



MASSBAR

A S S O C I A T I O N

Francis V. Kenneally, Esq.
Clerk of the Supreme Judicial Court
For The Commonwealth
John Adams Courthouse
One Pemberton Square, Suite 1400
Boston, MA 02108-1707
RE: No. SJC-13399, Commonwealth v. Elvio Marrero

Amicus Letter of the Massachusetts Bar Association
in Support of Reversal of the Order Denying Defendant a New Trial

Interest of the Massachusetts Bar Association

The Massachusetts Bar Association (“MBA”), is a nonprofit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession, and respect for the law. With the approval of the Association’s President and Chief Legal Counsel, its House of Delegates has determined that the issues raised in this case affect the administration of justice in the Commonwealth and has authorized filing of this brief.

Certifications

Counsel certifies that the MBA has no economic interest in this case and declares that none of the conduct described in Appellate Rule 17 has occurred. Copies of this amicus letter have been served on counsel for all parties.

Issue Addressed and Position Taken

The Court solicited amicus filings on whether the Defendant “is entitled to a new trial on a charge of murder in the first degree on the grounds that the Commonwealth failed to disclose exculpatory evidence in its possession supporting the defendant's alibi.” The MBA submits that the answer should be “Yes.”

Argument

Due process of law requires that the government disclose to a defendant favorable evidence in its possession that could materially aid the defense against pending charges. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Committee for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 731 (2019). The Massachusetts Rules of Criminal Procedure require a prosecutor, as part of automatic discovery, to disclose to a defendant “[a]ny facts of an exculpatory nature.” Mass. R. Crim. P. 14 (a)(1)(A)(iii), as amended, 444 Mass. 1501 (2005).

These discovery obligations apply both to information in the possession of the prosecutor and to information in the possession of persons “sufficiently subject to the prosecutor's control.” *Commonwealth v. Beal*, 429 Mass. 530, 531 (1999),

quoting *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998). That obligation includes “a duty to learn of any [exculpatory] evidence known to the others acting on the government's behalf in the case, including the police.” *Id.*, quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added).

Here, the parties had learned midtrial of an October 14, 1994 airline manifest called a “Passenger Name Record” [PNR]. See Defendant’s Brief, pp. 18-21, 22-28. The PNR indicated that on Oct. 14, a passenger, “E.Marrero,” checked in at J.F.K. Airport at 5:19 am for an American Airlines flight that departed at 7:00 a.m. and flew to the Dominican Republic.¹ The Defendant’s passport had a stamp of entry into the Dominican Republic, also dated Oct. 14th.

This information, the prosecutor testified, was a “gut punch” to the Commonwealth’s case because it directly contradicted prosecution witnesses and “flew in the face of” the prosecution’s version of events (*Id.*). Thus, this is not a case that required “prosecutorial clairvoyance” to understand the critical importance of an inquiry the prosecutor asked her investigators to forgo. See *Commonwealth v. Wilson*, 381 Mass. 90, 109 (1980). And the obligation of “reasonable inquiry,” see Mass R. Crim. Proc. Rule 14 (a)(3), into exculpatory

¹ The victim’s body was discovered on Oct. 16, 1994. The medical examiner testified that the victim could have been killed on Oct. 14 or Oct. 15 (TR3/34-35,88-121,166-167).

information was certainly no more onerous than searching for inculpatory information. See *Commonwealth v. Frith*, 458 Mass. 434, 440 -441(2010).

The prosecutor testified that, after learning of the PNR, she gave her police investigators a “specific instruction” to only search for inculpatory evidence: to “try to determine how” the PNR “could have been falsified” (Hrg2:54). Moreover, the prosecutor further directed the investigators, “if you come up with something, please get back to me,” but was firm that she “did not want a report . . . [and] did not want anything from them in terms of this is what we did,” she “just wanted to – to hear about it if – if there was a result to what I had asked them for” (Hrg2:57). The failure to produce a report meant an inquiry, even limited, could be kept from the Defendant. See Mass. R. Crim. P. 14(a)(1)(A)(vii) (material and relevant police reports constitute mandatory discovery).²

The prosecutor called witnesses to rebut the PNR and argued to the jury that: the PNR had “no connection to this case,” a different “E. Marrero” took the flight, and that the Defendant’s passport should be ignored. When the prosecutor pursued this strategy, she knew or should have known that the police had already uncovered evidence linking the travel agency on the PNR to the travel agency used regularly by the Defendant, and thus linked the PNR and the tickets to the Defendant. The

² The Defendant ultimately received the handwritten notes taken by the investigators, but not until 26 years after the incident.

prosecutor's obligation to disclose this potentially exculpatory evidence was clear and the prosecutor's purposeful effort to suppress any further exculpatory information was improper.

A prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. *Kyles*, 514 U.S. at 437-438. She should not have just looked for inculpatory evidence, but investigated whether the Defendant was on that flight to the Dominican Republic. That is what the pursuit of justice mandates. The obligation to make a reasonable inquiry must include, as it should have here, the pursuit of evidence favorable to Defendant's alibi. See Mass. R. Crim. P. 14(b)(1)(C)-(D) (rules mandating disclosure and continuing obligation of disclosure specific to alibi evidence).

The current Massachusetts Rules of Professional Conduct similarly make clear that a prosecutor's ethical obligations also require a '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.'" *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 647-648 (2020), citing Mass. R. Prof. C. 3.8(d), as appearing in 473 Mass. 1301 (2016); see also Mass. R. Prof. C. 3.4(a), as appearing in 471 Mass. 1425 (2015) (lawyer prohibited from concealing evidence or unlawfully obstructing another party's access to evidence); Mass R. Prof. C. 3.8 (g) (not avoid pursuit of evidence because the prosecutor believes it will damage

the prosecution's case or aid the accused); Mass. R. Prof. C. 3.8(i) (prosecutor's obligation to disclose postconviction exculpatory evidence).

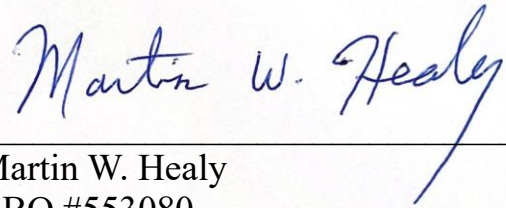
This Court has admonished prosecutors not to “withhold exculpatory information if they thought they could do so without crossing the line into a violation of the defendant's right to a fair trial.” *In the Matter of a Grand Jury Investigation*, 485 Mass.at 649. It has recognized that misconduct by prosecutors with respect to disclosure of exculpatory evidence contributes to wrongful convictions, delays and disrupts the fair administration of justice, and soils the reputation of lawyers among the general public. *In the Matter of Foster*, SJC-13360 (August 31, 2023) (slip op. pp.49-50). The Massachusetts Bar Association has worked diligently to prevent wrongful convictions, and believes that prosecutors have a special obligation in this regard. See the Report of the Massachusetts Conviction Integrity Working Group, “A Guide to Best Practices for Conviction Integrity Programs” at 13 (2021). The interests of the public are best served when lawyers comport themselves according to the high standards demanded of our profession.

Conclusion

This record reveals a flagrant disregard of prosecutorial obligations with respect to exculpatory evidence bearing on a critical issue in the case. Under the circumstances, a new trial is warranted in the interests of justice.

Date; September 15, 2023


Respectfully submitted,



Martin W. Healy
BBO #553080
Chief Legal Counsel
And Chief Operating Officer
Massachusetts Bar Association
20 West Street
Boston, MA 02111
(617) 338-0500



Thomas J. Carey, Jr.
BBO #073680
Amicus Committee Chair
Carey Law Office
1131 Main Street
Hingham MA 02043
(781) 740-1234
tom@tjcarey-appellatelaw.com



Donna Jalbert Patalano
BBO #651223
Criminal Justice Section Council
Law Office of Donna Patalano
60 Church Street
Winchester, MA 01890
(781) 777-3064
Donna.Patalano@gmail.com