***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

**To:** CAFL Appellate Panel Support Unit

**From:** [Law student KH]

**Re:** Denial of discovery or late turnover of discover as due process violation

**Date:** March 2020

1. **Questions Presented**
2. In Massachusetts, can a parent raise a colorable due process argument based on lack of discovery or delayed and/or incomplete turnover of the Department’s file?
3. Do other states recognize a due process violation when the Department fails to produce its file?
4. Does due process require a specific method of discovery?
5. What must trial counsel do in order to preserve the issue for appeal?
6. Can counsel argue that failure to turn over discover or late turnover of discovery amounts to a *Brady* violation?
7. **Brief Answers**
8. Massachusetts has not adopted a blanket rule as to whether denial of a discovery request, the Department’s violation of a discovery rule, or the Department’s late turnover of discovery is sufficiently prejudicial to warrant a reversal and remand. However, the Massachusetts SJC has held that when a party requests a continuance in a civil confinement hearing or a medical treatment hearing based on the failure to provide counsel with the necessary documents the grant of such a continuance is mandatory where a denial is reasonably likely to prejudice a person’s ability to prepare a meaningful defense.
9. Other states have suggested that a failure by the Department to produce its file could amount to a due process violation by denying the party either (a) an opportunity to rebut the Department’s allegations, or (b) the effective assistance of counsel.
10. In California, no rule, statute, or constitutional principle requires a child welfare agency to provide discovery at no cost; but if a circumstance arises where an indigent parent’s meaningful access to judicial process is impaired by discovery requirements, the California court does have authority to fix the time, place, and manner of discovery.
11. To argue on appeal that a parent was denied due process due to failures in discovery, trial counsel must preserve the issue. Trial counsel must (a) object on the basis of lack of opportunity to rebut adverse allegations and lack of effective assistance of counsel; (b) explain the prejudice created by the lack of discovery; (c) move for a continuance; and (d) utilize any alternative remedy provided by the court while still objecting based on the remedy’s inadequacy.
12. Appellate counsel may be able to argue that the failure to produce, the late turnover, or the incomplete production of discovery constitutes a due process violation under *Brady v. Maryland*.
13. **Discussion**
14. **The lack of discovery or delayed and/or incomplete turnover of the Department’s file may constitute a due process violation.**
15. Massachusetts

Removal of a child implicates constitutional rights of the highest order. *Care and Protection of Zita*, 455 Mass. 272, 284 (2009). Parents have a fundamental Fourteenth Amendment liberty interest in maintaining custody of their children*. See Care and Protection of Sophie*, 449 Mass. 100, 104 (2007); *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). Parents also have a fundamental liberty interest in maintaining a familial relationship with their children. *Ouilloin v. Walcott,* 434 U.S. 246, 255 (1978). When “there is a deprivation of a constitutionally protected . . . interest,” a party has a right to require that “the government act in a fair manner.” *Doe v. Attorney General,* 426 Mass. 136, 140 (1997). When a state seeks to terminate parental rights, it must do so in a manner that meets the requirements of the due process clause. *Santosky v. Kramer,* 455 U.S. 745, 752-54 (1982). Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Department of Pub. Welfare v. J.K.B*., 379 Mass. 1, 4 (1979). A meaningful opportunity to be heard requires the assistance of counsel. *See* *id*. It also requires that parents receive an opportunity to effectively rebut adverse allegations concerning child-rearing capabilities. *Brantley v. Hampden Div. of the Probate and Family Ct. Dept.*, 457 Mass. 172, 187 n. 21 (2010) (noting that the admission of significant hearsay may violate due process because it impedes the litigant’s ability to rebut the allegations against them); *Duro v. Duro*, 392 Mass. 574, 580 (1984) (holding that in order to effectively rebut adverse allegations, litigants must be provided with records of witnesses’ exact previous statements).

Massachusetts Juvenile Courts have rules that govern discovery in, for example, termination of parental rights cases. *See* MA JUV CT Rule 13. Rule 13(a) states that in any case in which “the Department or a licensed placement agency is or becomes a party, the Department or the licensed placement agency shall produce for each party a copy of its entire social services file, including reports made pursuant to M.G.L.A. c. 119, §§ 51A and 51B, within sixty days from the date the case is commenced, or within sixty days from the date the Department or the licensed placement agency becomes a party, whichever is later.” *Id*.

When producing a copy of its social services file in compliance with this rule, the Department or the licensed placement agency “may withhold privileged material and work product of its attorney, and may withhold the names, and other reasonable, identifying data, of past or present foster parents . . . or of an adoptive parent or prospective adoptive parent . . . or the reporter on reports made pursuant to G.L.A. c. 119, § 51A.” *Id.* However, the attorney for the Department or the licensed placement “shall produce with the copy of the file a list of materials and information withheld”; the attorney for the Department or the licensed placement agency “shall have an ongoing duty to produce for each other party on a timely basis any additions to the social services file made after initial production” required under this Rule 13. *Id.;*110 C.M.R. 12.09(1)(d); S*ee also* 110 C.M.R. 5.13(1)(e) (describing records relating to children, birth parents, and foster/adoptive parent applicants as “confidential”).

The lack, or late turnover, of discovery may deprive a parent of the effective assistance of counsel, itself a due process violation. *See In re Care and Protection of Stephen,* 401 Mass. 144, 149-50 (1987). A parent’s right to counsel in a state initiated proceeding to terminate parental rights includes, for instance, counsel being permitted to adequately investigate and contrast the suitability of the Department’s adoption plan with their own proposed plan. *Id.* (“right to counsel is of little value unless there is an expectation that counsel’s assistance will be effective”). Without access to the Department’s records, parents cannot prepare an effective cross examination of the Department’s witnesses or meaningfully contrast the Department’s plan with their own. *See Commonwealth v. Baran,* 74 Mass. App. Ct. 256, 276 (2009) (ineffective assistance of counsel is established where attorney’s failure to retain an expert resulted in counsel not knowing how to cross examine the Commonwealth’s witness effectively). Thus, limiting a parent’s right to challenge the propriety of the Department’s adoption plan infringes on his or her right to due process. *See Adoption of Mary,* 414 Mass. 705 (1993) (parents have due process right to rebut evidence against them).

In a care and protection case that ultimately resulted in termination of parental rights, the court took the opportunity to comment on the issue raised by the father regarding the right of a parent in a care and protection proceeding to take the deposition of a person likely to be called as a witness at trial. *Adoption of Paula,* 420 Mass. 716, 732 (1995). Prior to the hearing on the merits, the father filed a motion for leave to take depositions of medical professionals who evaluated his child and stated that the pretrial discovery he sought would be essential to his ability to cross examine the expert witnesses at trial; his motion was denied. *Id.* On appeal, the father argued that his due process right to a fundamentally fair trial was violated because the application of the rule allowing deposition of a prospective witness only by order of the court prevented him from adequately anticipating admissible evidence that was adverse to him. *Id.* at 733. In contrast, the court noted that a rule permitting the taking of depositions as of right would inevitably complicate the procedure, increase expenses, and engender delays without diminishing the likelihood that a parent will be deprived erroneously of his or her child’s custody. *Id.; see also Care and Protection of Zelda,* 26 Mass. App. Ct. 869, 872 (1989). Hence, the court determined that a parent’s right to a fair trial is adequately protected by existing procedural safeguard, such as liberal pretrial access to documents. *Id.* at 734. Therefore, the right to due process does not, in the setting of a care and protection case, require a right to unlimited pretrial depositions. *Id.*

In *Adoption of Iris,* while the court reversed on other grounds, the court reprimanded the Department for failure to provide timely discovery. *Adoption of Iris,* 43 Mass. App. Ct. 95, 100 n. 8 (1997).Here, the court adjudicated the daughter in need of care and protection, terminated parental rights, and committed the child to the custody of the Department until the adoption plan could be effectuated. *Id.* at 95. However, on appeal the court concluded that the inadequate evidence offered by the Department and the judge’s subsidiary findings of fact were not sufficient support the conclusion of unfitness. *Id.* at 96. While the reversal dealt with the unfitness determination, the court also made note of issues to potentially address in the event of retrial—one being that the Department was “inexplicably dilatory in meeting its discovery obligations and apparently only belatedly provided the parents two years of file materials, and only at trial disclosed a list of its exhibits and witnesses.” *Id.* at 100 n. 8.

Massachusetts has also addressed the potential due process implications of lack of or delay in discovery and counsel’s ability to prepare a meaningful defense in civil commitment hearings. *See In the Matter of N.L.,* 476 Mass. 632 (2017). In this context, the SJC held that where a person or his or her counsel requests a continuance for a civil commitment hearing, the grant of the continuance is mandatory where a denial is reasonably likely to prejudice a person’s ability to prepare a meaningful defense. *Id.* Mass. Gen. Law c. 123 Section 7 provides that a hearing on this petition must be considered within five days of its filing, unless a delay is requested by the person or his counsel. *Id.* at 634; *G.L. c. 123 §7(c)*. Section 5 pertains to a person’s rights at civil commitment hearings and includes the right to counsel and the right to present independent testimony at the hearing. *Id.* at 635; *G.L. c. 123 §5*. An indigent person must be appointed counsel and the court may provide such a person with an independent medical examination. *Id.; G.L. c. 123 §5.* Said person is allowed no less than two days after the appearance of counsel to prepare the case, and, after this minimum, period the hearing shall be conducted. *Id.; G.L. c. 123 §5.*

When a request for a delay is made by the subject of a civil commitment hearing or his or her counsel, the general rule no longer applies and the hearing may commence beyond the statutory five-day window. *Id.* at 635. The length of the continuance is within the discretion of the judge; however, the length of the delay should be only as long as is reasonably necessary to protect the individual’s right to prepare a meaningful defense. *Id.* at 637. Where a judge denies the requested continuance, he or she must state with particularity the reasons why the denial is not reasonably likely to prejudice a person’s ability to prepare a meaningful defense on the record. *Id.* In this context, the court noted that the infringement of a person’s liberty interest resulting from involuntary commitment for six months is massive and should only be undertaken after the person has the opportunity to prepare a meaningful defense. *Id.*

1. Other States

In Ohio, an Appellate court found the lack of discovery may impede a parent’s opportunity to effectively rebut adverse allegations, and thereby amount to a due process violation. *See* *In re B.D.*, 2009-Ohio-2299, ¶¶ 66, 68 (Ohio Ct. App., 11th Dist. 2009) (holding that “the trial court’s denial of counsels’ motions for continuance [to review records turned over by agency at “last minute”] acted to unreasonably and arbitrarily deprive appellants' of their ability to fully protect their essential rights.”). In *In re B.D.,* the court reversed an order granting permanent custody to the Department because of the Department’s failure to turn over documents in a timely manner. *Id.* Prior to trial, counsel filed a timely discovery demand seeking a subpoena for documents when the Department failed to turn them over; when the Department produced the documents only one day before trial, counsel for the parents moved for a continuance. *Id.* at ¶ 9, 12. Counsel argued that he had insufficient time to properly prepare for trial, but the judge denied the continuance and ordered a two-hour recess, directing the parents’ counsel to review the documents during that time. *Id.* ¶ 12, 13-14. Counsel again objected to the recommencement and stated that despite the “solution” offered by the court the clients were prejudiced. *Id.* at ¶ 17. Counsel was only able to review one-third of the documents provided and, as counsel argued, this rendered them insufficiently familiar “with the records for purposes of conducting full and meaningful cross-examination of [Department] witnesses.” *Id.* at ¶ 52.

On appeal, the Court determined that trial counsel had done everything in their power to provide adequate representation to their clients. *Id.* at ¶ 59. The Court accepted the appellants’ argument that “discovery of (and thus familiarity with) the remaining documents was imperative to the fairness and, perhaps more significantly, the constitutionality of the proceedings.” *Id.* at ¶ 63. According to the court, the limited opportunity afforded counsel to review the documents was undisputedly inadequate, that “counsel’s review of the evidence was sine qua non to satisfy due process,” and that “the trial court’s denial of the continuance acted to unreasonably and arbitrarily deprive appellants of their ability to fully protect their essential rights.” *Id.* at ¶ 66-67

Additionally, a Washington Appellate court ruled that the late appointment of counsel in a termination case rendered his assistance ineffective and specifically noted the lack of adequate opportunity for discovery. *In re the Dependency of V.R.R*., 134 Wash. App. 573, 585 (Wash. App. Ct., 2006). Counsel for the father had been appointed the day before the trial and at trial counsel objected to the lack of discovery and moved for a continuance, explaining the prejudice created by his inability to effectively assist his client. *Id.* at 579-80. In finding that the father’s counsel was unable to provide effective assistance, the court noted that counsel “received no discovery, had no opportunity to review the documents identified by DSHS[[1]](#footnote-1) in the Notice of Intent to Admit, and had no opportunity to interview the witnesses listed by DSHS or to obtain an independent evaluation of [the child].” *Id.* at 585. Thus, the court reversed the termination decree and remanded for a new trial. *Id.* at 586.

An Alaska case addresses the right to discovery before a 72-hour medication hearing. *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168 (Alaska 2009). Under Alaska law, a hearing is required on the patient's capacity to give or withhold informed consent for anti-psychotic medication within seventy-two hours of the petition. *Id*. at 174. In *Bigley*, the patient argued that his counsel did not receive his medical chart from the hospital prior to the medication hearing, and that this failure deprived him of due process. The Alaska Supreme Court agreed. According to the court, the patient’s counsel should have received the medical chart well before the hearing in order to have sufficient time to prepare for the proceeding: “Providing [counsel] with the medical chart on the day of the hearing was not sufficient to satisfy due process.” *Id.* at 184. Thus, the patient must have access to his medical and psychiatric records once a petition to involuntarily medicate the patient is filed.” *Id*.

1. **Due process does not necessarily require a specific method of discovery.**

In California, no court rule, statute, or constitutional principle requires a child welfare agency to provide discovery at no cost. *In re William M.W.,* 43 Cal. App. 5th 573, 579 (2019). However, should a circumstance arise where an indigent parent’s meaningful access to the judicial process is impaired by discovery requirements, the court has the authority to fix the time, place, and manner of discovery upon such terms and conditions as will serve the ends of justice and the purposes of the court. *Id.* In *In re William M.W.,* parents’ counsel filed a motion to compel discovery, seeking the court to order the copies of relevant discovery be provided by the welfare agency to both parents at no cost to them. *Id.* at 780. The child welfare agency refused to comply with the parents’ request, arguing that it had fulfilled its discovery obligations by making the discovery available to the parents under their usual protocol. *Id.* Specifically, the parents’ attorney had been notified that the discovery materials would be ready for review on a certain date and that if counsel wanted to duplicate the documents that the welfare agency was willing to provide copies at a rate of ten cents per page. *Id.* At the hearing on the parents’ discovery motion, parents’ counsel asserted that free discovery was required under constitutional principles, such as due process; however, the juvenile court judge denied the motion. *Id.* at 581.

On appeal, the parents attempted to establish a constitutional obligation not around access to pertinent records but around their preferred method of discovery, which the court rejected. *Id.* at 587. The court noted that in the civil context due process requires only that the procedures adopted comport with fundamental principles of fairness and decency. *Id.* at 588. Hence, the court held that the due process clause does not guarantee any particular form or method of procedure. *Id.* To support this holding, the court mentioned that several other courts in California have also concluded that simply making discovery available is enough. *Id.* at 589; *see also Joe Z. v. Superior Court,* 3 Cal.3d 797, 803 (1970) (upholding the right of a juvenile ward represented by the public defender to inspect and copy his pretrial statements but rejecting the request for scanned or emailed documents free of charge). Therefore, the court concluded that the open file procedure adopted by the welfare agency comported with due process as a general matter. *Id.*

1. **In order to preserve the issue, trial counsel must (a) object and raise the due process issue; (b) demonstrate prejudice; (c) move for a continuance; and (d) utilize all possible means provided by the court to mitigate the prejudice.**

In Massachusetts, due process challenges to the lack of discovery, or late turnover of discovery, are often unsuccessful when trial counsel fails to preserve the issue for appeal. In order to preserve the issue, the trial attorney must object on the basis of denial of the right to due process, explain the prejudice created by the lack of discovery, move for a continuance, and utilize other means offered by the court to mitigate the prejudice while still objecting based on its insufficiency.

1. Trial counsel must object to the lack of discovery and raise the due process issue.

To preserve the issue, trial counsel must object to the lack of discovery and raise due process. *See Fidelity Management & Research Co. v. Ostrander*, 40 Mass. App. Ct. 195, 201 (1996) (stating that the party’s failure to assert such a claim at the hearing on the motion for summary judgment hinders the party’s argument that she was denied right to discovery).Specifically, counsel must argue that the lack of discovery impacts the client’s ability to rebut the Department’s allegations and to receive the effective assistance of counsel. *E.g., In re Care and Protection of Stephen,* 401 Mass at 149. However, as a general rule, appellate courts will not consider a discovery issue raised in the first instance on appeal absent exceptional circumstances. *See* *Fidelity Management & Research Co. v. Ostrander*, 40 Mass. App. Ct. 195, 201 (1996) (declining to consider the argument of denial of right to discovery).

However, sometimes an objection is not enough. If the court responds to an objection by asking counsel to further explain the discovery request, or the legal basis for the discovery request, counsel must comply. *See Adoption of Lenore,* 55 Mass. App. Ct. 275, 277 n.2 (2002). In *Adoption of Lenore*, the Department failed to turn over part of its file. *Id.* When the trial court was informed of this failure, it held a hearing to determine if the documents were needed. *Id.* At the end of the hearing, the judge informed counsel that, if he wanted the documents, he could submit a proposed order that included legal authority demonstrating his right to them. *Id*. Counsel failed to do so; thus, the Appeals Court ruled that, due to this failure, the issue had not been preserved for appellate review. *Id*.

1. Counsel must explain how the lack of discovery or late turnover of discovery prejudices the client.

Trial counsel must explain the prejudice caused by the lack of discovery or late turnover of discovery. *See Adoption of Daniel,* 58 Mass. App. Ct. 195, 204-05 (2003). Counsel may demonstrate prejudice by arguing that he or she had insufficient time to adequately prepare. *See id.* However, if there was some time for counsel to prepare, the court may find no prejudice. *Id.* For example, in *Adoption of Daniel*, the mother claimed that she was ambushed by the Department social worker’s testimony and did not have adequate time to prepare to rebut it. *Id.* at 204. The Appeals Court rejected this argument because the social worker’s testimony was announced one month before it was actually given; hence, the mother’s counsel had “ample time” to prepare for cross-examination. *Id.* The court further noted that even if there had been a discovery concern, the social worker’s testimony was limited to a discussion of the foster parents. *Id.* at 204-05. Because Mother was not prevented from defending against any allegations of unfitness, she suffered no prejudice. *Id.* Similarly, in *Care and Protection of Amalie,* the Department failed to provide Mother with exculpatory documents. *Care and Protection of Amalie,* 69 Mass. App. Ct. 813, 821 (2007). However, the documents were eventually produced and were considered by the judge in his decision. *Id.* Therefore, the court held that the late disclosure caused no prejudice. *Id.*

1. Counsel must request a continuance.

Trial counsel must also seek a continuance. In *Adoption of Daniel*, the Department called asurprise witness at trial and did not give the mother any discovery about that witness. 58 Mass. App. Ct. at 204. The mother claimed on appeal that she had been “ambushed” by that witness’s testimony. *Id.* However, the Appeals Court rejected the mother’s argument because her counsel did not request a continuance. *Id.; see also Commonwealth v. Giontzis*, 47 Mass. App. Ct. 450, 460 (1999) (affirming conviction despite the prosecution’s surprise witness, because any prejudice to the defendant “could have been mitigated by a request for a continuance”).

1. If the court designs an alternative method to ameliorate the parent’s need for discovery, or gives extra time to review late-produced discovery, counsel must take advantage of it but should still object to the remedy as inadequate.

If the trial court provides the litigant with an opportunity to mitigate the discovery issue, trial counsel must utilize it and also object in order to preserve the issue. *See In re Alison M.,* 15 A.3d 194, 218 (Conn. App. Ct. 2011). In *In re Alison M.,* the Department failed to turn over any discovery prior to trial. *Id.* at 207. At trial, counsel moved for a continuance, which the court denied. *Id.* Instead, the court offered counsel the opportunity to recall any witnesses in two days and to schedule an additional day of testimony if needed; however, trial counsel failed to take advantage of either offer. *Id.* On appeal, the Connecticut Appellate Court viewed counsel’s failure as an indication that no erroneous deprivation had occurred, and therefore no remedy was required. *Id.* at 209.

While counsel must utilize all means provided by the court to mitigate the harm caused, he or she must also object to the means provided as insufficient. *See In re B.D.*, 2009-Ohio-2299, ¶¶ 66, 68 (Ohio Ct. App., 11th Dist. 2009). For example, *In re B.D*., trial counsel attempted to utilize the court’s remedy—a short recess to review the Department’s file—but still objected to the late turnover of discovery at the recommencement of trial. *Id.* at ¶ 52. The Court of Appeals of Ohio held that this was sufficient to preserve the discovery issue on appeal. *Id.* at ¶ 64.

1. **Exculpatory Evidence and Brady**
2. The Brady Rule in Criminal Cases

If the Department has failed to turn over exculpatory evidence, counsel may also be able to argue that there has been a violation under *Brady v. Maryland*,373 U.S. 83 (1963). In *Brady,* the defendant was convicted of capital murder and sentenced to death. *Id*. at 84. After the verdict had been returned and the judgment affirmed, the defense learned that the prosecution had withheld a statement where Brady’s co-defendant had confessed to the homicide. *Id.* The U.S. Supreme Court upheld the Court of Appeals’ decision reversing the judgment and remanding for a new trial. *Id.* at 90. In doing so, the Court held that, in criminal cases, the failure by the prosecution to turn over requested, material, exculpatory evidence to the defense is a violation of due process. *Id.* at 87; *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978). The Court reasoned that the goal of criminal proceedings—the administration of justice—requires fundamental fairness. *Id*. at 87. The State’s failure to turn over exculpatory evidence ultimately violates that fairness requirement and therefore the defendant’s due process rights. *Id.*

1. Application of Brady in Civil Cases

The Supreme Court has never addressed the applicability of *Brady* to civil cases. *See* Justin Goetz, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 Minn. L. Rev. 1424, 1428 (2011). In Massachusetts, *Brady* has not been applied in non-criminal contexts. However, other jurisdictions have applied *Brady* in civil cases. *See In re G.P.*, 679 P.2d 976, 993 (Wyo. 1984).

Due process may require the application of *Brady* to child welfare cases. In *In re G.P.,* a father’s rights were terminated based, in part, on evidence that he had sexually abused his daughter. *In re G.P.,* 679 P.2d at 988-989. On appeal, the father claimed that the State had violated *Brady* by refusing to pay for a medical examination that would have shown that his daughter was a virgin. *Id.* at 993.[[2]](#footnote-2) In its analysis of the father’s due process claim, the Wyoming Supreme Court emphasized the U.S. Supreme Court’s statement in *Lassiter* that “[a]pplying the Due Process Clause is . . . an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.” *Id.* (quoting *Lassiter v. Dept. of Social Services*, 425 U.S. 18, 24-25 (1981)). Thus, while the court ultimately held that a medical examination would not have exonerated the father and therefore was no error, the opinion suggests that fundamental fairness required applying *Brady*. *Id.; See also Sperry & Hutchinson Co. v. FTC*, 256 F.Supp. 136, 142 (S.D.N.Y. 1966) (presuming that due process in the civil context requires disclosure of exculpatory evidence because “[i]n civil actions . . . the ultimate objective is not that the Government ‘shall win a case, but that justice shall be done’”).

In order to make a successful *Brady* argument, counsel must show that the prosecution and/or the Department suppressed or failed to turnover exculpatory evidence, that evidence was favorable to the parent, and the evidence was material because it is reasonably probable that, had the evidence been disclosed, the result of the proceeding would have been different. *In. re M.M.,* 202 P.3d 409, 415 (Wyo. 2009).At trial, counsel should raise the issue, demonstrate prejudice, and seek a continuance. *See id.* In *In re M.M.,* the father claimed that the Department’s failure to turn over exculpatory evidence had violated his due process rights under *Brady*. *Id.* at 412. The court “assumed without deciding” that *Brady* applied and conducted a *Brady* analysis. *Id.* at 415. The court determined that the evidence in question was, in fact, disclosed by the Department the day before trial; thus, the father had ample time to address it. *Id.* at 415-416. The court even cited trial counsel’s failure to request a continuance as support for its conclusion that there was no violation of *Brady*. *Id.* at 416. While the court ultimately concluded that there was no *Brady* issue, its analysis suggests that, to preserve the *Brady* issue, trial counsel must raise the issue, demonstrate prejudice, and seek a continuance. *See id.* at 416-17.

Unfortunately, the SJC has not addressed this question directly, but it has a more relaxed, pro-defense standard for reversals for failure to turn over exculpatory evidence than the U.S. Supreme Court. *See e.g., Commonwealth v. Tucceri*, 412 Mass. 401, 413 (1992). In *Tucceri,* the court held that it prefers to refer to the degree of prejudicial effect of the improper nondisclosure of exculpatory evidence, rather than the materiality of the exculpatory evidence as the Supreme Court refers to, when the party has made no request or only a general request for exculpatory evidence. *Id.* at 411-12. Hence, the 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. *Id.* at 413. Thus, because of the SJC’s broader concern for fairness, it may be amenable to a *Brady* argument in the child welfare context. *See id*. at 413.

1. DSHS is Washington’s child welfare agency. [↑](#footnote-ref-1)
2. The *G.P.* court adopted the reasoning of *Bowen v. Eyman,* holding that the State’s refusal to pay for a blood test that could have proven the defendant’s innocence was tantamount to a *Brady* violation.  *In re G.P.*, 379 P.2d at 992 (citing *Bowen v. Eyman*, 324 F.Supp. 339, 340 (D. Ariz. 1970)). [↑](#footnote-ref-2)