the test in *United States v. Agurs*, 427 U.S. 97 (1976) for determining the consequences of a prosecutor’s failure to comply with a specific request for exculpatory evidence).

A materiality standard favorable to defendants is warranted because any delay in receiving exculpatory evidence may be prejudicial to the defendant in seeking to investigate further, as it was here. By the time that Mr. Gaines learned of the Bass affidavit, both Mr. Bass and Det. O’Malley had died, limiting the avenues for investigation and the defense’s ability to demonstrate that “justice may not have been done.” Mass. R. Crim. P. 30(b).

Accordingly, the Court should craft a standard that prohibits the Commonwealth from sitting on exculpatory evidence until long after the subject of that evidence are dead and then asserting that the evidence is not “credible” or would not have changed the outcome of the case.

Indeed, applying a defense-favorable materiality standard is particularly important when newly discovered evidence is the basis for a Rule 30(b) motion. In that case, the defendant must ordinarily show that “there [was] a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial.” *Commonwealth v. Grace*, 397 Mass. 303, 306 (1986). But, as a matter of Massachusetts law, that is precisely the same materiality standard that

applies to a *Brady* claim where the defense made only a general request or no request for suppressed exculpatory evidence. See *Tucceri*, 412 Mass. at 413 (citing *Grace*, 397 Mass. at 306 (where the defense has made only a general request or no request at all for suppressed exculpatory evidence, “[t]he judge must determine whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial”)). By contrast, a standard which grants relief where the defense demonstrates that “a substantial basis exists for claiming prejudice from the non-disclosure” of exculpatory evidence suppressed post-conviction ensures that the Commonwealth bears some cost for its suppression and that the Defendant is not prejudiced by the delay. *Id.* at 412.

In this case, the evidence of Det. O’Malley’s 1989 misconduct and David Bass’s 1990 affidavit recanting his trial testimony against Mr. Gaines were material to the fairness of Mr. Gaines’s trial under any standard for the reasons expressed in Mr. Gaines’s appellate brief, especially when considered in conjunction with all of the other exculpatory evidence which the Commonwealth suppressed prior to trial. Mr. Gaines’s conviction therefore must be reversed. The fact that the Commonwealth suppressed this evidence for thirty years—significantly affecting Mr. Gaines’s ability to explore and exploit these important facts—justifies applying a lower materiality standard and strengthens the case for reversal.

CONCLUSION

For these reasons, MACDL respectfully requests that the Court clarify that art. 12 of the Massachusetts Declaration of Rights, which requires the Commonwealth to “produce all proofs, that may be favorable” to the defendant, requires the prosecution to disclose exculpatory evidence whenever it learns of it. Furthermore, MACDL asks the Court to hold that where the Commonwealth violates that right post-conviction, the Defendant’s conviction must be reversed upon a showing that a substantial basis exists for claiming prejudice from the non-disclosure of the exculpatory evidence.

Because Mr. Gaines meets that standard and also because justice may not have been done, this Court should affirm the trial court’s Order granting Mr. Gaines a new trial.

Respectfully submitted,

/s/ Kevin S. Prussia

CHAUNCEY B. WOOD (BBO # 600354)
MASSACHUSETTS ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
55 Union Street, 4th Floor
Boston, MA 02108
(617) 248-1806
cwood@woodnathanson.com

KEVIN S. PRUSSIA (BBO # 666813)
MADELEINE LAUPHEIMER (BBO #
696647)
ASMA S. JABER (BBO # 707322)
KAYLEE Y. DING (BBO # 713017)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Kevin.Prussia@wilmerhale.com
Madeleine.Laupheimer@wilmerhale.com
Asma.Jaber@wilmerhale.com
Kaylee.Ding@wilmerhale.com

*Attorneys for Amicus Curiae
Massachusetts Association of Criminal
Defense Lawyers*

February 16, 2024

**CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. A. P. 17 (c) (9)**

I hereby certify that, to the best of my knowledge, this brief complies with Mass. R. A. P. 17 and 20. The brief is in Times New Roman 14-point font, contains 5,254 non-excluded words, and was prepared using Microsoft Word for Office 365. I have relied on the word count feature of this word processing system in preparing this certificate.

/s/ Kevin S. Prussia

KEVIN S. PRUSSIA

WILMER CUTLER PICKERING

HALE AND DORR LLP

60 State Street

Boston, MA 02109

(617) 526-6000

Kevin.Prussia@wilmerhale.com

February 16, 2024

CERTIFICATE OF SERVICE

I, Kevin S. Prussia, hereby certify, under the penalties of perjury that on February 16, 2024, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, and I served two copies on the following counsel either by first-class mail, pursuant to Mass. R. A. P. 13(c) and 19(d)(1), or by electronic mail with consent of the counsel being served, pursuant to Mass. R. A. P. 13(c):

David A.F. Lewis
Assistant District Attorney
Office of the District Attorney,
Suffolk County
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
david.a.f.lewis@mass.gov

Merritt Schnipper
Schnipper Hennessy PC
25 Bank Row, Suite 2S
Greenfield, MA 01301
(413) 325-8541
mschnipper@schnipperhennessy.com

/s/ Kevin S. Prussia

KEVIN S. PRUSSIA
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Kevin.Prussia@wilmerhale.com