

MASSACHUSETTS LAWYERS WEEKLY

DA's use, handling of informants questioned

By: Brandon Gee April 9, 2015



Problems with a cooperating witness may force Plymouth County prosecutors to abandon murder charges against Michael Goncalves, pictured at a November hearing in Brockton Superior Court. Photo: Marc Vasconcellos/The Enterprise

One was dubbed the "Cape Verdean Whitey Bulger."

Another was allowed to testify for the government after threatening to kill a state trooper, a prosecutor and a victim-witness advocate; police even kept his gun safe for him while he was in the courthouse.

A third had his bail lowered and paid by a state trooper — although both would deny the arrangement after the fact.

Examples such as those — gleaned from court records and numerous interviews with defense lawyers and prosecutors — have made criminal informants and cooperating witnesses a flashpoint in Plymouth County, where critics say the District

Attorney's Office and Massachusetts State Police are too cavalier in their use and handling of high-risk and/or discredited sources to build and bring their cases.

Many current challenges facing the Plymouth DA's Office — including accusations of retaliation; the recent unconfirmed departure of nearly 20 prosecutors; and concerns that the office may have withheld exculpatory evidence — can be traced to an internal rift over informants and cooperating witnesses.

Boiling point

When former Plymouth County Assistant District Attorney John E. Bradley Jr. sued DA Timothy J. Cruz and his top deputies in 2013 — alleging he was fired in retaliation for not making political contributions to Cruz — his complaint claimed that he began to raise concerns "regarding certain policies and practices ... with respect to several high-risk informants/witnesses with criminal histories" in late 2010.

In one instance, Bradley balked at the use of funds from the DA's Office to bail out an informant who had been charged with a felony. He regarded it as a "possible misuse of taxpayer funds" that carried "ethical and public safety risks," according to his U.S. District Court complaint.

While the complaint does not specify the incident, Lawyers Weekly has confirmed that it is in reference to a well-documented incident in November 2010, when Massachusetts State Police Trooper Brian Galvin came to the aid of Kashin Nembhard, who was arrested for possession with intent to distribute heroin after leading police on a high-speed chase in Bristol County.

Numerous court filings detail the encounter. Nembhard told police officers in Norton that he could provide information on Brockton murders. As a result, Galvin came to Attleboro District Court, negotiated Nembhard's bail down from \$5,000 to either \$300 or \$350 (the accounts vary on that point), and bailed him out with funds from the Plymouth DA's Office. Nembhard ultimately cooperated with prosecutors on several cases and received favorable sentences on both his Bristol County charges and subsequent federal gun charges, according to recent Supreme Judicial Court briefs in a related case.

The arrangement didn't sit well with some prosecutors in Plymouth County. In addition to Bradley, they included former ADAs Daniel J. Hourihan and Karen H. O'Sullivan, who thought the bail arrangement hadn't been relayed to ADAs in a timely fashion, according to a 2012 memo by Plymouth ADA Christine M. Kiggen.

The issue reached a head at a March 22, 2012, meeting called by Plymouth First ADA Frank J. Middleton Jr. In a memo, Middleton wrote that the meeting's purpose was "to ensure that anyone with [Nembhard] as a potential

witness had all information regarding any promises, rewards and inducements made.”

Specifically, the effort was to ensure everyone understood Nembhard's bail had been paid by Galvin using funds from the DA's Office and that this was to be relayed to defense attorneys in cases in which Nembhard was a witness, according to the memos written by Middleton, Kiggen and other participants, which also state that the meeting devolved into a heated argument between Middleton and O'Sullivan.

Despite the effort to make the bail arrangement clear, other records reveal both Nembhard and Galvin would deny it later that year.

Nembhard, testifying in the murder case *Commonwealth v. Webb*, insisted he had used his own money to bail himself out, according to a transcript, which forced Kiggen to stipulate otherwise. A few months later, Kiggen, while questioning Galvin before a grand jury, asked if Nembhard had been offered any promises, awards and inducements.

“Only that the information would be passed along to the District Attorney's Office for consideration,” Galvin replied, according to a 2014 affidavit filed by Brockton defense lawyer David P. Sorrenti in furtherance of a motion to dismiss an unrelated perjury indictment that hinged on Galvin's credibility.

Exodus

In an interview with Lawyers Weekly, former Plymouth ADA Hourihan said the situation underscores that the Plymouth DA's Office is a “dysfunctional, screwed-up mess.”

Cruz thinks the opposite is true.

“I think morale is great,” he said, declining to comment in any detail on reports that 19 ADAs have left his office since November 2012, including 13 since last July. Cruz would say only that high turnover is common among state prosecutors; a spokeswoman for the office would neither confirm nor deny the number of departures.

According to Hourihan, though, there is a severe lack of communication between prosecutors and their supervisors and a precarious relationship with police that has been allowed to “fester.”

“Middleton empowered the State Police Detective Unit to have too much influence with prosecutors when it came to how to handle homicide investigations and cooperating witnesses — telling a DA to put a cooperating witness before a grand jury in a homicide investigation without disclosing where they found that witness, how they got statements, or full disclosure of promises, awards and inducements offered to that witness before they were asked to testify,” said Hourihan, now a Bristol ADA. “When you raise questions, you are bullied and disciplined for it.”

Former Plymouth ADA Timothy A. Shyne agrees. In an interview, he said that while he knew Nembhard was a witness in one of his own cases, he did not know that he was testifying in several others until the March 2012 meeting. But, like Hourihan, Shyne also said it wasn't uncommon to be left in the dark because “the office had a unique way of dealing with the state police.”

Shyne, who is now in private practice, said his understanding is that, in most Massachusetts counties, the DAs have formal authority over homicide investigations. The website of the Suffolk County DA's Office, for example, explicitly states that it is “obligated under statute to oversee all death investigations.”

“I did not get the impression that that was the way things worked in Plymouth County,” Shyne said. “With regard to that atmosphere, there were at times situations where you didn't have reports or other information about witnesses. You wouldn't necessarily know that the state police were using the same witness in another case, or what their dealings were, unless you asked. And if you didn't know to ask, you wouldn't ask.”

While he praised the work of the state police and said the arrangement typically worked well, the Nembhard situation raised red flags, he said.

“The concern was, if we didn't know about this, is there anything else?” Shyne said. “We're the guys who have to show up in the courtroom. We're the ones who are ultimately responsible.”

Cruz denied that there are problems with the way his office handles informants and cooperating witnesses. Multiple interview requests to the state police went unanswered.

The 'Cape Verdean Whitey'

Defense lawyers say the situation negatively affects their work, too.

Daniel S. Solomon of Boston's Blank & Solomon said he can sense that Plymouth County prosecutors aren't fully informed because they often claim to have only just discovered facts about their witnesses at the 11th hour.

"These things happen; it just seems to happen there a lot," he said. "I think they take to some degree their marching orders from [the state police], which is not smart because they have their own agenda and aren't bound by the same ethical rules as lawyers. ... I can't know objectively what is true and what isn't true. That's the zeitgeist of that office. And that's why they've had a lot of top people leave."

While he believes the inappropriate use of immunized witnesses is a statewide "epidemic," Brockton defense lawyer Joseph F. Krowski Jr. said Plymouth County has some "infamous ones ... that no objective person would believe is reliable."

Cooperating witnesses "will say anything to anyone if it suits their needs," he said. "It's unfortunate. There are a lot of exceptional prosecutors in Plymouth County who have a ton of integrity, but the state police and DA have to be much more selective about witnesses they use and cases they call."

As an example, Krowski cites someone he and other defense lawyers regard as one of the most notorious Plymouth County criminal informants in recent memory: Olivio Leverone.

After getting arrested on firearms charges in the summer of 2010, Leverone agreed to provide information on eight homicides that occurred between 2006 and 2010 in exchange for dismissal of his pending criminal charges and \$2,500 in relocation expenses, according to an Aug. 30, 2012, decision by Superior Court Judge Jeffrey A. Locke in the murder case *Commonwealth v. Barros*.

"He was the guy, apparently, who the *entire* Cape Verdean community in Brockton goes to, to talk about homicides," Solomon said sarcastically, referring to the prominent ethnic group in Plymouth County of which Leverone is a member.

Shyne was among the prosecutors who made use of Leverone. In 2011, Leverone's testimony helped Shyne convince Locke to grant a "motion to admit statements of the unavailable witness at trial on the basis of defendant's forfeiture by wrongdoing." Based in part on Leverone's testimony, Locke determined that defendant Michael Barros had at least acquiesced to having associates murder the government's main witness against him.

But Locke also found that Leverone's testimony was "at best, vague and at times confused" and "contradictory." Locke's decision also noted that, after Leverone was himself shot in September 2011, "he recanted an earlier statement that he gave police regarding the identity of his assailants."

Shyne said Leverone ultimately developed "a reputation in Brockton for being the Cape Verdean Whitey Bulger because he was providing information, but also lying, to state police."

His run as an informant and cooperating witness ended in 2012, when he was arrested on gun and assault-to-murder charges and held on \$250,000 bail. Leverone ultimately was acquitted on the assault-to-murder charge, but convicted on other charges including assault with a dangerous weapon and witness intimidation.

Checking any guns, sir?

Due to problems with another repeat cooperating witness, Nilton DaRosa, the Plymouth DA's Office recently "nolle prossed" the case of murder defendant Joao Fernandes, and is considering doing the same for co-defendant Michael Goncalves, ADA Thomas J. Flanagan Jr. told Superior Court Judge Cornelius J. Moriarty II at a March 30 hearing.

DaRosa, who had been relocated out of state, was brought back to Massachusetts to testify against the two even though, according to court filings, he told a state trooper that he feared for his family and even threatened to kill

the trooper, a prosecutor and a victim-witness advocate in Plymouth County if they tried to force him to testify. DaRosa later backed off the threat, according to the trooper's affidavit.

Once he was in Massachusetts, it was discovered that DaRosa was carrying a gun, according to police reports. DaRosa claimed he was licensed and that "he was armed while working security," according to a police report.

On multiple occasions in January, according to the police reports, the officers who escorted him from a hotel to the Goncalves trial each morning would take the gun from DaRosa before he entered the courthouse, put it in a locked box, and return it to him at the end of the day.

DaRosa proved to be a combative witness who provided little help to the prosecution, according to sources on both sides of the case. Jan. 16 was the last day that DaRosa was required to appear in court, according to police reports. The jury deadlocked and a mistrial was declared Feb. 6.

It wasn't until after the mistrial that police, at the request of ADA Flanagan, began investigating DaRosa's claims about the firearm, according to a report by Brockton Police Department Sgt. George F. Khoury. On March 3, DaRosa's employer told police that he did not work as an "armed" guard, according to the report. Online records indicated DaRosa was licensed to carry a firearm only in the state of California.

A complaint and arrest warrant for the unlawful carrying of a firearm issued on March 13, and DaRosa was arrested by local police in his new home state. Once in Massachusetts, DaRosa was transferred to the Bridgewater State Hospital for a competency evaluation.

Goncalves' attorney, Rosemary C. Scapicchio of Boston, finds the sequence of events suspicious and has filed a motion to obtain more information about the circumstances of DaRosa's arrest, believing it may signal selective prosecution.

"They didn't choose to charge him until after he tanked on them," she said.

According to a spokeswoman for the Plymouth DA's Office, however, Flanagan did not learn that DaRosa had a gun with him until Feb. 11, and he immediately instructed police to investigate whether he possessed it legally.

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