STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-

[redacted]
Defendant.
_____/

PROOF OF SERVICE

CASE NO. 25-SD-4521577A

Beth R. Wickwire (P61575)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Craig W. Elhart (P26369)
Attorney for Defendant
329 South Union
Traverse City, Mi 49684
(906) 936-6800

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: [redacted]
C. Immel Brady Material

Served Upon: Craig W. Elhart
329 Union
Traverse City, MI 49684

Method of Service: Email: [redacted]

Date Served: September 19, 2025

Paige Tardiff, Office Manager
Delta County Prosecutor's Office

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-

[redacted]
Defendant.
_____/

PROOF OF SERVICE

CASE NO. 25-11332-FH

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906) 789-5115

Jana Mathieu (P73515)
Attorney for Defendant
321 N Front Street
Marquette, MI 49855

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: [redacted] Giglio Material

Served Upon: Jana Mathieu

Method of Service: EMAIL: [redacted]

Date Served: May 19, 2025

Paige Tardiff, Office Manager
Delta County Prosecutor's Office

STATE OF MICHIGAN IN THE
CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff

PROOF OF SERVICE

CASE NO. 23-FY-387

-vs

[redacted]
Defendant.

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Diane Kay-Hougaboom (P70751)
Attorney for Defendant
1801 Ludington Street
Escanaba, MI 49829
(906)360-0001

PROOF OF SERVICE

The undersigned states she served documents as follows:

Served: MSP Report 80-02-24 Brady Information

Served Upon: Diane Kay-Hougaboom

Method of Service:EMAIL: [redacted]

Date Served: January 9, 2024

Paige Tardiff, Circuit Court & Evidence Clerk
Delta County Prosecutor's Office

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

PROOF OF SERVICE

CASE: 24-SD-4444581A

Vs-

[redacted]
Defendant.
_____/

Beth R. Wickwire (P61575)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Trent M. Stupak (P63064)
Attorney for Defendant
205 Ludington Street
Escanaba, MI 49829
(906) 786-7885

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: Immel – Giglio Concern
[redacted]

Served Upon: Trent Stupak
205 Ludington St.
Escanaba, MI 49829

Method of Service: Email : [redacted]

Date Served: January 23, 2025

Angela Coon
Angela Coon, Misdemeanor Intake Clerk
Delta County Prosecutor's Office

STATE OF MICHIGAN IN THE
CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff

PROOF OF SERVICE

CASE NO.23-11032-FH

-vs

[redacted]

Defendant.
_____/

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Diane Kay-Hougaboom (P70751)
Attorney for Defendant
1801 Ludington Street
Escanaba, MI 49829
(906)360-0001

PROOF OF SERVICE

The undersigned states she served documents as follows:

Served: Statement of Charges
[redacted]

Served Upon: Diane Kay-Hougaboom

Method of Service:EMAIL: [redacted]

Date Served: May 13, 2024

Paige Tardiff, Circuit Court & Evidence Clerk
Delta County Prosecutor's Office

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-

[redacted]
_____/

PROOF OF SERVICE

CASE NO. 24-11156-FH

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906) 789-5115

Jana Mathieu (P73515)
Attorney for Defendant
321 N Front Street
Marquette, MI 49855

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: Immel- Giglio Concern [redacted]

Served Upon: Jana Mathieu

Method of Service: EMAIL: [redacted]

Date Served: January 9, 2025

Paige Tardiff, Office Manager
Delta County Prosecutor's Office

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

PROOF OF SERVICE

CASE NO. 24-SD-4392494A

vs-

[redacted]
Defendant.
_____/

Beth R. Wickwire (P61575)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

James R. Maki (P84455)
Attorney for Defendant
524 Ludington St STE 101
Escanaba, MI 49829
(906) 233-7122

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: [redacted]
Trooper Immel 2023 State of Charges Proposed Discipline

Served Upon: James R. Maki
524 Ludington St Suite 101
Escanaba, MI 49829

Method of Service: E-Mail: [redacted]

Date Served: September 05, 2024

Angela Coon

Angela Coon, Misdemeanor Intake Clerk
Delta County Prosecutor's Office

STATE OF MICHIGAN
IN THE 94th DISTRICT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-
[redacted]
Defendant.

PROOF OF SERVICE

CASE NO. 24-SD-4392187A

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Trent Stupak (P60364)
Attorney for Defendant
205 Ludington Street
Escanaba, MI 49829
(906) 786-7885

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: Immel- Giglio Concern
[redacted]

Served Upon: Trent Stupak

Method of Service:Email: [redacted]

Date Served: December 19, 2024

Paige Tardiff, Office Manager
Delta County Prosecutor's Office

STATE OF MICHIGAN IN THE
CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff

PROOF OF SERVICE

CASE NO.24-11257-FH

[redacted]
Defendant.
_____/

Lauren Wickman (P79974)
Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

Diane Kay-Hougaboom (P70751)
Attorney for Defendant
1801 Ludington Street
Escanaba, MI 49829
(906)360-0001

PROOF OF SERVICE

The undersigned states she served documents as follows:

Served: [redacted]
Immel- Giglio Concern 1
[redacted]

Served Upon: Diane Kay-Hougaboom

Method of Service:EMAIL: [redacted]

Date Served: March 24, 2025

Paige Tardiff, Office Manager
Delta County Prosecutor's Office

Brady & Giglio

A PROSECUTOR'S GUIDE

Prosecuting Attorneys Coordinating Council

May 2021

FOREWARD

The *Brady/Giglio* cases and their progeny impose a complex framework of requirements upon prosecutors regarding their duty to disclose material exculpatory evidence to defendants. This complex body of law is not easily summarized, and each office and attorney should diligently research specific case issues as they arise. Additionally, each individual office must decide which policies and procedures to enact to ensure compliance with these duties. This manual is meant to be a resource and starting point for such issues. As with any legal research, care should be exercised when relying upon cited cases and attorneys are responsible for ensuring the viability of the laws cited.

PACC would like to thank the Federal Judicial Center for use of their materials in putting together this manual.

"The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v United States, 295 US 78, 88; 55 S Ct 629, 633; 79 L Ed 1314 (1935).

THE SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Although the ethical duties that apply to all attorneys apply equally to prosecutors, there are additional ethical responsibilities applicable solely to prosecutors.

3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) 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 degree of the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

A PROSECUTOR'S DUTIES UNDER *BRADY* AND *GIGLIO* MUST BE VIEWED CONSIDERING THESE SPECIAL DUTIES AND ETHICAL OBLIGATIONS.

WHAT IS *BRADY* AND TO WHOM DOES IT APPLY?

THE DUTY TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE

In *Brady v. Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the United States Supreme Court held that due process requires the prosecution to disclose evidence favorable to the accused, where such evidence is material to guilt or punishment. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. This rule is followed in Michigan. *People v Chenault*, 495 Mich 142, 149-150; 845 NW2d 731 (2014) and was recently reaffirmed by the United States Supreme Court, "Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 132 S. Ct. 627, 630; 181 L Ed2d 571 (2012).

> The principle…is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,'…
>
> *Brady*, 373 US at 87-88.

Though seemingly simple on its face, as with many legal issues, application of the rule has resulted in a large body of case law, both state and federal, regarding to whom the rule applies, when it applies and what types of evidence must be disclosed. Subsequent cases have made it clear, that *Brady* imposes a duty of disclosure upon prosecutors regardless of whether the defendant has requested the information. *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555, 131 L Ed 2d 490 (1995)

GIGLIO: THE REQUIREMENT TO DISCLOSE IMPEACHMENT EVIDENCE

Giglio v. United States, 405 US 150, 155; 92 S Ct 763; 31 L Ed2d 104 (1972), extended the scope of *Brady* to include relevant impeachment evidence. As the Court explained in *United States v. Bagley,* 473 US 667, 678; 105 S Ct 3375; 87 L Ed2d 481 (1985), "[i]mpeachment evidence . . . falls within the *Brady* rule" (citing *Giglio*, 405 US at 154). Under *Brady*, such exculpatory evidence includes the contents of plea agreements with key government witnesses, which the prosecution must reveal. *California v. Trombetta*, 467 U.S. 479, 485 (1984). The disclosure obligation under *Brady* includes evidence that *could* be used to impeach the credibility of a witness.

> "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."
>
> *Giglio*, 405 US at 154.

GIGLIO AND LAW ENFORCEMENT WITNESSES

An emerging issue is how *Giglio* impacts disclosure of misdeeds by law enforcement officers. While there are no published Michigan cases directly addressing this issue, many federal circuit courts have dealt with it. The Second Circuit addressed the incomplete disclosure of evidence that federal agents involved with the investigation against defendant had themselves engaged in criminal acts during the investigation (The agents later pleaded guilty to criminal charges). The court rejected the claim that the late and incomplete disclosure constituted a *Brady* violation where the evidence was not exculpatory or impeaching as it has no bearing on the defendant's guilt or innocence. *United States v Ulbricht*, 858 F3d 71, 114 (CA 2, 2017)

FAVORABLE EVIDENCE KNOWN TO OTHERS ACTING ON GOVERNMENT'S BEHALF

Although *Brady* initially imposed an absolute duty of disclosure on *prosecutors*, subsequent cases have expanded that duty to police as well. In *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555, 131 L Ed 2d 490 (1995), the United States Supreme Court held that *Brady* encompasses evidence known only to investigators and not to the prosecutor. See also, *People v Aldrich*, 246 Mich App 101, 133; 631 NW2d 67 (2001).

Thus, to comply with *Brady* a prosecutor "has a duty to learn of any favorable evidence known to the others *acting on the government's behalf* in this case, including the police." *Strickler v Greene,* 527 US 263, 281; 119 S Ct 1936; 144 L Ed 2d 286 (1999) (internal quotation marks omitted, emphasis added). In *Strickler*, the withheld information consisted of notes taken by a detective during interviews with a key witness and letters from the witness to the detective. 527 U.S. at 266 & 273–75. Consistent with *Strickler*, the Sixth Circuit has held that "the due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police" to disclose evidence whose 'exculpatory value' is 'apparent' to officers. *Moldowan v City of Warren*, 578 F3d 351, 381, 388 (CA 6 2009). That duty is discharged once an officer delivers such evidence to the prosecutor's office. *Id*. at 381. *See also Youngblood v West Virginia*, 547 US 867, 869–70; 126 S Ct 2188; 165 L Ed2d 269 (2006) (confirming that *Brady* reaches evidence known to the police but not the prosecutor).

In *People v Dimambro*, 318 Mich App 204 (2016) the Michigan Court of Appeals held that a medical examiner is a person acting on the government's behalf for *Brady* purposes. "[I]t is apparent that a county medical examiner is expected to work closely with the prosecution in cases related to the investigation of an unexpected or violent death and is expected to testify on the prosecution's behalf. Notably, the United States Supreme Court does not limit the prosecution's duty to learn of favorable evidence to only the police or law enforcement agencies, but, instead, extends this duty to any 'others acting on the government's behalf.'" In *Dimambro*, the medical examiner possessed autopsy photographs that were not given to the prosecution until after trial. Ruling the photographs were material because they could have been used to impeach the medical examiner, defendant was granted a new trial.

THE COMPONENTS OF A *BRADY* VIOLATION

To assert a successful Brady claim, a defendant must show the following three essential elements: "[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler*, 527 US at 281–82. "Stated differently, the components of a "true *Brady* violation," are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *Chenault*, 495 Mich at 150, citing *Strickler*, 527 US at 281-282. See also*, Skinner v Switzer*, 526 US 521, 536; 131 S Ct 1289; 179 L Ed2d 233 (2011).

FAVORABLE TO THE ACCUSED

Information is "favorable to the accused either because it is exculpatory, or because it is impeaching." *Strickler,* 527 U.S. at 281–82; See also, *People v Stokes*, 312 Mich App 181 (2015), vacated in part on other grounds, 501 Mich 918 (2017). When it is uncertain whether information is favorable or useful to a defendant, "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v Bell*, 556 US 449, 470 n.15; 129 S Ct 1769; 173 L Ed2d 701 (2009). See also, *Kyles*, 514 U.S. at 439–40; *US v Agurs*, 427 US 97, 108; 96 S Ct 2392; 49 L Ed2d 342 (1986), holding mod by *Bagley*, 473 US 667.

> NOTE: See Appendix A for a listing that includes types of evidence that have been ruled exculpatory and Appendix B for a listing of types of evidence that have been held to be impeachment.

SUPRESSION

For *Brady* purposes, it does not matter whether suppression was intentional or inadvertent. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*." *Chenault*, 495 Mich at 149, (quoting *Brady*, 373 US at 87.) "[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler,* 527 US at 288.

> "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."
>
> *Agurs*, 427 US at 110 (citations omitted).

In *Chenault*, 495 Mich at 155, the Michigan Supreme Court recently overruled the previous four-part test used by Michigan courts for addressing *Brady* claims, removing an added prong that required a showing that the defendant did not possess the evidence, nor could he have obtained it himself with any reasonable diligence. The court noted that such a requirement could not be found in United States Supreme Court case law. *Id*. The Sixth Circuit has also

"decline[d] to adopt the due diligence rule that the government proposes based on earlier, erroneous cases." *United States v Tavera*, 719 F3d 705, 712 (CA 6, 2013).

This may not be as far reaching as it seems. In *Chenault,* the court stated, "We believe that the concerns that a diligence requirement might address are already confronted in the context of *Brady*'s suppression requirement." Thus, it is arguable that if the evidence is something the defense could have obtained with reasonable diligence, there simply was no suppression. There is some support for this position in federal case law.[1]

Evidence outside the prosecution's control

Brady is concerned only with cases in which the government possesses information which the defendant does not. Thus, a prosecutor's duty under *Brady* "does not apply to information that is not wholly within the control of the prosecution." *Coe v Bell*, 161 F3d 320, 344 (CA 6, 1998); See also, *US v Delgado*, 350 F3d 520, 527 (CA 6, 2003). "*Brady* does not apply when the information is available from another source," e.g., by "looking at public records." *Owens v Guida*, 549 F3d 399, 418 (CA 6, 2008). See also, *Spirko v Mitchell*, 368 F3d 603, 611 (CA 6, 2004) (no *Brady* violation arose from failure to produce evidence of defendant's alleged accomplice's alibi because it was available to defense from other sources and defense was aware of essential facts necessary to obtain evidence.); *Doan v. Carter*, 548 F.3d 449, 460 (CA 6, 2008) (holding that where defense counsel knew of the withheld evidence it "cannot form the basis of a *Brady* violation.") No *Brady* violation occurs where the prosecution fails to disclose a public record equally accessible to defense counsel. *See Bell v Bell*, 512 F.3d 223, 235 (CA 6, 2008). *See also Matthews v Ishee*, 486 F.3d 883, 891 (CA 6, 2007) ("Where, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.")

[1] See, e.g., *Parker v Allen*, 565 F3d 1258, 1277 (CA 11, 2009) ("there is no suppression if the defendant knew of the information or had equal access to obtaining it"); *US v Zichittello*, 208 F3d 72, 103 (CA 2 2000) ("Even if evidence is material and exculpatory, it 'is not "suppressed"' by the government within the meaning of *Brady* 'if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'") (citations omitted); *Rector v Johnson*, 120 F3d 551, 558–59 (CA 5, 1997) (same); *US v Clark*, 928 F2d 733, 738 (CA 6, 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' . . . or where the evidence is available to defendant from another source.") (citations omitted). Cf. *United States v Quintanilla*, 193 F3d 1139, 1149 (CA 10, 1999) ("a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.").

Michigan seemingly followed that rationale in *People v Stanaway*, 446 Mich 643, 667; 521 NW2d 557, 569 (1994), noting "the prosecutor has not at any time had access to the records requested by the defendant. Nor were these 'investigative' records of a governmental agency. The disclosure requirements of *Brady, supra,* are directly applicable where the prosecutor possesses the record." *Id*., citing *People v Reed,* 393 Mich 342, 353, 224 NW2d 867 (1975); *People v Dellabonda,* 265 Mich 486, 500–501, 251 N.W. 594 (1933).

In *United States v Pembrook*, 876 F.3d (2017), the court held that inmate disciplinary records for an informant housed in a state correctional facility were not within the scope of Brady as they were not records a federal prosecutor possessed and they had to duty to acquire them.

No duty to create evidence

Although *Brady* requires disclosure of exculpatory evidence, many federal circuits have held that "*Brady* . . . does not require the government to create exculpatory material that does not exist." *US v Sukumolachan*, 610 F2d 685, 687 (CA 9, 1980); *see also, Richards v Solem*, 693 F2d 760,766 (CA 8, 1982) ("Although the state has a duty to disclose evidence, it does not have a duty to create evidence.") The federal constitution did not require the police to generate evidence. See, *Sanchez v US*, 50 F3d 1448, 1453 (CA 9, 1995) ("The government has no obligation to produce information which it does not possess.")

MATERIALITY

What is it?

One of the most difficult aspects of applying the *Brady* framework is the materiality requirement. As the United States Supreme Court noted when addressing the materiality prong of a *Brady* claim, "the issue before us here is legally simple but factually complex. We must examine the trial record, 'evaluat[e]' the withheld evidence 'in the context of the entire record, and determine in light of that examination whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Turner v United States*, 137 S Ct 1885, 1893; 198 L Ed 2d 443 (2017).

"To establish materiality, a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" *Chenault*, 495 Mich at 150; quoting, *Bagley*, 473 US 667, see also *Smith*, 132 S. Ct. at 630; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *People v Stokes*, 312 Mich App 181 (2015), vacated in part on other grounds, 501 Mich 918 (2017) "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[]

confidence in the outcome of the trial.'" *Id.* (quoting *Kyles v. Whitley,* 514 US at 434) (alteration in original). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434. Material evidence is that which is "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." *US v Clark*, 988 F2d 1459, 1467 (CA 6, 1993).

Prejudice, or "materiality," is "an essential element" of a *Brady* claim. *Smith v Mitchell*, 348 F3d 177, 212 (CA 6, 2003). See also, *Jells v. Mitchell*, 538 F.3d 478, 502 (CA 6, 2008) ("When determining whether the withheld information was material and therefore prejudicial, we consider it in light of the evidence available for trial that supports the petitioner's conviction."). "Prejudice (or materiality) in the *Brady* context is a difficult test to meet." *Jamison v. Collins*, 291 F3d 380, 388 (CA 6, 2002).

When determining materiality, there is no distinction between exculpatory evidence and impeachment evidence. *Bagley*, 473 US at 676 ("This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [for *Brady* purposes].") Where undisclosed evidence "merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *Jefferson v US*, 730 F3d 537, 550 (CA 6, 2013) (internal quotation omitted).

"[T]he *Brady* standard is not met if the petitioner shows merely a reasonable *possibility* that the suppressed evidence might have produced a different outcome." *Montgomery v Bobby*, 654 F3d 668, 678 (CA 6, 2011). *Brady* does not require the government to disclose information that has a mere possibility of helping the defendant. *United States v. Agurs*, 427 US at 109–10.[2]

In *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam), the court held "[e]vidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury."" To prevail on his *Brady* claim, *Wearry* need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. He only had to show that the new evidence is sufficient to "undermine confidence" in the verdict. The court also ruled that

[2] In *Chenault*, 495 Mich at 153, n.5, the Michigan Supreme Court noted "*Bagley* retreated from the different materiality standards articulated in *Agurs*." As earlier discussed, the *Chenault* Court rejected the argument that the phrase "unknown to the defense," as used in *Agurs* and *Kyles* suggested that the United State Supreme Court would affirm the addition of a diligence requirement to the *Brady* analysis.

the state court had "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively." *Id*. at 1007.

In *People v Acumby-Blair*, __ Mich App __(2021)(Docket No. 347369), the court ruled that the defendant failed to establish materiality where the prosecution failed to disclose that a police witness was found by another court to have made a false statement in a search warrant affidavit. In that particular case, the officer's testimony at trial was related to the seizure of physical evidence. While the information would have impeached the officer's credibility, it didn't " undermine the physical evidence" connecting defendant to the crime, nor the testimony of other officers on the issue. "Thus, even though the prosecutor suppressed impeachment evidence within her control, defendant's claim of a *Brady* violation fails because he has not established the materiality of the suppressed evidence."

Cumulative effect of the suppressed evidence

Although each instance of nondisclosure is examined separately, the "suppressed evidence [is] considered collectively, not item by item" in determining materiality. *Kyles,* 514 U.S. at 436–37, n.10 ("showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached"). The undisclosed evidence "must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs,* 427 U.S. at 112. See also, *Chenault*, 495 Mich at 157 ("We conclude that, even in the absence of the suppressed evidence, the defendant received a trial that resulted in a verdict worthy of confidence, because the *cumulative effect* of the evidence was not material.)(emphasis added). "[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith*, 132 S. Ct. at 630.

Inadmissible evidence

The Supreme Court has held that there is no *Brady* violation where the evidence would have been inadmissible during trial. *Wood v. Bartholomew*, 516 US 1, 6; 116 S Ct 7; 133 Led2d 1 (1995). In *Wood*, the prisoner argued that the prosecution's failure to disclose the polygraph results of a key witness violated *Brady*. The Supreme Court disagreed, "The information at issue here, then—the results of a polygraph examination of one of the witnesses—is not 'evidence' at all. Disclosure of the polygraph results, then, could have had no direct effect on

the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses."

In *Henness v. Bagley*, 644 F3d 308, 325 (CA 6, 2011), the Sixth Circuit held that because the suppressed evidence was hearsay and therefore inadmissible, the petitioner had to "demonstrate that the statement would lead to the discovery of additional, admissible evidence that could have resulted in a different result at trial." The Seventh, Fourth and Ninth Circuits agree that *Brady* only applies to information that *will be* admissible. *See United States v Morales*, 746 F3d 310, 314 (CA 7, 2014); *Hoke v. Netherland*, 92 F3d 1350, 1356 n. 3 (CA 4, 1996) ("[T]hese statements may well have been inadmissible at trial ... and therefore, as a matter of law, 'immaterial' for *Brady* purposes.") ; *Henry v. Ryan*, 720 F3d 1073, 1080 (CA 9, 2013) (in order for evidence to be material under *Brady v. Maryland*, 373 U.S. 83 (1963), the "evidence must be admissible as evidence or capable of being used to impeach a government witness.")

> *NOTE: Most circuits, including the 6th Circuit have held that information may be favorable even if it is not admissible as evidence itself, if it reasonably could lead to admissible evidence. See Appendix B.*

INITIAL BURDEN IS ON THE DEFENDANT

Several federal circuits have held that the proponent of a *Brady* claim-i.e., the defendant, bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it. *United States v. Lopez*, 534 F3d 1027, 1034 (CA 9, 2008); *United States v. Brunshtein*, 344 F3d 91, 101 (CA 2, 2003). Once the defendant produces such evidence, the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from "others acting on the government's behalf." *Kyles*, 514 U.S. at 437.

TIMING—WHEN DOES *BRADY* APPLY?

There are three different contexts in which *Brady* applies, "'[e]ach involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.'" *Chenault*, slip op. at 9, quoting *Agurs*, 427 US at 103 (emphasis added). *Brady* generally applies to a complete failure to disclose, not tardy disclosure. *Robertson v. Lucas*, 753 F3d 606, 622 (CA 6, 2014). "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose," and a "[d]elay only violates *Brady* when the delay itself causes prejudice." *US v Bencs*, 28 F3d 555, 560-561 (CA 6, 1994) (citations and internal quotation marks omitted); see also *People v Fox*, 232 Mich App 541, 549; 591 NW2d 384 (1998).

"Any disadvantage that a defendant might suffer because of the tardiness of impeachment material can be cured by asking for a recess." *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004).

IN TIME FOR EFFECTIVE USE AT TRIAL

As noted earlier, information may be considered "suppressed" for *Brady* purposes if disclosure is delayed to the extent that the defense is not able to make effective use of the information in the preparation and presentation of its case at trial. How much preparation a defendant needs to effectively use *Brady* material—which determines how early disclosure must be made by the prosecution—depends upon the circumstances of each case. Disclosure before trial, preferably well before trial, is always best and likely required if the material is significant, complex, voluminous, or could lead to other exculpatory material after further investigation. See, *US v Garner*, 507 F3d 399, 405–07 (CA, 6, 2007) (defendant "did not receive a fair trial" where cell phone records that would have allowed impeachment of critical prosecution witness were not disclosed until the morning of trial and the defense was not given sufficient time to investigate records: "The importance of the denial of an opportunity to impeach this witness cannot be overstated.")

"Any disadvantage that a defendant might suffer because of the tardiness of impeachment material can be cured by asking for a recess." *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004). "[E]ven tardy disclosures of *Brady* material do not violate the defendant's constitutional rights unless he can demonstrate the delay denied him a constitutionally fair trial." *Farrell v US*, 162 F App'x 419, 424 (CA 6, 2006). There is nothing in *Brady* or *Agurs* to require that such disclosures be made before trial. *US v McPartlin*, 595 F2d 1321, 1346 (CA 7, 1979). *See also US v Einfeldt*, 138 F3d 373, 377 (CA 8, 1998) (*Brady* not violated when prosecution belatedly discloses evidence during trial).

In light of these considerations, and because the effect of suppression usually cannot be evaluated fully until after trial, potential Brady material should ordinarily be disclosed as soon as reasonably possible after its existence is known by the government. Disclosures on the eve of or during trial should be avoided unless there is no other reasonable alternative.

WHEN DOES THE OBLIGATION BEGIN?

A prosecutor's obligations to disclose material exculpatory or impeachment evidence are ongoing. They begin once the case is brought and continue through pre-trial and trial. *Pennsylvania v Ritchie*, 480 US 39, 60; 107 S Ct 989; 94 L Ed2d 40 (1987).

One question that has recently arisen is when exactly the *Brady* obligation begins. Two published California Court of Appeals panels held it applies at the preliminary hearing stage. See *Bridgeforth v Superior Court* (2013) 214 Cal App 4th 1074, 1083–1087 (2013), and *People v Gutierrez*, 214 Cal App 4th 343 (2013) ("defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings.") In contrast two older Oklahoma cases hold that there is no right to *Brady* disclosure before a preliminary examination. *State v Benson*, 661 P2d 908, 909 (Okl Crim 1983); *Stafford v. District Court of Oklahoma County*, 595 P2d 797, 799 (Okl Crim 1979). Many courts have held under the Due Process Clause that *Brady* disclosures are exclusively a trial right.

In *People v Bosca*, 310 Mich App 1, 12; 871 NNW2d 307 (2015), the Michigan Court of Appeals ruled that the failure to produce medical records prior to preliminary examination was not a *Brady* or discovery violation because "[e]ven if the boys' injuries did not fully match their testimony, the discrepancy for purposes of the preliminary examination was irrelevant, as the district judge was not the ultimate finder of fact." The court noted, "'[W]here the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over.'" *Id*. quoting *People v Laws*, 218 Mich App 447, 452; 554 Nw2d 586 (1996). Thus, while not directly holding *Brady* inapplicable to preliminary examinations, the argument certainly can be made that if the alleged violation concerns conflicting evidence, there was no prejudice to the defendant.

Plea agreements

In *United States v. Ruiz*, 536 US 622; 122 S Ct 2450; 153 L Ed2d 586 (2002), the United States Supreme Court held that a guilty plea is not rendered involuntary by the prosecutor's failure to disclose exculpatory impeachment information prior to the entry of the plea. *See id*. at 628–33. The Supreme Court noted that "impeachment information is special in relation to the *fairness of a trial*, not in respect of whether a plea is *voluntary*." *Ruiz*, 536 U.S. at 629 (emphasis original). Pre-plea disclosure of *Brady* impeachment evidence was not required, so long as any evidence of factual innocence was disclosed. *Id*. at 629. The Fifth Circuit has noted, "A defendant entering a guilty plea cannot rely on *Brady* materials in seeking post conviction relief, because his right to a fair trial is not implicated.").

> *Note: The prosecution has no disclosure obligation during grand jury proceedings. United States v. Williams, 504 U.S. 36, 49–53; 112 S Ct 1735; 118 L Ed2d 652 (1992).*

WHEN DOES THE OBLIGATION END?

Another question is when the *Brady* obligation ends. A few circuit courts have stated that *Brady* disclosure requirements apply post-trial through the completion of direct appeal that ends with the Supreme Court. *See Fields v Wharrie*, 672 F3d 505, 515 (CA 7, 2012) ("a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness."); *Leka v Portuondo* , 257 F3d 89, 100 (CA 2, 2001) ("*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward."); *Broam v Brogan*, 320 F3d 1023, 1030 (CA 9, 2003) ("A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process under *Brady*."). These cases rely a footnote from *Imbler v Pachtman*, 424 U.S. 409, 427 n.25 (1976). *Imbler* was a civil rights case brought under 42 USC 1983 where the Court found a prosecutor was absolutely immune from civil suit for damages. The cases also rely on dicta from a footnote and the argument can be made that *after a conviction* any obligation is premised on ethical obligations, not due process. The Ninth Circuit has declined to extend *Brady* to habeas corpus proceedings. J*ones v. Ryan*, 733 F3d 825, 837 (CA 9, 2013).

BRADY'S RELATIONSHIP TO DISCOVERY

Brady properly understood does not concern discovery. Rather, it provides a remedy where the prosecution fails to disclose exculpatory information that undermines confidence in the verdict resulting in a constitutional due process violation. Under *Brady*, a prosecutor must disclose exculpatory evidence, regardless of whether the defendant requests it. See *Kyles,* 514 US at 433.

There is no similar constitutional right to discovery. "[T]he Constitution does not require the prosecutor to share all useful information with the defendant." *United States v Ruiz*, 536 US 622, 629; 122 S Ct 2450; 153 L Ed2d 586 (2002) (citing *Weatherford v Bursey*, 429 US 545, 549; 97 S Ct 837; 51 L Ed2d 30 (1977) ("[T]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."); See also, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000).

Courts have discretion in shaping the remedies for *Brady* and *Giglio* violations. "Remedies for such violations, however, 'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.' Because dismissing an indictment is a 'drastic step,' it is 'disfavored.' Id. But, where a defendant was prejudiced by the

late disclosure and there was flagrant prosecutorial misconduct, dismissal with prejudice may be an appropriate remedy." *United States v Garrison*, __ F.3d __ (CA 9, 2018).

Michigan's discovery rules

Though *Brady* is not a rule of discovery, Michigan has discovery rules applicable to criminal cases:

MCR 6.201 Discovery

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

In addition to the court rules, statutory authority concerning the discovery requirements of the prosecuting attorney are found at MCL 767.40a:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.
(6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party.

"[O]ur Supreme Court has plainly stated that MCR 6.201 governs and defines the scope of criminal discovery in Michigan." *People v Greenfield*, 271 Mich App 442, 447; 722 NW2d 254, 257 (2006), citing, *People v. Phillips*, 468 Mich. 583, 588-589, 663 N.W.2d 463 (2003).

The duty to disclose is ongoing and requires prosecutors and investigators to exercise due diligence in identifying res gestae witnesses. *People v DeMeyers*, 183 Mich App; 454 NW2d 202 (1990), lv app den, 37 Mich. 865, 462 N.W.2d 368. Additionally, the prosecutor is required to reasonably assist the defendant, or defense counsel, to serve process upon a witness. This requirement applies regardless of the witness' status, for example, as an accomplice. *People v Koonce*, 466 Mich 515; 648 NW2d 153 (2002).

However, because there is no general constitutional right to discovery in criminal cases, a failure to disclose information may be non-constitutional in nature. *Elston*, 462 Mich at 765 (Late disclosure of disclose laboratory report revealing presence of sperm cells was not constitutional in nature as it was not exculpatory.)

DISPUTED DISCLOSURE

If a defendant requests disclosure of materials that the government contends are not discoverable under Brady, the trial court may conduct an in-camera review of the disputed materials. See, e.g., *US v Prochilo*, 629 F3d 264, 268 (CA 1, 2011). "To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. . . This showing cannot consist of mere speculation. . . Rather, the defendant should be able to articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material. *Id.* at 268–69 (citing, *Pennsylvania v Ritchie*, 480 US 39, 58 n.15; 107 S Ct 989; 94 L Ed2d 40 (1987)).

Confidential informants

"'Generally, the people are not required to disclose the identity of confidential informants.'" *People v Henry* (aft rem), 305 Mich App 127, 156; 854 NW2d 114, 134 (2014); lv app den 497 Mich 1025; 863 NW2d 38 (2015) (citation omitted). "However, when a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an in camera hearing to determine if the informant could offer any testimony beneficial to the defense." *Id*. citing, *People v. Underwood*, 447 Mich 695, 705–706, 526 NW2d 903 (1994). The court should consider whether the defendant has demonstrated a need for the testimony under the circumstances of the case including "'the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *Henry*, 305 Mich App at 156, quoting *Underwood*, 447 Mich at 705.

Privileged information

Where privileged information is at issue, the defendant must demonstrate "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557, 574 (1994). Upon such a showing, the court can conduct in camera review. *Id*. See also, MCR 6.201(C)(2). "Where the defendant has made the required showing, in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality…" *Id*. at 678-79.

CONCLUSION

"[I]t must be remembered that *Brady* is a constitutional mandate. It exacts the *minimum* that the prosecutor, state or federal, must do" to avoid violating a defendant's due process rights. *United States v. Beasley*, 576 F2d 626, 630 (CA 5, 1978) (emphasis added).

Given that fact, prosecutors must give careful consideration when deciding which evidence must be disclosed, regardless of whether the law requires disclosure. The overriding principle is that earlier discussed: the prosecutor's duty is to secure justice and ensure that the defendant receives justice, not simply to convict. Considering not only legal obligations, but ethical duties will ensure that the best possible decision is reached.

APPENDIX A: EXAMPLES OF EXCULPATORY EVIDENCE

Any evidence inconsistent with an element of the crime or defendant's guilt

- Confession by codefendant; *Brady* 373 US at 84.
- Affirmative defense, necessity; *Finley v Johnson,* 243 F3d 215, 221–22 (CA 5, 2001).
- Prosecution possessed independently corroborated information that would have strengthened defendant's credibility in claiming duress; *US v Udechukwu,* 11 F3d 1101, 1106 (CA 1, 1993).
- Psychiatric evaluation done during pretrial detention could have strengthened insanity defense; *US v Spagnoulo,* 960 F2d 990, 993–95 (CA 11, 1992).

Failure of witness to identify defendant

The failure of any person who participated in an identification procedure to make a positive identification of the defendant, regardless of whether the government anticipates calling that person as a witness at trial:

- The sole eyewitness told police on night of murder and a few days later that he could not make an identification; *Smith v Cain,* 132 S Ct at 629–30.
- Six eyewitness statements contained physical details that were inconsistent with defendant and more closely resembled state's key witness; *Kyles,* 514 US at 423–25.

Information that links someone other than the defendant to the crime

- Evidence that another person confessed to stabbing the victim; *DiSimone v Phillips,* 461 F3d 181, 195 (CA 2, 2006).

- Undisclosed evidence that car driven by someone other than defendant was seen speeding away from murder scene; *Monroe v Angelone,* 323 F3d 286, 313, 316 n.20 (CA 4, 2003).
- Description by eyewitness of person who picked up cocaine closely matched another witness rather than defendant; *United States v Robinson,* 39 F3d 1115, 1116–19 (CA 10, 1994).

Information casting doubt on the accuracy of any evidence

- Suppressed notes of FBI agent cast doubt on whether defendant had intent to commit offense; *United States v. Triumph Capital Group, Inc.,* 544 F3d 149, 162–65 (CA 2, 2008).
- Investigative report concluding that fire was accidental and not arson, which prosecution had used as aggravating factor in murder case; *Benn v. Lambert,* 283 F.3d 1040, 1060–62 (CA 9, 2002).
- Undisclosed photograph most likely would have "destroyed" credibility of key prosecution witness; *Ballinger v Kerby,* 3 F.3d 1371, 1376 (CA 10 1993).
- Evidence that the gun defendant allegedly fired at police was inoperable; *United States ex rel. Smith v. Fairman,* 769 F2d 386, 391 (CA 7, 1985).

Any information favorable and material to the sentencing phase

- Any information favorable and material to the defendant in the sentencing phase; *Brady*, 373 US at 85–86.
- Death sentence could have been affected by evidence that defendant may have been drunk or high when committing murders; *Cone v. Bell,* 556 US 449, 474–75 (2009)
- Prior inconsistent statement by key witness describing lower amount of drugs sold by defendant that could affect his sentence; *United States v. Weintraub,* 871 F.2d 1257, 1261–65 (CA 5, 1989).

APPENDIX B: EXAMPLES OF IMPEACHMENT EVIDENCE

Inconsistent statements of witness the prosecution intends to call

- All statements made orally or in writing by any witness the prosecution intends to call in its case-in-chief that are inconsistent with other statements made by that same witness; *Strickler v. Greene, 527 US 263, 281; 119 S Ct 1936; 144 L Ed 2d 286 (1999)*
- Undisclosed witness statements inconsistent with trial testimony; *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555, 131 L Ed 2d 490 (1995)441–46 (1995).
- Note written by two victim witnesses that contradicted testimony; *Youngblood v. West Virginia*, 547 US 867, 869–70; 126 S Ct 2188; 165 L Ed2d 269 (2006).
- Statements made to federal agents by witness that he continued to sell drugs when working with the government when he testified that he had stopped selling them. *United States v Walter*, 870 F.3d 622 (2017).

All plea agreements entered into by the government in this case or related cases with any witness the government intends to call

- Undisclosed deal between prosecutor and key witness; *Douglas v. Workman*, 560 F.3d 1156, 1174–75 (CA 10, 2009).
- As part of his plea deal reducing charges against him and limiting his sentence in return for testifying, one of three murder suspects agreed to refrain from undergoing psychiatric evaluation so as to avoid questions about his mental capacity; *Silva v Brown*, 416F3d 980, 986–87 (CA 9, 2005).

Any favorable dispositions of criminal charges pending against witnesses the prosecutor intends to call

- Informal agreement to reduce charges against witness in different case in return for his testimony against defendant; *Akrawi v Booker*, 572 F3d 252, 263 (CA 6, 2009).
- Several instances of prosecutor dropping charges in other cases against witness in exchange for testimony against defendant; *Douglas v Workman*, 560 F3d 1156, 1166–67 (CA 10, 2009).
- Key witness had several pending charges against him dropped during prosecution of defendant; *Singh v Prunty*, 142 F3d 1157, 1162 (CA 9, 1998).

Offers or promises made or other benefits provided, directly or indirectly, to any witness in exchange for cooperation or testimony, including:

- ***Dismissed or reduced charges***
  - Witness who actually killed drug supplier was told he might have capital murder charges reduced if he testified that defendant drug dealer hired him to do the shooting; *Wolfe v Clarke*, 691 F3d 410, 417–18 (CA 4, 2012).
  - Key prosecution witness, who was originally charged as codefendant, had other felony charges dismissed; *US v Smith*, 77 F.3d 511, 513–16 (D.C. Cir. 1996).
  - Promise to drop all charges against two witnesses in exchange for testimony against defendant; *Blankenship v Estelle*, 545 F2d 510, 513–14 (CA 5, 1977).
- ***Immunity or offers of immunity***
  - Alleged promise of immunity to key witness; *Horton v Mayle*, 408 F3d 570, 578–81 (CA 9, 2005).
  - Alleged promise by state attorney to grant immunity from prosecution on numerous prior offenses in exchange for testimony; *Haber v Wainwright*, 756 F.2d 1520, 1523 (CA 11, 1985).
- ***Expectations of downward departures or reduction of sentence***
  - Assistance to key witness with pre-parole release and reinstatement of lost good-time credits; *Douglas v Workman*, 560 F3d 1156, 1174–75 (CA 10, 2009).

- key witness led to believe she would receive reduced sentence in her case if she testified against husband in his case; *Tassin v Cain*, 517 F3d 770, 778–79 (CA 5, 2008).
- state's key witness was scheduled to go before parole board—of which prosecutor was a member—seeking a sentence commutation just a few days after he was to testify against defendant; *Reutter v Solem*, 888 F.2d 578, 581–82 (CA 8, 1989).
- Promise to testifying codefendant, who earlier pled guilty, to recommend probation; US v Gerard, 491 F.2d 1300, 1303–04 (CA 9, 1974).

❖ ***Assistance in other criminal proceedings—federal, state, or local***

- District attorney's office dropped four pending charges after witness met with prosecutor with offer to testify; *Bell v. Bell*, 512 F3d 223, 233 (CA 6, 2008).
- Key witness expected, and later received, "an extremely favorable plea agreement" on unrelated state charges; *US v Risha*, 445 F3d 298, 299–02 (CA 3, 2006).
- Prosecutor arranged for informant to be released without being charged after stop for traffic offense led to arrest on outstanding warrants; *Benn v Lambert*, 283 F3d 1040, 1057 (CA 9, 2002).

❖ ***considerations regarding forfeiture of assets, forbearance in seeking revocation of professional licenses or public benefits, waiver of tax liability, or promises not to suspend or disbar a government contractor***

- Government's failure to initiate asset forfeiture proceedings or enforce civil liability for unpaid taxes related to key witness's former drug dealing indicated leniency in return for cooperation; *US v Shaffer*, 789 F2d 682, 688–89 (CA 9, 1986).

❖ ***Stays of deportation or other immigration benefits***

- Undocumented alien working as paid confidential informant was given "special parole visa through INS" in return for cooperation with DEA; *US v Blanco*, 392 F3d 382 (CA 9, 2004).
- While waiting to testify against defendant, illegal aliens who were caught trying to enter the United States received "significant benefits, including Social Security cards, witness fees, permits allowing travel to and from Mexico, travel expenses, living expenses, some phone expenses, and other benefits; *US v Sipe*, 388 F3d 471, 488–89 (CA 5, 2004).

❖ ***Monetary or other benefits, paid or promised***

- Payments to witnesses for assistance in undercover drug operation and testimony in court); *US v Bagley*, 473 U.S. 667, 683–84 (1985).
- Witness who provided the only evidence contradicting defendant's self-defense claim worked as paid confidential informant for local authorities before and after defendant's trial; *Robinson v Mills*, 592 F3d 730, 737–38 (CA 6, 2010).
- Witness gang members "received a continuous stream of unlawful, indeed scandalous, favors from staff at the U.S. Attorney's office while jailed [and] awaiting the trial of the defendants," including lax supervision that allowed drug use and drug dealing, long distance telephone calls, and sexual contact with visitors; *US v Boyd*, 55 F3d 239, 244–45 (CA 7, 1995).
- Government's failure to disclose protective custody and its substantial payment of almost $10,000 to primary witness; *US v Librach*, 520 F2d 550, 553 (CA 8, 1975); *Cf. Wilson v Beard*, 589 F3d 651, 662 (CA 3, 2009) (officer "loaned money, interest free, to [witness] during the time period when [witness] acted as a police informant").

❖ ***Non-prosecution agreements***

- Promise to key witness—and alleged coconspirator—that he would not be prosecuted if he testified against defendant); *Giglio v US*, 405 US 150, 152– 55 (1972).
- Prosecution promised not to prosecute key witness—a convicted felon—for possession of a firearm; *Monroe v Angelone*, 323 F3d 286, 312–14 (CA 4, 2003).
- Witness was promised he would not be prosecuted in a separate case if he testified; *US v Sanfilippo*, 564 F2d 176, 177–79 (CA 5, 1977).

❖ ***Letters to other law enforcement officials setting forth the extent of a witness's assistance or making recommendations on the witness's behalf***

- Law enforcement personnel promised prisoner-witness to bring his cooperation to attention of judges and prosecutors in other cases to help him get reduced sentences; *Jackson v Brown*, 513 F3d 1057, 1070–72 (CA 9, 2008).
- In exchange for testimony, government agreed to write letter to Parole Commission outlining cooperation of witness who was imprisoned for other offense; *US v Bigeleisen*, 625 F2d 203, 208 (CA 8, 1980).

❖ ***Relocation assistance or more favorable conditions of confinement***

- Question whether relocation payments witness received were sufficient to warrant evidentiary hearing for *Brady* violation; *Quezada v Scribner*, 611 F3d 1165, 1168–69 (CA 9, 2010).
- Promise to recommend that witness be allowed to serve California sentence in Arizona to be closer to his family; *Jackson v Brown*, 513 F3d 1057, 1070–71 (CA 9, 2008).
- In exchange for testifying, witness who was in jail for other offenses sought placement in different building and participation in work-release program; *Bell v Bell*, 512 F3d 223, 232–33 (CA 6, 2008); *Cf. US v Talley*, 164 F.3d 989, 1003 (CA 6, 1999) (where witness "was the government's key witness and his credibility was at issue throughout the trial, failure to disclose a relocation benefit to the jury would have violated the rule set forth in Giglio").
- Information that the prosecution paid a witness $2,000 for a hotel and then relocated him to a new apartment as he feared he was in danger due to his connection with the case was *Brady* material that should have been disclosed. However, non-disclosure did not undermine confidence in the verdict where the payments were made more than a year before trial and there was no showing they were made to encourage the witness to testify. *Kennell v Dormire*, 873 F3d 637, 639 (CA 8, 2017).

❖ ***Consideration or benefits to culpable or at-risk third parties***

- Before admitting to shooting victim and implicating defendant, witness received assurances from prosecutor that his 14-year-old son would not be prosecuted; *LaCaze v Warden Louisiana Correctional Institute for Women*, 645 F3d 728, 735–36; denial of reh'g en banc, 647 F3d 1175 (2011)
- Key witness was promised his girlfriend would be released from custody if he incriminated defendant; *Harris v Lafler*, 553 F3d 1028, 1033–35 (CA 6, 2009); *Cf. Graves v Dretke*, 442 F3d 334, 342–44 (CA 5, 2006) (prosecution did not reveal that the key witness—himself a possible suspect in murder case—tried to protect his wife from prosecution but had earlier made statement that she was present during crime).

Prior convictions of witnesses the prosecutor intends to call

- Misinformation about criminal record of key government witness who was confidential informant; *US v Bernal-Obeso*, 989 F2d 331, 332–33 (CA 9, 1993);
- Prosecution failed to disclose main witness's numerous convictions and deals he made with prosecution to testify; *Ouimette v Moran*, 942 F2d 1, 10–11 (CA 1, 1991).

- Codefendant granted immunity for testimony had prior criminal record). *US v Auten*, 632 F2d 478 (CA 5, 1980).

Pending criminal charges against any witness known to the government

- Letters to other county prosecutor urging dismissal of pending charge against witness; *Sivak v Hardison*, 658 F3d 898, 909–11 (CA 9, 2011).
- Key witness faced charges of sexual misconduct with minor; *US v Kohring*, 637 F3d 895, 903–04 (CA 9, 2010).
- "forbearance on potential charges . . . to secure the cooperation of a witness" must be disclosed to defense; *Cargall v Mullin*, 317 F3d 1196, 1215–16 (CA 10, 2003).

Prior specific instances of conduct by any witness known to the government that could be used to impeach the witness (i.e. under MRE 608)

- Alleged attempts by key witness to suborn perjurious testimony in different case; *US v Kohring*, 637 F3d 895, 906 (CA 9, 2010).
- Evidence that confidential informant breached prior agreement with DEA and continued to use illegal drugs despite testifying that she had stopped; *US v Torres*, 569 F3d 1277, 1282–83 (CA 10, 2009).
- Information that victim had made false accusations of similar nature; *US v Velarde*, 485 F.3d 553, 561–63 (10th Cir. 2007)
- Informant's history of committing crimes and "regularly" lying while acting as informant; *Benn v Lambert*, 283 F3d 1040, 1054–56 (CA 9, 2002).
- Two witnesses attempted to influence testimony of another witness by threatening him and his family; *US v O'Conner*, 64 F3d 355, 357–59 (CA 8, 1995) (per curiam)

Substance abuse, mental health issues, or physical or other impairments known to the government that could affect any witness's ability to perceive and recall events

- Medical reports indicating "jailhouse informant" witness was schizophrenic and had history of lying; *Gonzalez v. Wong*, 667 F3d 965, 983–84 (CA 9, 2011).
- Government witness's history of severe mental problems which showed witness was prescribed psychotropic drugs during relevant time period; another witness also had undisclosed mental issues; *Wilson v Beard*, 589 F3d 651, 660–62 (CA 3, 2009).
- Evidence that key witness was using drugs during trial; *Benn v Lambert*, 283 F3d 1040, 1056 (CA 9, 2002).

Information known to the government that could affect any witness's bias, such as:

- ***Animosity toward the defendant***
  - Evidence that defendant and codefendant were "at war" would have advanced defendant's claim that he was not part of charged drug conspiracy; *US v Aviles-Colon*, 536 F3d 1, 19–21 (CA 1, 2008).
  - Evidence not revealed until presentence report that key witness "personally disliked" defendant *US v Sipe*, 388 F3d 471, 477 (CA 9, 2004), *Cf. Schledwitz v US*, 169 F3d 1003, 1014–15 (CA 6, 1999) (key witness, portrayed as "neutral and disinterested expert" during petitioner's fraud prosecution, actually had for years been actively involved in investigating petitioner and interviewing witnesses against him).
  - Informant, who was key witness, owed defendant money, thus giving him incentive to send defendant to prison; US v Steinberg, 99 F3d 1486, 1491 (CA 9, 1996).

- ***Previous relationship with law enforcement authorities***
  - Key government witness worked as paid informant in other criminal cases before and after defendant's trial; *Robinson v Mills*, 592 F3d 730, 737 (CA 6, 2010).
  - Two prior undisclosed contracts between confidential informant witness and DEA; *US v Torres*, 569 F3d 1277, 1282–83 (CA 10, 2009).
  - Key witness was informant for government in earlier, different drug investigation; *US v Shaffer*, 789 F2d 682, 688–89 (CA 9, 1986).

Prosecutorial misconduct

- Threatening remark by prosecutor to "critical" prosecution witness who was on probation that if he did not "come through for us" he would be sent back to jail *US v Scheer*, 168 F3d 445, 449–53 (CA 11, 1999).
- Prosecutor failed to correct representations he made to jury which were damaging to defendant's duress defense, despite learning before trial ended that they were actually false; *US v Alzate*, 47 F3d 1103, 1110 (CA 11, 1995)
- Prosecution refused to reveal that a witness it chose not to call had signed a cooperation agreement to testify truthfully if requested and instead falsely claimed at trial that witness had invoked Fifth Amendment right to refuse to testify; *US v Kojayan*, 8 F3d 1315, 1318–19 (CA 9, 1993), *Cf. Douglas v Workman*, 560 F3d 1156, 1192–94 (CA 10, 2009) (prosecutor's "active concealment" of *Brady* violation that prevented

defendant from presenting claim in timely fashion warranted allowing claim as a second or successive request for habeas relief).

APPENDIX C: INFORMATION THAT COULD LEAD TO ADMISSIBLE EVIDENCE IS MATERIAL

- Brady information "need not be admissible if it 'could lead to admissible evidence' or 'would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise.'" *US v Triumph Capital Group, Inc.,* 544 F3d 149, 162–63 (CA 2, 2008) (quoting *US v Gil,* 297 F3d 93, 104 (CA 2, 2002)).
- No Brady violation because undisclosed information was not admissible nor would it have led to admissible evidence or effective impeachment. *United States v. Wilson*, 605 F3d 985, 1005 (D.C. Cir. 2010)
- "we think it plain that evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." *Ellsworth v Warden*, 333 F3d 1, 5 (CA 1, 2003).
- "inadmissible evidence may be material under Brady" *Spence v Johnson*, 80 F3d 989, 1005 at n.14 (CA 5, 1996).
- "A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence." *Spaziano v Singletary*, 36 F3d 1028, 1044 (CA 11, 1994).
- If defendant "is able to make a showing that further investigation under the court's subpoena power very likely would lead to the discovery of [admissible material]

evidence," defendant may "request leave to conduct discovery." *US v Velarde*, 485 F3d 553, 560 (CA 10, 2007).

- There was *no Brady* violation where undisclosed information was not admissible and could not be used to impeach; court did not address whether it could lead to admissible evidence. *Madsen v Dormire*, 137 F3d 602, 604 (CA 8, 1998) (citing *Wood*, But *cf. Hoke v Netherland*, 92 F3d 1350, 1356 at n3 (CA 4, 1996) (reading *Wood* to hold that inadmissible evidence is, "as a matter of law, 'immaterial' for Brady purposes").

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Brady is an ongoing obligation that results in a violation upon complete failure to disclose and upon delayed disclosure if the delay causes prejudice such that the defendant is unable to use the evidence; the sooner disclosure occurs the more chance there is for any potential prejudice to be cured including through a recess or adjournment
• The duty to disclose under *Brady* is ongoing; starting once the case it brought and continuing thereafter.[1] • "'Generally speaking, *Brady* does not apply to delayed disclosure, but only to a complete failure to disclose,' unless there is prejudice arising from the delay."[2] • In some circumstances, a trial court can effectively deal with a *Brady* issue by allowing the defendant time to review the *Brady* evidence and use it to the extent it is helpful.[3] • "[S]o long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated."[4] • "Any disadvantage that a defendant might suffer because of the tardiness of impeachment material can be cured by asking for a recess."[5] • "The failure of the government to turn over [cell phone] records within a timeframe that would allow [the defendant's] counsel to investigate them prejudiced defendant."[6]
Grand jury: disclosure not required
• The prosecutor does not have a duty to disclose *Brady* material during grand jury proceedings.[7] • "The government . . . has no judicially enforceable duty to provide a grand jury with exculpatory evidence."[8]
Preliminary examinations: disclosure not generally required
• As a general principle, there is no *Brady* violation for failure to provide *Brady* material prior to examination that would only have created conflicting evidence because conflicting evidence is a matter for the jury, not the examination judge, and the defendant should still be bound over.[9]
Suppression hearing: disclosure likely required where challenge is to truthfulness of search warrant affidavit but otherwise the caselaw is unclear
• The prosecutor might have a duty to disclose favorable, material evidence for use by the defense prior to a suppression hearing.[10]
Pre-plea: disclosure of **impeachment** evidence not required; **exculpatory** evidence unclear
• "[T]he Constitution does not require the Government to disclose material **impeachment** evidence prior to entering a plea agreement with a criminal defendant."[11]

[1] *Pennsylvania v Ritchie*, 480 US 39, 59-60 (1987).
[2] *McNeill v Bagley*, 10 F4th 588, 600 (CA 6, 2021); *Robertson v Lucas*, 753 F3d 606, 621 (CA 6, 2014) ("'In general, the principles announced in *Brady* do not apply to a tardy disclosure of exculpatory information, but to a complete failure to disclose. If previously undisclosed evidence is disclosed ... during trial, no *Brady* violation occurs unless the defendant has been prejudiced by the delay in disclosure.'"), quoting *United States v Word*, 806 F2d 658, 665 (CA 6, 1986); see also *United States v Bencs*, 28 F3d 555, 560-561 (CA 6, 1994); *People v Fox*, 232 Mich App 541, 549-551 (1998) (discussing lack of prejudice in late-disclosure of *Brady* material); *see also Cunningham v. Shoop*, 23 F.4th 636, 675–76 (CA 6, 2022), *cert. denied*, 214 L. Ed. 2d 241, 143 S. Ct. 37 (2022) (discussing that delay in *Brady* disclosure can cause prejudice but finding in that case no prejudice from the in-trial disclosure of material to aid in cross-examination and noting that the defendant did not request an adjournment and, when asked, the defense counsel said he was ready to cross-examine the witness).
[3] *People v Hawkins*, 340 Mich App 155, 186 (2022) (finding no *Brady* violation requiring a remedy because "the district court dealt with the prosecution's failure to disclose [the evidence] by granting defendant an adjournment and time to analyze that evidence and use it to the extent that it provided any benefit to defendant. . . . [The court] corrected the potential of any due-process violation and prevented any unfairness . . . .").
[4] *United States v Presser*, 844 F2d 1275, 1283 (CA 6, 1988).
[5] *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004).
[6] *United States v Garner*, 507 F3d 399, 405 (CA 6, 2007) (law enforcement had received the records 5 days before trial but they were not turned over to the defendant until the start of trial, depriving the defendant of 5 days in which he could have investigated the records)
[7] *United States v Williams*, 504 US 36, 49-53 (1992).
[8] *United States v Angel*, 355 F3d 462, 475 (CA 6, 2004).
[9] *People v Bosca*, 310 Mich App 1, 27-30 (2015), reversed in part on other grounds, *People v Bosca*, 509 Mich 851 (2022).
[10] *United States v Barton*, 995 F2d 931, 935 (CA 9, 1993) ("[W]e hold that the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."); *United States v Gamez-Orduno*, 235 F3d 453, 461-462 (CA 9, 2000) (finding obligation); but see *United States v Bowie*, 198 F3d 905, 912 (CA DC, 1999) ("[I]t is hardly clear that the *Brady* line of Supreme Court cases applies to suppression hearings. Suppression hearings do not determine a defendant's guilt or punishment, yet *Brady* rests on the idea that due process is violated when the withheld evidence is 'material either to guilt or to punishment' . . . ." (citation omitted).
[11] *United States v Ruiz*, 536 US 622, 633 (2002) (emphasis added). The *Ruiz* Court did not, however, address whether withholding of exculpatory evidence prior to a plea would violate *Brady*. *Id.* at 630-33. The Court did emphasize that pre-plea disclosure of evidence of factual innocence alleviates concerns of an innocent person pleading guilty. *Id.* at 631.

- The federal circuits have not reached a consensus as to whether *Brady* requires **exculpatory** evidence to be disclosed prior to plea but at least one unpublished Michigan case suggests that it should.[12]
- The Michigan Supreme Court has recently held that a prosecutor error in a habitual offender enhancement notice made a plea involuntary.[13]

Trial (prior to and during): disclosure required

- The prosecution must disclose *Brady* evidence prior to and during trial.[14]

Sentencing: disclosure required

- The prosecution must disclose *Brady* evidence prior to sentencing.[15]

Direct appeal: disclosure likely still required

- There is not a consensus among appellate courts as to whether or for how long a prosecutor's *Brady/Giglio* obligations persist after conviction and sentencing.[16]
- A prosecutor's *Brady/Giglio* obligations continue past the original trial until the conviction becomes final, which does not occur until a defendant exhausts all direct appeals afforded him, and including any retrial. "Accordingly, a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness."[17]

Post-conviction proceeding(s): disclosure likely not required beyond direct appeal

(but prosecutor cannot redact exculpatory material in manner that thwarts defendant's access to postconviction relief in the courts)

- The *Brady* rule generally does not extend to postconviction proceedings; a prosecutor does not have a *Brady* obligation to disclose material exculpatory evidence in postconviction proceedings.[18]
- "In *Osborne*, 557 U.S. at 68, 129 S. Ct. 2308, the Supreme Court noted that 'nothing in our precedents' suggests that the prosecutor's obligation to disclose *Brady* material to the defendant before trial continues after the defendant is convicted and the case is closed."[19]
- Redacting exculpatory evidence from investigative file in response to a public-records request post-trial can violate a defendant's right to access to the courts.[20]

Indefinitely: even if *Brady* is not the source of the obligation, a prosecutor has an ethical duty under MRPC 3.8 to disclose certain favorable evidence indefinitely

- "[A]fter 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."[21]
- MRPC 3.8(f) provides, in pertinent part, that a prosecutor has a continuing obligation to disclose and investigate certain "new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted . . . ."
- MRPC 3.8 (g) provides: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction."

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[12] *See Alvarez v City of Brownsville*, 904 F3d 382, 392-394 (CA 5, 2018) (reviewing federal circuit caselaw addressing disclosure of exculpatory *Brady* material before a plea and noting a lack of consensus among the circuits); *People v David*, 2007 WL 2683655, MCOA No. 268460 (Sept 13, 2007) (discussing that defendant was deprived of due process of law for failure of prosecution to ensure that the defense counsel could review *Brady* material before trial and noting that one of the considerations was that defense counsel was unable to advise the defendant of the propriety of accepting a plea offer).

[13] *People v Guyton*, 2023 WL 4609733, MSC No. 163700 (2023). The trend is toward full disclosure of exculpatory evidence as soon as possible.

[14] *United States v Headman*, 594 F3d 1179, 1183 (CA 10, 2010) ("Although *Brady* claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence (such as impeachment evidence) that is unavailable to the government until the trial is underway."); *United States v Presser*, 844 F2d 1275, 1283-1284 (CA 6, 1988) (discussing disclosure of impeachment evidence during trial and ability of court to cure any prejudice); *Joseph v Coyle*, 469 F3d 441, 472 (CA 6, 2006) (same).

[15] *Brady v Maryland*, 373 US 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[16] *Waterford v Washburn*, 455 F Supp 3d 579, 610-611 (MD TN 2020) (discussing lack of consensus among appellate courts and citing cases).

[17] *Fields v Wharrie*, 672 F3d 505 515-516 (CA 7, 2012).

[18] *District Attorney's Office for the Third Judicial Dist. v Osborne*, 557 US 52, 68-69 (2009) ("Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.").

[19] *Gavitt v Born*, 835 F3d 623, 648 (CA 6, 2016).

[20] *Jackson v City of Cleveland*, 64 F4th 736, 750-752 (CA 6, 2023).

[21] *Imbler v Pachtman*, 424 US 409, 427 n.25 (1976).

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Disclosure Requirements

Prosecutor's Evidence Disclosure Duties[1]

- MCR 6.201 (felony discovery rule); MCR 6.202 (disclosure of lab reports); MCR 6.610(E) (misdemeanor discovery rule)
- MRPC 3.8(d) (special disclosure responsibilities of a prosecutor)
- MCL 763.8 (custodial interrogations); MCL 767.19g (GJ testimony); MCL 767.40a (res gestae/trial Wits); MCLs 767A.5(6), (7); 767A.8 (investigative subpoenas); MCLs 768.27a; 768.27b; 768.27c (other-acts/stmts); MCL 780.702; MCL 780.702a (immunity)
- *Brady v Maryland*, 373 US 83 (1963) (duty, with or without request, to disclose exculpatory evidence, including evidence material to guilt or punishment); *Giglio v United States*, 405 US 150 (1972) (duty under *Brady* includes impeachment evidence)

***Brady/Giglio* Disclosure Rule: Prosecutor has an independent duty to disclose material, potentially favorable exculpatory and impeachment evidence related to guilt or punishment.**

- Prosecution must, with or without request by the defendant[2] and irrespective of good or bad faith of the prosecutor, disclose all material, potentially favorable evidence related to guilt or punishment. Favorable evidence is exculpatory evidence and impeachment evidence of any kind of all witnesses, including police officers, cooperators, experts, and victims.[3]

Prosecutor does not have a duty to create evidence.[4]

- Examples: voice print analysis; lineup using participants of defendant's choice; plaster casts of crime scene tire/foot impressions; testing of blood for third time; hardcopy of PBT result that never existed; and interviews of all possible witnesses.[5]

Prosecutor has a duty to seek out evidence in governmental control.

- "[T]he individual 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."[6]
- This prosecutorial duty exists even if police have their own duty[7] and across jurisdictional lines,[8] but not necessarily between independent state agencies, unless the other agency is involved in the investigation or prosecution.[9]

Examples of Evidence in governmental control (that prosecutor must seek out):

- *Brady* material known only to the police/law enforcement investigator, autopsy photos of ME, evidence at Crime Lab, court determination that a police witness had testified untruthfully.[10]

Examples of Evidence not in governmental control: (if prosecutor has actual possession disclosure rules apply)

- Counseling records possessed by another, documents in the possession of a cooperator, DOC mental health/custody records where it is not a DOC investigation, foreign government investigation evidence.[11]

The *in camera* review process can be used when evidence might be protected from disclosure.[12]

- The *in camera* review process is provided in MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 667 (1994).[13]

***Brady/Giglio* Lists**

- Check with your supervisor and/or your office's senior attorneys to find out if your office maintains a *Brady* list (information on officers who have incidents that must be disclosed) and follow your office's procedures to ensure compliance with *Brady/Giglio*.

Err on the side of disclosure.

- "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[14]
- A prosecutor's ethical or statutory obligation many require disclosure broader than *Brady*, so err on the side of disclosure.[15]

Examples of evidence that must be disclosed:

Alternate suspects	Benefits to any witness	Confession by another	Cooperator agreements	Cooperator confessions
Criminal Hx Key Wit.	Defenses, support info	D's impaired state	Elements – undermined	Expert change opinion
Expert undermine P	Expert bias	Eyewitness statements	False accusation of V	False testimony – fix
Identification info – all	Immigration assistance	Immunity agreements	Inconsistent statements	Informant-Wit: cred.
Informant-Wit: incentive	Informant-Wit: stmts	Informant-Wit: status	Key Wit: informant Hx	Lab reports
Non-Pros. Agreements	Pending charges for Wit.	Plea agreements	Police-Wit misconduct	Promise protect 3d party

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[1] These are the primary disclosure duties dealing with evidence that prosecutors often encounter, but a prosecutor must use their own due diligence in ensuring all required disclosures are made and in protecting from disclosure that which should not be disclosed.

[2] *Kyles v Whitley*, 514 US 419, 432-440 (1995).

[3] *Brady v Maryland*, 373 US 83, 87 (1963); *People v Chenault*, 495 Mich 142, 149-150 (2014); *Giglio v United States*, 405 US 150, 154-155 (1972).

[4] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *see also People v Anstey*, 476 Mich 436, 461 (2006).

[5] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *United States v Harvey*, 756 F2d 636, 643 (CA 8, 1985); *Richards v Solem*, 693 F2d 760, 766 (CA 8, 1982); *People v Green*, 310 Mich App 249, 256 (2015); *Baker v Barrett*, 16 F Supp 3d 815, 845 (ED Mi 2014); *Kowalak v Scutt*, 712 F Supp 2d 657, 694 (ED MI 2010).

[6] *Kyles v Whitley*, 514 US 419, 438 (1995); *Strickler v Greene*, 527 US 263, 281 (1999).

[7] *See*, *Moldowan v City of Warren*, 578 F3d 351, 381 (CA 6, 2009);

[8] *United States v Risha*, 445 F3d 298, 299 (CA 3, 2006).

[9] *Hall v. Mays*, 7 F4th 433, 446 (CA 6, 2021).

[10] *Kyles v Whitley*, 514 US 419, 420 (1995); *People v Dimambro*, 318 Mich App 204 (2016); *Horn v Stephenson*, 11 F4th 163, 172 (CA 2, 2021); *McCormick v Parker*, 821 F3d 1240, 1247 (CA 10, 2016); *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020); *People v Butsinas*, 2018 WL 521819, MCOA No. 327799 (Jan 23, 2018).

[11] *People v Stanaway*, 446 Mich 643, 667 (1994); *United States v Graham*, 484 F3d 413, 417 (CA 6, 2007); *Hall v Mays*, 7 F4th 433, 446 (CA 6, 2021); *People v Walker*, 2021 WL 8442980, MCOA Nos. 351789, 352198 (2021); *United States v Ekiyor*, 89 F Supp 3d 928, 937 (ED MI 2015).

[12] *United States v Prochilo*, 629 F3d 264, 268 (CA 1, 2011), citing *Pennsylvania v Ritchie*, 480 US 39, 58 & n.15 (1987); *People v Chenault*, 495 Mich 142, 152 n.4 (2014) (citing with approval *United States v Ruggiero*, 472 F2d 599, 604 (CA 2, 1973)).

[13] *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994).

[14] *United States v Agurs*, 427 US 97, 108 (1976); *Cone v Bell*, 556 US 449, 470 n.15 (2009); *Kyles v Whitley*, 514 US 419, 439 (1995).

[15] *Cone v Bell*, 556 US 449, 470 n.15 (2009) (referencing ABA MRPC 3.8(d)).

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	Prosecutor misconduct	Prosecutor influence	Pros. Theory: undermine	Scene of crime evidence	Search warrant affidavit
	Sentence impact info.	Transcript of Wit. Inter.	U-Visa or T-Visa	Vic. Impact Stmt (VIS)	Wit. Pro-Pros/Anti-D bias
	Wit. Credibility material	Wit. influence/intimid.	Wit. Competence (drug/mental hlth)	Police notes (if preserved) of *Brady* material	
	Examples of evidence that caselaw says does not need to be disclosed (but you must decide if disclosure is required in your case):[16]				
	• Evidence that a civilian[17] witness is under investigation for an unrelated criminal matter, unless the civilian witness is told before testifying that he is under investigation because that goes to motive to testify favorably to the state.[18]				
	Examples of evidence that the caselaw is unclear whether disclosure is required (careful consideration required):				
	• Evidence that a victim applied for crime victim payments, particularly when police/prosecutor involved in program/application.[19]				
	Examples of evidence that may warrant *in camera* review to determine disclosure:				
	Privileged info., including what expert reviewed and medical/MH	Disclosure of identity of CI	Confidential security video (e.g. prison)		
	Internal Affairs investigation material[20]	Presentence investigation reports of Co-D	Attorney notes: of *Brady/Giglio* material[21]		

Timing of disclosure

Brady is an ongoing obligation that results in a violation upon failure to disclose and upon delayed disclosure if the delay causes prejudice[22]
• In some circumstances, a trial court can effectively deal with a *Brady* issue by allowing the defendant time to review the *Brady* evidence and use it to the extent it is helpful. Typically, there is no violation if the evidence is disclosed in time to be used at trial.[23]
Grand jury: disclosure not required
• The prosecutor does not have a duty to disclose *Brady* material during grand jury proceedings.[24]
Preliminary examinations: disclosure not generally required
• As a general principle, there is no *Brady* violation for failure to provide *Brady* material prior to examination.[25]
Suppression hearing: disclosure likely required
• The prosecutor might have a duty to disclose favorable, material evidence for use by the defense prior to a suppression hearing, especially where challenge is to truthfulness of search warrant affidavit.[26]
Pre-plea: disclosure of **impeachment** evidence not required; **exculpatory** evidence unclear
• "[T]he Constitution does not require the Government to disclose material **impeachment** evidence prior to entering a plea agreement with a criminal defendant."[27] The federal circuits have not reached a consensus as to whether *Brady* requires **exculpatory** evidence to be disclosed prior to plea but at least one unpublished Michigan case suggests that it should.[28] Additionally, the Michigan Supreme Court has recently held that a prosecutor error in a habitual offender enhancement notice made a plea involuntary.[29]
Trial (prior to and during): disclosure required
• The prosecution must disclose *Brady* evidence prior to and during trial.[30]
Sentencing: disclosure required
• The prosecution must disclose *Brady* evidence prior to sentencing.[31]
Direct appeal: disclosure likely still required
• There is not a consensus among appellate courts as to whether or for how long a prosecutor's *Brady/Giglio* obligations persist after conviction and sentencing.[32] But at least one federal circuit has said: "[A] prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final . . . ."[33]

[16] Even if the law allows for non-disclosure, you must decide whether to turn over the information anyway in a given case remembering that when in doubt to err on the side of disclosure.

[17] Investigations, even if in another matter, into wrongdoing(s) of law enforcement witness(es) involved in the defendant's case generally must be disclosed. *See, e.g. United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995).

[18] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999); *United States v Chitty*, 760 F2d 425, 428 (CA 2, 1985).

[19] *Moore v Marr*, 254 F3d 1235, 1244-1245 (CA 10, 2001).

[20] A prosecutor must exercise caution when dealing with material related to internal affairs investigations. Some material should not be disclosed and some material may warrant *in camera* review. *See, e.g.*, MCL 15.395; *Garrity v New Jersey*, 385 US 493 (1967); *Ostoin v Waterford Twp. Police Dept.*, 189 Mich App 334, 337 (1991).

[21] A prosecutor should **not** put themselves in the situation where they are the sole observer/participant in talking to a witness so that any disclosable material can come from another observer/participant rather than from the attorney notes, which usually contain work-product.

[22] *Pennsylvania v Ritchie*, 480 US 39, 59-60 (1987); *McNeill v Bagley*, 10 F4th 588, 600 (CA 6, 2021); *Robertson v Lucas*, 753 F3d 606, 621 (CA 6, 2014); *United States v Bencs*, 28 F3d 555, 560-561 (CA 6, 1994); *People v Fox*, 232 Mich App 541, 549-551 (1998); *see also Cunningham v. Shoop*, 23 F.4th 636, 675–76 (CA 6, 2022).

[23] *People v Hawkins*, 340 Mich App 155, 186 (2022); *United States v Presser*, 844 F2d 1275, 1283 (CA 6, 1988); *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004); *United States v Garner*, 507 F3d 399, 405 (CA 6, 2007).

[24] *United States v Williams*, 504 US 36, 49-53 (1992); *United States v Angel*, 355 F3d 462, 475 (CA 6, 2004).

[25] *People v Bosca*, 310 Mich App 1, 27-30 (2015), reversed in part on other grounds, *People v Bosca*, 509 Mich 851 (2022).

[26] *United States v Barton*, 995 F2d 931, 935 (CA 9, 1993); *United States v Gamez-Orduno*, 235 F3d 453, 461-462 (CA 9, 2000); but see *United States v Bowie*, 198 F3d 905, 912 (CA DC, 1999).

[27] *United States v Ruiz*, 536 US 622, 633 (2002) (emphasis added).

[28] *See Alvarez v City of Brownsville*, 904 F3d 382, 392-394 (CA 5, 2018); *People v David*, 2007 WL 2683655, MCOA No. 268460 (Sept 13, 2007).

[29] *People v Guyton*, 2023 WL 4609733, MSC No. 163700 (2023). The trend is toward full disclosure of exculpatory evidence as soon as possible.

[30] *United States v Headman*, 594 F3d 1179, 1183 (CA 10, 2010); *United States v Presser*, 844 F2d 1275, 1283-1284 (CA 6, 1988); *Joseph v Coyle*, 469 F3d 441, 472 (CA 6, 2006).

[31] *Brady v Maryland*, 373 US 83, 87 (1963).

[32] *Waterford v Washburn*, 455 F Supp 3d 579, 610-611 (MD TN 2020).

[33] *Fields v Wharrie*, 672 F3d 505 515-516 (CA 7, 2012).

Brady & *Giglio*: At a Glance

created 8/22/23

Post-conviction proceeding(s): disclosure likely not required beyond direct appeal
(but prosecutor cannot redact exculpatory material in manner that thwarts defendant's access to postconviction relief in the courts)

- "In *Osborne*, [ ], the Supreme Court noted that 'nothing in our precedents' suggests that the prosecutor's obligation to disclose *Brady* material to the defendant before trial continues after the defendant is convicted and the case is closed."[34]
- Redacting exculpatory evidence from investigative file in response to a public-records request post-trial can violate a defendant's right to access to the courts.[35]

Indefinitely: even if *Brady* is not the source of the duty, a prosecutor has an ethical duty to disclose certain favorable evidence indefinitely[36]

- MRPC 3.8(f) provides that a prosecutor has a continuing obligation to disclose/investigate "new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted . . . ."
- MRPC 3.8 (g) provides: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction."

Violations

Brady Violation: suppression by the prosecution of evidence favorable to the defendant that was material

- A *Brady* violation is established when the following three factors are shown:
  (1) the prosecution has suppressed evidence within the government's control, either willfully or inadvertently;
  (2) the evidence was favorable to the defendant either because it was exculpatory evidence or because it was impeachment evidence; &
  (3) the evidence was **"material"** such that withholding the evidence caused prejudice.[37]

"Material" definition: reasonable probability of a different result in the fairness of the trial
"Reasonable probability" definition: probability sufficient to undermine confidence in the outcome

- "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[38]
- The standard is not met based on a mere possibility of a different outcome, nor is the analysis whether it was more likely than not that defendant would have received a different verdict but rather whether defendant received a fair trial even without the evidence.[39]
- A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[40]

Materiality is influenced by the entirety of the record[41]

- The materiality of the withheld evidence is considered in relation to the entire record such that significant withheld evidence might not undermine the confidence of the verdict because the other proofs were so strong, but relatively minor withheld evidence might undermine the confidence of the verdict when the verdict was already questionable.[42]

Materiality is determined by consideration of the net effect of all evidence withheld

- Although each instance of non-disclosure is looked at separately, the withheld evidence is not looked at item by item to determine materiality. Rather, the net effect/cumulative effect of all of the withheld evidence is considered and if the net effect "raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand . . . ."[43]

Materiality determination does not inherently distinguish between exculpatory or impeachment evidence, but the outcome-determination analysis can reveal distinctions[44]

- In analyzing alleged *Brady* violations, SCOTUS "has rejected any [ ] distinction between impeachment evidence and exculpatory evidence" because the *Giglio* Court held that impeachment evidence falls within the ambit of *Brady*.[45] Exculpatory evidence is not inherently more valuable than impeachment evidence and vice versa, but the effect of non-disclosure of each kind of evidence might be different depending on the proofs in a case. For example, suppressed impeachment evidence is often merely cumulative.[46]

Materiality depends on how critical the witness/evidence is in relation to the entire proofs

- "'The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.' Thus, 'when the undisclosed evidence is merely cumulative of other evidence . . ., no *Brady* violation occurs.' Similarly, when the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material. Conversely, if the impeaching evidence 'would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.'"[47]

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[34] *Gavitt v Born*, 835 F3d 623, 648 (CA 6, 2016), citing *District Attorney's Office for the Third Judicial Dist. v Osborne*, 557 US 52, 68-69 (2009).
[35] *Jackson v City of Cleveland*, 64 F4th 736, 750-752 (CA 6, 2023).
[36] *Imbler v Pachtman*, 424 US 409, 427 n.25 (1976).
[37] See *People v Chenault*, 495 Mich 142, 149-150 (2014); *People v Abcumby-Blair*, 335 Mich App 210, 217-218 (2020).
[38] *United States v Bagley*, 473 US 667, 682 (1985); see also *Turner v United States*, 582 US 313 (2017); *People v Chenault*, 495 Mich 142 (2014).
[39] *Montgomery v Bobby*, 654 F3d 668, 678 (CA 6, 2011); *Kyles v Whitley*, 514 US 419, 434 (1995) (citations omitted); *Wearry v Cain*, 577 US 385, 392 (2016) (citations omitted).
[40] *Kyles v Whitley*, 514 US 419, 434 (1995) (citations omitted); *Wearry v Cain*, 577 US 385, 392 (2016) (citations omitted).
[41] *United States v Agurs*, 427 US 97, 113 (1976).
[42] *See United States v Agurs*, 427 US 97 (1976); *Smith v Cain*, 565 US 73 (2012); *People v Chenault*, 495 Mich 142 (2014).
[43] *Kyles v Whitley*, 514 US 419, 420 (1995); *Gumm v Mitchell*, 775 F3d 345, 370 (CA 6, 2014).
[44] The timing of disclosure of exculpatory and impeachment evidence might differ, but not the analysis of a violation for failure to disclose. *See, e.g., United States v Ruiz*, 536 US 622, 633 (2002).
[45] *United States v Bagley*, 473 US 667, 676-677 (1985); *United States v Mullins*, 22 F3d 1365, 1372 (CA 6, 1994).
[46] *Jalowiec v Bradshaw*, 657 F3d 293, 313 (6th Cir. 2011), *as amended* (Nov 23, 2011).
[47] *United States v. Sipe*, 388 F3d 471, 478 (CA 5, 2004); *See, e.g., United States v Scheer*, 168 F3d 445, 452-453 (CA 11, 1999); *United States v Weintraub*, 871 F2d 1257, 1262 (CA 5, 1989); *Jefferson v United States*, 730 F3d 537, 550 (CA 6, 2013).

Brady & Giglio: At a Glance

- "'In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.'"[48]
- "[T]here are some instances where specific impeachment evidence is so important (for issues such as the identity of the culprit) that it is material for *Brady* purposes even when a witness has already been effectively impeached on other issues."[49]

Materiality might be established even if the withheld evidence would not have been admissible if it could have led to admissible evidence

- Withheld *Brady* evidence is not material if it would have been inadmissible because it could not have affected the result of the proceeding. But if withheld evidence could have led to admissible evidence, a *Brady* violation can be found.[50]

Although defendant has no obligation to exercise diligence in obtaining *Brady* material, defendant's knowledge of and access to undisclosed material may result in there being no *Brady* violation found (Caution: regardless of whether a failure to disclose is later determined to be a violation, prosecutors must diligently disclose all *Brady* material, whether requested or not, even if Def. otherwise has access to the material)

- "[E]vidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim."[51]
- Examples include: (1) recorded jail calls defendant made to potential witnesses; (2) the ultimate disposition of criminal charges on a witness's criminal history printout; and (3) public/court records.[52]

Prosecutor's subjective mindset in failing to disclose *Brady/Giglio* evidence is irrelevant in determining whether a violation has occurred (but can be relevant in determining the remedy)

- For a *Brady* violation analysis it does not matter if the prosecutor acted in good faith or in bad faith or intentionally or inadvertently in failing to turn over evidence. The good or bad faith of the prosecutor is irrelevant in deciding the consequences to the criminal trial. "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[53]
- "Thus, even when the prosecutor's actions in suppressing exculpatory evidence are in flagrant bad faith, if the evidence at issue is not material, no *Brady* violation has occurred. . . . Conversely, where, as here, the prosecution has acted in good faith but simply misunderstood the scope of its *Brady* obligation, constitutional error has occurred if the exculpatory evidence at issue is material."[54]

Remedy: A new trial is the typical remedy for a *Brady* violation

- "The decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial."[55] However, "a new trial is generally not required where the testimony of the witness is corroborated by other testimony or whether the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."[56]

Remedy: Dismissal can be the remedy for flagrant prosecutorial misconduct

- "Although the appropriate remedy [for a *Brady/Giglio* violation] will usually be a new trial, . . . , a district court may dismiss the indictment when the prosecution's actions rise, as they did here, to the level of flagrant prosecutorial misconduct."[57]

Remedy: Exclusion of evidence/witness

- At least one court has imposed the remedy of exclusion of evidence/witness testimony for a *Brady* violation when the government's conduct did not rise to the level of flagrant misconduct but was not merely an innocent mistake.[58]

Potential consequences to a prosecutor who violates *Brady*

While the good or bad faith of a prosecutor is irrelevant in determining whether a *Brady* violation has occurred, it is relevant in determining the consequences to the prosecutor. Potential consequences include:

Contempt of court/OTSC.[59]	Loss of employment/disciplinary action.[60]	Potential civil lawsuit, although immunity might apply.[61]
Professional misconduct proceedings are possible, not historically common.[62]	Being chastised in a published court decision for misconduct.[63]	

[48] *United States v Bruce*, 984 F3d 884, 898 (CA 9, 2021), quoting *United States v Jernigan*, 492 F3d 1050, 1054 (CA 9, 2007).
[49] *United States v Walker*, 657 F3d 160, 188 (CA 3, 2011); *Dennis v Secretary, Pennsylvania DOC*, 834 F3d 263, 301 (CA 3, 2016).
[50] *Wood v Bartholomew*, 516 US 1, 6 (1995); *Barton v Warden, Southern Ohio Correctional Facility*, 786 F3d 450, 465 (CA 6, 2015); *United States v Dill*, 297 F3d 93, 104 (CA 2, 2002).
[51] *People v Chenault*, 495 Mich 142, 155 (2014).
[52] *People v Richardson*, 2016 WL 3030860 (MCOA No. May 26, 2016); *United States v Castano*, 906 F3d 458, 466 (CA 6, 2018); *United States v Ladoucer*, 573 F3d 628, 636 (CA 8, 2009).
[53] *Brady v Maryland*, 373 US 83, 87 (1963); *Smith v Phillips*, 455 US 209, 219 (1982); *United States v Agurs*, 427 US 97, 103 (1976); holding modified by *United States v Bagley*, 473 US 667 (1985).
[54] *Spicer v Roxbury Corr. Inst.*, 194 F3d 547, 559 (CA 4, 1999) (citation omitted); *Strickler v Greene*, 527 US 263, 288 (1999).
[55] *United States v Presser*, 844 F2d 1275, 1286 (CA 6, 1988); *United States v Bolton*, 908 F3d 75, 91 (CA 5, 2018).
[56] *People v Lester*, 232 Mich App 262, 282 (1998), overruled on other grounds by *People v Chenault*, 495 Mich 142 (2014).
[57] *United States v Chapman*, 524 F3d 1073, 1086 (CA 9, 2008); *see also United States v Garrison*, 888 F3d 1057, 1065 (CA 9, 2018); *United States v Driscoll*, 984 F3d 103, 109 (CA DC, 2021); *United States v Lopez*, 577 F3d 1053, 1068 (CA 9, 2009).
[58] *See United States v Frazier*, 203 F Supp 3d 1128, 1134-1135 (W.D. Wash. 2016).
[59] *Mansfield v Williamson County*, 30 F4th 276, 278-79 (CA 5, 2022); *see also*, *United States v Jones*, 686 F Supp 2d 147, 147-149 (D. Mass. 2010).
[60] *See United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992).
[61] *Connick v Thompson*, 563 US 51, 54 (2011); *Price v Montgomery County, Kentucky, et al.*, __ F4th __ (CA 6, 2023) (No. 21-6076); *but see Harris v Bornhorst*, 513 F3d 503, 520-522 (CA 6, 2008); s*ee also, e.g. Smith v Holtz*, 210 F3d 186, 201 (CA3 2000).
[62] MRPC 3.8, 8.4; *Connick v Thompson*, 563 US 51, 66 (2011); Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 Drake L Rev 307 (2018).
[63] *United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992).

Brady & *Giglio*: Disclosure Requirements

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Prosecutor's Evidence Disclosure Duties[1]

- MCR 6.201 (felony discovery rule; linked); MCR 6.202 (disclosure of lab reports upon receipt linked); MCR 6.610(E) (misdemeanor discovery rule; linked)
- MRPC 3.8(d) (special responsibilities of a prosecutor – disclosures included; linked)
- MCL 28.214(4) (authority to disclose defendant's LEIN information to the defendant; linked)
- MCL 763.8 (custodial interrogations involving major felonies, duty to disclose copy of recorded statement; linked)
- MCL 767.19g (furnishing testimony of witness to person indicted by grand jury; linked)
- MCL 767.40a (duty to disclose res gestae witnesses & witnesses intended to be called at trial; linked)
- MCLs 767A.5(6), (7); 767A.8 (disclosures related to investigative subpoenas; link MCL 767A.5; link MCL 767A.8)
- MCLs 768.27a; 768.27b; 768.27c (disclosures related to other-acts/statements in specific cases; link MCL 768.27a; link MCL 768.27b; link MCL 768.27c)
- MCL 780.702; MCL 780.702a (disclosures related to grants of immunity; link MCL 780.702; link MCL 780.702a)
- *Brady v Maryland*, 373 US 83 (1963) (duty, with or without request, to disclose exculpatory evidence, including evidence material to guilt or punishment)
- *Giglio v United States*, 405 US 150 (1972) (duty under *Brady* includes impeachment evidence)

Brady/Giglio Disclosure Rule:[2] Prosecutor has an independent duty to disclose material, potentially favorable exculpatory and impeachment evidence related to guilt or punishment.

- Prosecution must, with or without request by the defendant,[3] disclose all material, potentially favorable evidence related to guilt or punishment. Favorable evidence is exculpatory evidence and impeachment evidence of any kind of all witnesses, including police officers, cooperators, experts, and victims.
- The *Brady* holding:[4]
  "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."
- The *Giglio* holding (extending *Brady* to relevant impeachment evidence):[5]
  "[T]he Government's case depended almost entirely on [the testimony of a witness who had been told he would not be prosecuted if he testified]; without it there could have been no indictment and no evidence to carry the case to the jury. [His] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."

Prosecutor does not have a duty to create evidence.

- Although the prosecution has a duty to disclose any *Brady/Giglio* evidence, it does not have a duty to create such evidence.[6]
- Examples of evidence the prosecution does not have to create include: voice print analysis of phone recordings; lineup using participants of defendant's choice; plaster casts of crime scene tire/foot impressions; testing of blood for third time; hardcopy of PBT result that never existed; and interviews of all possible witnesses.[7]

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[1] These are the primary disclosure duties dealing with evidence that prosecutors often encounter, but a prosecutor must use their own due diligence in ensuring all required disclosures are made and in protecting from disclosure that which should not be disclosed. For example, these do not deal with disclosures required by certain specific statutory obligations of a prosecutor. *See, e.g.*, MCL 600.2163a (dealing with protections and procedures for minor, developmentally-disabled, and vulnerable adult witnesses that include disclosure and protection from disclosure requirements); MCL 201.10 (dealing with Removals from Office and disclosures/accesses required). Nor do they deal with when a defendant raises a particular defense. See, e.g. MCL 768.20 (alibi); MCL 768.20a (insanity defense). Nor do they deal with notice requirements, such as MRE 404(b) (other acts evidence) and MCL 769.13 (notice to seek enhanced sentence). For an example of item(s) protected from disclosure, see MCL 15.395 (Confidentiality and protections from disclosure of involuntary statements of law enforcement officers).

[2] The obligation is often referred to as "*Brady/Giglio*" to reflect that *Brady* dealt with exculpatory evidence and *Giglio* extended *Brady* to impeachment evidence; this document uses "*Brady*" to encompass both *Brady* (exculpatory) and *Giglio* (impeachment) unless otherwise indicated.

[3] *Kyles v Whitley*, 514 US 419, 432-440 (1995).

[4] *Brady v Maryland*, 373 US 83, 87 (1963); see also *Smith v Cain*, 565 US 73 (2012) (reaffirming *Brady* and discussing materiality of statements of a witness give 5 days apart); *People v Chenault*, 495 Mich 142, 149-150 (2014) (recognizing applicability of *Brady* in Michigan).

[5] *Giglio v United States*, 405 US 150, 154-155 (1972).

[6] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *see also People v Anstey*, 476 Mich 436, 461 (2006).

[7] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980) (prosecution did not have to create voiceprint analyses of telephone recordings so that defendant could attempt to prove one call was an impersonation); *United States v Harvey*, 756 F2d 636, 643 (CA 8, 1985) (prosecution does not have to arrange for a lineup using suspects/participants of defendant's choice); *Richards v Solem*, 693 F2d 760, 766 (CA 8, 1982) (prosecution was under no duty to "take plaster casts of tire and foot tracks at the scene of the crime for comparison with [defendant's] car and feet"); *People v Green*, 310 Mich App 249, 256 (2015) ("[The prosecution] is required to disclose evidence that has been developed, [but] it is not required to develop evidence, including testing a blood sample for a third time, that defendant hopes will provide him with a defense.") *Baker v Barrett*, 16 F Supp 3d 815, 845 (ED Mi 2014) (finding no *Brady* violation for failure to produce a hard copy of a preliminary breath test result when there was no evidence that such a hard copy printout ever existed); *Kowalak v Scutt*, 712 F Supp 2d 657, 694 (ED Mi 2010) (prosecutor has no obligation under *Brady* to interview all possible witnesses in an effort to assist the defense) (citation omitted).

Brady & *Giglio*: Disclosure Requirements

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Prosecutor has a duty to seek out evidence in governmental control.

- It does not matter if a prosecutor does not know of the *Brady* evidence. A prosecutor is held responsible for all evidence within **government** control; "the individual 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."[8]
- This prosecutorial duty exists even though many courts recognize a derivative obligation on the part of police to provide the *Brady* evidence to the prosecutor.[9]
- This duty may even exist across jurisdictional lines such that a federal prosecutor may be imputed with knowledge possessed by a state prosecutor and vice versa.[10]
- This duty does not necessarily exist, however, between independent state agencies, such as the MDOC, unless the other agency is involved in the investigation or prosecution.[11]

Examples of Evidence in governmental control (that prosecutor must seek out):

- *Brady* material known only to the police/law enforcement investigator and not shared with the prosecutor, such as witness statements, informant statements, and list of license plate numbers.[12]
- Autopsy photos in possession of medical examiner.[13]
- Evidence at the MSP Crime Lab or other local lab, as these are agencies directly related to and involved with the criminal investigation/prosecution.[14]
- Court determination in another case prosecuted by the same prosecutor's office that a police witness had testified untruthfully.[15]

Examples of Evidence not in governmental control:

(if prosecutor has actual possession of such records, they are subject to *Brady/Giglio* disclosure rules)

- Counseling records that "the prosecutor has not at any time had access to the records . . . ." Such records are not "'investigative' records of a governmental agency."[16]
- Documents in the possession and control of a cooperating witness because that witness was not an agent of the government and is not akin to a police officer.[17]
- DOC mental health/custody records of an inmate-witness as a prosecutor does not have an obligation to seek out evidence from another sovereign or state agency that is not involved in the particular case.[18]
- Evidence uncovered in law enforcement investigations by foreign governments or agencies.[19]

The *in camera* review process can be used when evidence might be protected from disclosure.

- "When the defendant seeks access to specific materials that the government maintains are not discoverable under *Brady*, however, a trial court may in some instances conduct an *in camera* review of the disputed materials."[20]

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[8] *Kyles v Whitley*, 514 US 419, 438 (1995); *Strickler v Greene*, 527 US 263, 281 (1999).

[9] *See, e.g.*, *Moldowan v City of Warren*, 578 F3d 351, 381 (CA 6, 2009) (listing cases that have made this holding and stating: "Although the prosecutor's office bears primary responsibility for carrying out the state's actual 'disclosure' obligations under *Brady*, the police bear . . . an equally important '*Brady*-derived' responsibility to turn over potentially exculpatory evidence to the prosecutor's office.") (citation omitted).

[10] *United States v Risha*, 445 F3d 298, 299 (CA 3, 2006) (No evidence has been advanced that the federal prosecutors in Risha's case had actual knowledge of Caito's expectations or of a pending plea agreement. The question ultimately presented here is whether cross-jurisdiction constructive knowledge can be imputed to the federal prosecution because of close involvement between the federal prosecution and state agents, or because impeachment information may have been "readily available." Under certain fact findings, such knowledge might be imputed.").

[11] *Hall v Mays*, 7 F4th 433, 446 (CA 6, 2021) (recognizing the precedent that "a prosecutor does not have a duty to secure evidence from another sovereign (or state agency) that had no involvement whatsoever in a particular case"), *cert. denied*, 212 L. Ed. 2d 611, 142 S. Ct. 2655 (2022).

[12] *Kyles v Whitley*, 514 US 419, 420 (1995).

[13] *People v Dimambro*, 318 Mich App 204 (2016).

[14] See MCL 12.201 et seq (The Forensic Laboratory Funding Act); *Horn v Stephenson*, 11 F4th 163, 172 (CA 2, 2021) ("*Brady* applies to forensic examiners in state crime laboratories. . . .").

[15] *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020) (including allegations of false statements in search warrant affidavits).

[16] *People v Stanaway*, 446 Mich 643, 667 (1994) ("The disclosure requirements of *Brady* . . . are directly applicable where the prosecutor possesses the record.") (citation reference omitted).

[17] *United States v Graham*, 484 F3d 413, 417 (CA 6, 2007).

[18] *Hall v Mays*, 7 F4th 433, 446 (CA 6, 2021) ("We are not inclined to break new ground by holding that the prosecutor has an affirmative duty to pursue and obtain psychological records for its witnesses, even inmate witnesses . . . ."), *cert. denied*, 212 L. Ed. 2d 611, 142 S. Ct. 2655 (2022); *see also People v Walker*, 2021 WL 8442980, MCOA Nos. 351789, 352198 (Dec 17, 2021) ("The prosecution [does] not have an obligation to learn information possessed by other governmental agencies which had no involvement in the investigation or prosecution of its case."; no duty to seek/obtain DOC information about the custodial status of a prosecution witness when the DOC was not involved in the case).

[19] *United States v Ekiyor*, 89 F Supp 3d 928, 937 (ED MI 2015).

[20] *United States v Prochilo*, 629 F3d 264, 268 (CA 1, 2011), citing *Pennsylvania v Ritchie*, 480 US 39, 58 & n.15 (1987) (approving of court reviewing disputed material *in camera* to determine if it is material).

- "[T]here [is] no suppression when the government provide[s] the requested evidence to the trial court for an *in camera* inspection and ruling."[21]
- The *in camera* review process is provided in MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 667 (1994).[22]

Brady/Giglio Lists

- Many prosecutors' offices maintain a list of police officers that have history that is required to be disclosed under *Brady/Giglio*. These are often referred to as "*Brady* Lists." Check with your supervisor and/or your office's senior attorneys to find out if your office maintains such a list and follow your office's procedures to ensure compliance with *Brady/Giglio*.

Err on the side of disclosure.

- "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[23]
- "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[24]
- "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."[25]

Examples of evidence that must be disclosed:

- See separate Quick Reference Guide titled: "*Brady & Giglio*: Examples of Required Disclosures"

Examples of evidence that caselaw says does not need to be disclosed (but you must decide):[26]

- Evidence that a civilian[27] witness is under investigation for an unrelated criminal matter (as opposed to having pending charges) generally does not need to be disclosed, unless the civilian witness is told before testifying that he is under investigation because that goes to motive to testify favorably to the state.[28]

Examples of evidence that the caselaw is unclear whether disclosure is required:
(such evidence, therefore, requires careful consideration by a prosecutor as disclosure may be required)

- Evidence that a victim applied for crime victim payments, particularly when the program administering such payments is run with the help of the prosecutor's office.[29]

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[21] *People v Chenault*, 495 Mich 142, 152 n.4 (2014) (citing with approval *United States v Ruggiero*, 472 F2d 599, 604 (CA 2, 1973)).
[22] *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994) ("Where the defendant has made the required showing [of a 'good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense'], in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislatures interest in protecting the confidentiality of the therapeutic setting.")
[23] *United States v Agurs*, 427 US 97, 108 (1976); *Cone v Bell*, 556 US 449, 470 n.15 (2009) ("[T]he prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").
[24] *Kyles v Whitley*, 514 US 419, 439 (1995) (quoting *Berger v United States* 295 US 78, 88 (1935)).
[25] *Cone v Bell*, 556 US 449, 470 n.15 (2009) (referencing ABA MRPC 3.8(d)).
[26] Just because the caselaw allows for non-disclosure does not mean you should not disclose. Each case is different and each office's practices are different. Therefore, exercise your own due diligence in seeking out guidance from your office and analyzing the material based on the facts and circumstances of your case, remembering to err on the side of disclosure.
[27] Investigations, even if in another matter, into wrongdoing(s) of law enforcement witness(es) involved in the defendant's case generally must be disclosed. *See, e.g. United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999) (government police witness was the subject of an investigation into the truthfulness of his testimony in another case); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021) (in a prison contraband case, government should have disclosed that one of its corrections officer witnesses was under investigation in another case for similar allegations); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995) (government should have disclosed that that an officer was "alleged to have taken money belonging to government informants, lying on search warrant applications, and stealing money during police searches).
[28] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999) ("[T]he prosecution has a duty to disclose charges pending against a witness. . . . However, defendant has cited no authority supporting the conclusion that the prosecution has a duty to disclose that a witness is under investigation in an unrelated matter, nor are we disposed to so hold in the absence of precedent."); *United States v Chitty*, 760 F2d 425, 428 (CA 2, 1985) ("The information that [the witness] had been told that he was under investigation was disclosable pursuant to *Brady*, . . .; it provided a motive to testify favorably to the Government, and the fact was known to the prosecutor's office . . . .") (citation omitted).
[29] *Moore v Marr*, 254 F3d 1235, 1244-1245 (CA 10, 2001) (discussing reasons that crime victim payments might be used to challenge credibility of the victim, including financial incentive, but declining to decide if such evidence is favorable because even if favorable the evidence in that case was not material as the other evidence of guilt was overwhelming so that there was not proof that failure to disclose was outcome-determinative).

Brady & Giglio: Disclosure Requirements

created 8/22/23

	Examples of evidence that may warrant *in camera* review to determine disclosure:
	• Privileged communications with doctors and/or contained within counseling records.[30] • Privileged or confidential information reviewed by a government expert.[31] • Confidential security camera footage of a prison.[32] • Disclosure of the identity of a confidential informant may, sometimes, be required.[33] • Presentence investigation reports of coconspirators/codefendants.[34] • Attorney notes of interviews of witnesses[35] that reveal exculpatory/impeachment information must be disclosed but a method for doing so can include disclosure to court for *in camera* review.[36] • Internal affairs investigation material[37]
Timing of disclosure	
	• See separate Quick Reference Guide titled: "*Brady & Giglio*: Timing of Disclosure"
Prosecutor's duty to disclose exists regardless of whether a failure to disclose is later determined to be a *Brady* violation.	
	• "[S]aying that a particular nondisclosure was not a *Brady* violation in no way suggests that the prosecutor did not have a duty to disclose the information."[38] • Thus, see separate Quick Reference Guide titled: "*Brady & Giglio*: Violations" for guidance on violations.

[30] MCL 767.5a(2); MCL 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994); *Pennsylvania v Ritchie*, 480 US 39, 43 (1987) (information in counseling records).

[31] *United States v White*, 492 F3d 380, 408-413 (CA 6, 2007).

[32] *Piggie v Cotton*, 344 F3d 674, 679 (CA 7 2003).

[33] *See California v Trombetta*, 467 US 479, 485 (1984) ("[U]nder some circumstances [the government] may be required to disclose the identity of undercover informants who possess evidence critical to the defense."), citing *Roviaro v United States*, 353 US 53 (1957); *People v Underwood*, 447 Mich 695,703-704 (1994) (use of an *in camera* hearing is the proper procedure for determining what, if any, information related to a confidential informant is required to be disclosed); *see also*, *People v Henry* (aft. rem.), 305 Mich App 127, 156 (2014) ("[W]hen a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an *in camera* hearing to determine if the informant could offer any testimony beneficial to the defense.").

[34] *United States v Trevino*, 89 F3d 187, 192 (CA 4, 1996) ("We conclude that a district court is under no duty to conduct an *in camera* examination of a requested PSR unless the accused has first clearly specified the information contained in the report that he expects will reveal exculpatory or impeachment evidence.").

[35] A prosecutor should **not** put themselves in the situation where they are the sole observer/participant in talking to a witness so that any disclosable material can come from another observer/participant rather than from the attorney notes, which usually contain work-product.

[36] *Paradis v Arave*, 240 F3d 1169, 1176-1178 (CA 9, 2001) (disclosure required of prosecutor notes of medical examiner's opinions shortly after victims' bodies were found and examined as they were potential impeachment evidence related to the time and location of the deaths); *United States v Dupuy*, 760 F2d 1492, 1500-1502 (CA 9, 1985) (prosecutor's notes taken during plea negotiations with codefendants that prosecutor agreed to keep confidential later proved to contain potentially exculpatory evidence for the defendant so it was proper for prosecutor to disclose those notes to the trial court for *in camera* review; "By submitting the issue to the judge, the prosecutor satisfied her duty to disclose exculpatory material. . . . Consultation with the judge is particularly appropriate when the Government has legitimate reasons for protecting the confidentiality of the material requested, for the trial judge can then weigh the Government's need for confidentiality against the defendant's need to use the material in order to obtain a fair trial.") (citations omitted); *Bell v Bell*, 512 F3d 223, 232-233 (CA 6, 2008) (prosecutor notes of interview with inmate who sought consideration from government in exchange for his testimony that memorialized the consideration sought by the inmate were favorable; but not material); *but see People v Holtzman*, 234 Mich App 166, 188-190 (1999) (discussing that prosecutor notes of witness interviews were not "statements" under the reciprocal discovery rule); *United States v Henke*, 222 F3d 633, 642-643 (CA 9, 2000) (court was not required to conduct *in camera* review of prosecutor notes of pretrial interviews of witnesses that were not disclosed as claimed work-product because defendant made no showing that there might be exculpatory information in the notes).

[37] A prosecutor must exercise caution when dealing with material related to internal affairs investigations. Some material should not be disclosed and some material may warrant *in camera* review. *See, e.g.*, MCL 15.395 (Confidentiality and protections from disclosure of involuntary statements of law enforcement officers); *Garrity v New Jersey*, 385 US 493 (1967) (precluding admission in a criminal prosecution of involuntary statements of police officers); *Ostoin v Waterford Twp. Police Dept.*, 189 Mich App 334, 337 (1991) (holding, in a case dealing with a police internal affairs investigative file, that Michigan recognizes "a qualified privilege which protects from disclosure documents reflecting a governmental agency's evaluative or deliberative processes" but not the "'objective facts' upon which decisions are based" and finding that court should have conducted an *in camera* review of contested personnel files).

[38] *Bell v Bell*, 512 F3d 223, 235 n7 (CA 6, 2008).

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-

[redacted]
Defendant.
_____/

PROOF OF SERVICE

CASE NO: 24-FY-424

Lauren M. Wickman (P79974)
Chief Prosecuting Attorney
310 Ludington Street
Escanaba, MI 49829
(906)789-5115

James R. Maki (P84455)
Attorney for Defendant
524 Ludington Street Suite 101
Escanaba, MI 49829
(906) 786-7885

PROOF OF SERVICE

The undersigned states that she served documents as follows:

Served: [redacted]
Trooper Immel 2023 State of Charges/Proposed Discipline

Served Upon: James R Maki (P84455)
524 Ludington Street Suite 101
Escanaba, MI. 49829

Method of Service: [redacted]

Date Served: September 5, 2024

Morgan Verbrigghe, Felony Intake Clerk
Delta County Prosecutor's Office

Brady & *Giglio*: Examples of Required Disclosures (Annotated) created 8/22/23

Item
Alternate, legitimate suspects information: including eyewitness statements tending to identify another person as the perpetrator, another vehicle was seen speeding away from the crime scene, confession by another person, others seen at the scene[1]
Benefits of any kind given by a government actor (e.g. police, prosecutor, member of office) to a witness/codefendant/cooperator before or during trial even if not explicitly in exchange for testimony because it reflects tacit understanding that person will be helpful to the government or creates a sense of obligation on the part of a witness to testify favorably to the government. This can be in the form of help, favors, special treatment, inducements, or leniency: including charges not being authorized, pretrial release, pre-parole release, reinstatement of goodtime credits, sentence recommendation to probation, writing letters to assist in prison transfer/parole decision/sentencing/resolution of other criminal charges, promise to share with other prosecutors and judges the cooperation, providing money for relocation, offering a reward, delayed filing of warrant, not instituting forfeiture proceedings, not enforcing civil liability, inmate visitation privileges, lax inmate supervision, allowing inmates to make long-distance calls, placement in protective custody, payments to witness, interest-free loans to an informant, sentencing benefit promised to cooperator[2]
Confession by another person[3]

[1] "'Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of "legitimate suspects."'" *Hughbanks v Hudson*, 2 F4th 527, 536-537 (CA 6, 2021) (son of victim was legitimate suspect due to his motive and post-murder actions), quoting *Gumm v Mitchell*, 775 F3d 345, 364 (CA 6, 2014) (a suspect who was reported to have confessed is a legitimate suspect); *compare McNeill v Bagley*, 10 F4th 588, 598-599 (CA 6, 2021) (report containing information about an alternative suspect was not favorable to the defendant because the alternative suspect was definitively and quickly removed as a suspect); *United States v Robinson*, 39 F3d 1115, 1116-1119 (CA 10, 1994) (eyewitness statement that tended to identify a prosecution witness/former codefendant as the real suspect); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (evidence that another vehicle was seen speeding away from the scene); *DiSimone v Phillips*, 461 F3d 181, 195 (CA 2, 2006) (evidence that another person confessed to stabbing the victim); *Turner v United States*, 582 US 313, 323 (2017) (other persons were seen at the scene of a murder prior to police arrival); *Turner v United States*, 582 US 313, 323 (2017) (statements of a witness who named another suspect in the murder even though that witness had credibility issues); *In re Jackson*, 12 F4th 604, 610 (CA 6, 2021) (evidence that eyewitness gave a statement implicating an alternative suspect, which did not match identification of the defendant).

[2] *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed); *Singh v Prunty*, 142 F3d 1157, 1162 (CA 9, 1998) (charges not being authorized, pretrial release); *Douglas v Workman*, 560 F3d 1156, 1165, 1174-1175 (CA 10, 2009) (pre-parole release and reinstatement of goodtime credits); *United States v Gerard*, 491 F2d 1300, 1303-1304 (CA 9, 1974) (sentencing recommendation for probation); *Jackson v Brown*, 513 F3d 1057, 1070-1072 (CA 9, 2008) (prosecutor promised one prisoner-witness to write a letter recommending a prison transfer; and police promised another witness they would bring his cooperation to the attention of judges and prosecutors regarding his pending cases); *United States v Bigeleisen*, 625 F2d 203, 205, 208 (CA 8, 1980) (in exchange for testimony, prosecutor promised to write letter to witness's sentencing judge and parole commission outlining his cooperation); *United States v Talley*, 164 F3d 989, 1003 (CA 6, 1999) (money for relocation in exchange for testimony); *Sivak v Hardison*, 658 F3d 898, 909-910 (CA 9, 2011) (letters from prosecutors seeking consideration for cooperator in cases pending in other jurisdictions and with the parole board; a letter documenting consideration sought by the cooperator from out-of-state prosecutor; and a letter from trial prosecutor documenting the assistance given to the cooperator by the prosecutor's office); *United States v Bagley*, 473 US 667, 683-684 (1985) (witnesses were told there was a possibility they would be given a reward if their assistance was satisfactory to the government); *Benn v Lambert*, 283 F3d 1040, 1057 (CA 9, 2002) (during trial at which cooperator was testifying prosecutor arranged for cooperator to be released from custody after traffic offense led to arrest on warrants, cooperator not being charged with offenses, and delayed filing of a probation violation warrant); *United States v Shaffer*, 789 F2d 682, 689 (CA 9, 1986) (court concluded cooperator was paid in the form of leniency for his cooperation because the prosecution had, among other things, not initiated forfeiture proceedings against cooperator for assets related to drug dealings, had not enforced a civil liability, and had paid some of his expenses); *United States v Boyd*, 55 F3d 239, 244-45 (CA 7, 1995) (gang-member witnesses who were in custody received "scandalous" favors from the prosecutor's office including visitation privileges within the prosecutor's offices, lax supervision allowing the witnesses to obtain drugs, have sex, and steal, and ability to make long distance phone calls); *United States v Librach*, 520 F2d 550, 553 (CA 8, 1975) (government failed to disclose that witness was placed in protective government custody and had received nearly $10,000 in payments from the government); *Wilson v Beard*, 589 F3d 651, 666-667 (CA 10, 2009) (officer provided interest-free loan to informant during his time as an informant); *Quezada v Scribner*, 611 F3d 1165, 1168-1169 (CA 9, 2010) (relocation payments made to witness in relation to cooperation in another case); *Kennell v Dormire*, 873 F3d 637, 639 (CA 8, 2017) (relocation payments and assistance given to a witness a year before the defendant's trial); *Wolfe v Clarke*, 691 F3d 410, 417-418 (CA 4, 2012) (murderer-witness/cooperator was told by police that if he implicated the defendant in a murder-for-hire scheme and testified to the same that he might have his murder charges reduced or receive a benefit at sentencing).

[3] *DiSimone v Phillips*, 461 F3d 181, 195 (CA 2, 2006) (evidence that another person confessed to stabbing the victim).

Cooperator/codefendant/confederate agreement(s) in their entirety -- whether formal, informal, or tactic agreements -- even with witnesses the prosecution is choosing not to call[4]
Cooperator/codefendant/confederate confession[5]
Criminal history of a key witness/codefendant[6]
Defendant's defenses – any information that tends to support the defense(s): including duress, lack of conspiracy, insanity, necessity[7]
Defendant's intoxicated/drugged state during commission of the crime(s)[8]
Elements of offense – any information that casts doubt upon any element of the offense[9]
Expert changed opinion from original report[10]
Expert report that undermines prosecution's theory of the case[11]
Expert witness bias/involvement as more than disinterested professional[12]
Eyewitness statements[13]

[4] *Bell v Bell*, 512 F3d 223, 233 (CA 6, 2008) ("It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*.. . . The existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate. . . . A witness's expectation of a future benefit is not determinative of the questions of whether a tacit agreement subject to disclosure existed."); *Douglas v Workman*, 560 F3d 1156, 1174-1175 (CA 10, 2009) (linchpin witness was given a deal in exchange for his testimony that was not disclosed and witness denied any deal had been made); *Akrawi v Booker*, 572 F3d 252, 263 (CA 6, 2009) (informal agreement to reduce charges a witness had in one county in exchange for his testimony in another county); *Blankenship v Estelle*, 545 F2d 510, 513-514 (CA 5, 1977) (inmate claimed to have heard cooperator say he and another cooperator had a deal with the prosecutor that if they testified against the defendant their charges would be dropped, and after trial they were dropped, although at trial the impression was left with the jury that the cooperators had indictments pending without any additional information as to an intent to dismiss); *United States v Kojayan*, 8 F3d 1315, 1318-1319 (CA 9, 1993) (non-testifying witness had a cooperation agreement and, therefore, could have been called as this could have led to a missing witness instruction or the testimony of the witness); *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed); *Silva v Brown*, 416 F3d 980, 986-987 (CA 9, 2005) (agreement with codefendant to have murder charges dismissed against him if he did not seek psychiatric evaluation and testified against one of the other defendants); *Tassin v Cain*, 17 F3d 770, 774, 778-779 (CA 5, 2008) (agreement that a cooperator had with the prosecutor and court that she would receive a favorable sentence if she waived spousal privilege and that it would be the most favorable sentence if she testified consistent with her police statement).

[5] *Brady v Maryland*, 373 US 83, 84-86 (1963) (confession of confederate/codefendant that he was the person who committed the murder during the course of a robbery perpetrated by confederate and defendant for guilt determination and sentencing purposes).

[6] *United States v Bernal-Obeso*, 989 F2d 331, 332-333, 336 (1993) (noting prosecution's obligation to disclose informant's criminal history); *Ouimette v Moran*, 942 F2d 1, 2, 10-11 (CA 1, 1991) (prosecutor did not disclose extensive criminal history of its key witness and did not disclose the nature of several deals that the witness had made with the government in exchange for his testimony); *United States v Auten*, 632 F2d 478, 481 (CA 5, 1980) (criminal history of codefendant granted immunity even though prosecution had not run the criminal history records).

[7] *United States v Alzate*, 47 F3d 1103, 1110 (CA 11, 1995) (prosecutor failed to disclose that officer told prosecutor during trial that his representations to the jury about an issue impacting defendant's duress defense were false; evidence defendant claimed existed did exist); *United States v Aviles-Colon*, 536 F3d 1, 19-21 (CA 1, 2008) (evidence that defendant and codefendant had been "at war" with each other, as it supported defendant's claim that he was not part of a conspiracy with that codefendant); *Cone v Bell*, 556 US 449, 472-474 (2009) (witness statements and police reports that would have corroborated defendant's insanity defense); *United States v Cessa*, 861 F3d 121, 131 (CA 5, 2017) ("'[C]ourts routinely find that evidence supporting an affirmative defense is exculpatory . . . ."); *United States v Udechukwu*, 11 F3d 1101, 1106 (CA 1, 1993) (*Brady* violation for prosecutor's failure to disclose evidence that corroborated defendant's claim of duress); *United States v Spagnoulo*, 960 F2d 990, 994-995 (CA 11, 1992) (*Brady* violation for prosecutor's failure to disclose psychological report that cast doubt on the defendant's competence and might have supported an insanity defense).

[8] *Cone v Bell*, 556 US 449, 474-475 (2009) (defendant's intoxicated/drugged state when committing the murders as that might have impacted death sentence).

[9] *United States v Triumph Capital Group, Inc.*, 544 F3d 149, 162-165 (CA 2, 2008) (investigator's notes, which would have cast doubt on defendant's intent to commit the offense).

[10] *People v Burger*, 331 Mich App 504, 518-519 (2020) (fire investigators' (experts') changed opinions about how many points of origin of an incendiary fire).

[11] *Benn v Lambert*, 283 F3d 1040, 1060-1062 (CA 9, 2002) (expert report that fire was accidental as it undermined prosecution theory of motive, aggravating circumstances, and premeditation).

[12] *Schledwitz v United States*, 169 F3d 1003, 1014-1015 (CA 6, 1999) (expert witness was not merely a "neutral and disinterested" expert but rather had been involved in the investigation of the defendant for years).

[13] *United States v Robinson*, 39 F3d 1115, 1116-1119 (CA 10, 1994) (eyewitness statement that tended to identify a prosecution witness/former codefendant as the drug courier rather than the defendant); *Kyles v Whitley*, 514 US 419, 420 (1995) (contemporaneous eyewitness statements taken following a murder that gave details about the perpetrator that were inconsistent with each other and did not match the defendant's physical appearance calling into doubt identification); *Turner v United States*, 582 US 313, 323 (2017) (statement of a witness who passed by the scene of the crime shortly after it was committed and shortly before it was discovered)

False accusation of victim in the past[14]
False/misleading testimony – any information that would clear-up, correct, or remedy such testimony[15]
Identification information – any information related to who committed the crime, including suspect description(s), misidentification(s) of defendant, inconsistencies, records that might demonstrate identification, misidentification by an informant, inconsistent statements of identification, and evidence that might undermine the strength of identification[16]
Immigration assistance/prevention of deportation: including permission to remain in the US, ability to travel freely, U-Visa/T-Visa assistance/application[17]
Immunity agreement(s)[18]
Inconsistent statement(s) of a witness/cooperator/codefendant in any form: including letters written to the police, written notes shown to police but not retained, oral statements, multiple police reports[19]
Informant-witness credibility/misbehavior evidence in current case or past cases: including history of committing crimes, "regularly" lying, using drugs, mental health issues[20]

[14] *United States v Velarde*, 485 F3d 553, 561-563 (CA 10, 2007) (victim made false accusations of a similar nature in the past that could have led to cross-examination material even if not admissible in its own right).

[15] *United States v Alzate*, 47 F3d 1103, 1110 (CA 11, 1995) (prosecutor failed to disclose that officer told prosecutor during trial that his representations to the jury about an issue impacting defendant's duress defense were false; evidence defendant claimed existed did exist).

[16] *Kyles v Whitley*, 514 US 419, 420 (1995) (contemporaneous eyewitness statements taken following a murder that gave details about the perpetrator that were inconsistent with each other and did not match the defendant's physical appearance calling into doubt identification); *United States v Garner*, 507 F3d 399, 405-407 (CA 6, 2007) (cell phone records of a carjacking victim whose phone was stolen during the carjacking as they showed use of the phone after the crime possibly informing the issue of identity of the perpetrators); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (information that the confidential informant provided misidentification of the defendant); *Smith v Cain*, 565 US 73, 75-76 (2012) (witness identified the defendant at trial as one of the perpetrators but had made statements, which were not disclosed, on the night of the murder and days later that he could not identify the perpetrators); *People v Chenault*, 495 Mich 142, 156-157 (2014) (videotaped statements of prosecution witnesses that might have been used for impeachment and to undermine strength of identification); *In re Jackson*, 12 F4th 604, 610 (CA 6, 2021) (eyewitness gave a statement implicating an alternative suspect, which did not match defendant).

[17] *United States v Blanco*, 392 F3d 382, 92 (CA 9, 2004) (cooperator received special immigration treatment by the INS and the DEA); *United States v Sipe*, 388 F3d 471, 476, 488-489 (CA 5, 2004) (prosecutor told defense that the only assistance to the alien witnesses was permission to remain and work in the US, they had in fact been given social security cards, were paid witness and travel fees, allowed to travel to and from Mexico, allowed to travel out of state, and allowed to use government phones for personal matters); *Roldan v Stroud*, 52 F4th 335, 338-339 (CA 7, 2022) (in context of a § 1983 action, the court recognized the need to disclose U-Visa assistance offered to a victim by police and/or prosecutor); *State v Huerta-Castro*, 390 P3d 185, 198-200 (NM Ct App 2016) (U-Visa application and supporting documents of the victims' mother was *Brady* material that should have been disclosed as prosecutor is imputed with knowledge of the members of the government's team, which included letters from members of the prosecutor's office and memos from the investigating detective); *but see Gomez v State*, 245 So3d 950, 954-955 (Dist Ct of App of FL, 4th Dist 2018) (finding no *Brady* violation for failure to produce victim's U-Visa application when state did not have possession or control of it and defense knew about it and could have subpoenaed it).

[18] *Horton v Mayle*, 408 F3d 570, 578 (CA 9, 2005) ("We hold that the prosecution's failure to disclose the deal between the police and [the witness for immunity] violated *Brady*.").

[19] *United States v Weintraub*, 871 F2d 1257, 1261-1265 (CA 5, 1989) (prior inconsistent statement of witness as to lower amount of drugs that defendant sold); *Strickler v Greene*, 527 US 263, 281 (1999) (letters from witness to officer casting doubt on significant portions of the witness's testimony because they contained inconsistent statements); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements); *Youngblood v West Virginia*, 547 US 867, 869-870 (2006) (written note of victims, purportedly shown to but not retained by an investigator, that was inconsistent to trial testimony as it contradicted claim that sexual assault occurred and supported defendant's claim of consent); *Graves v Dretke*, 442 F3d 334, 342-344 (CA 5, 2006) (inconsistent statement of cooperator/codefendant, who tried to protect his wife from prosecution by asking not to be asked about her participation in the crime, that wife was present for crime); *Smith v Cain*, 565 US 73, 75-76 (2012) (witness identified the defendant at trial as one of the perpetrators but had made statements, which were not disclosed, on the night of the murder and days later that he could not identify the perpetrators); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of inconsistent statements of two prosecution witnesses).

[20] *Benn v Lambert*, 283 F3d 1040, 1054-1056 (CA9, 2002); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (misbehavior of a confidential informant either during the current case or in other cases, such as using illegal drugs, criminal conduct during time as an informant); *Gonzalez v Wong*, 667 F3d 965, 983-984 (CA 9, 2011) (medical/psychological records of a "jailhouse informant" witness had mental health issues and had a history of lying).

Informant-witness incentives to testify against the defendant[21]
Informant-witness statements/inconsistent statements[22]
Informant-witness status as an informant[23]
Investigative subpoena transcripts: subject to the procedures outlined by MCL 767A.1 et seq and the appellate court, disclosure can be required of transcripts of testimony during investigative subpoenas of defendant, codefendants, and accomplices; testifying witnesses; non-testifying witnesses if the transcripts contain exculpatory information; and non-testifying witnesses without exculpatory information.[24]
Key witness's status as an informant before, during, or after controlled buys with defendant and/or before or during trial in current case or another case[25]
Laboratory reports: including ballistic report and crime scene processing[26]
Non-prosecution agreement(s) given to a witness/cooperator (whether known by the trial prosecutor or not)[27]
Pending criminal charges against a witness[28]
Plea agreement(s), in their entirety, made with witnesses or codefendants/cooperators[29]
Police misconduct: including court determination in another case that office lied, other evidence that officer lied, evidence that officer is under investigation for criminal behavior[30]

[21] *United States v Steinberg*, 99 F3d 1486, 1491 (CA 9, 1996) (informant witness owed the defendant money, giving him an incentive to send defendant to prison), *disapproved of on other grounds*, *United States v Foster*, 165 F3d 689 (CA 9, 1999).
[22] *Kyles v Whitley*, 514 US 419, 420 (1995) (informant statements even though the informant never testified); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements).
[23] *Banks v Dretke*, 540 US 668, 691 (2004).
[24] *People v Pruitt*, 229 Mich App 82, 88-89 (1998).
[25] *Banks v Dretke*, 540 US 668, 691 (2004); *United States v Shaffer*, 789 F2d 682, 688-689 (CA 9, 1986) (key witness was informant for government in earlier, different drug investigation); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (CI worked as DEA informant before and after controlled buys with defendant); *Robinson v Mills*, 592 F3d 730, 737 (CA 6, 2010) (key government witness worked as paid informant in other criminal cases before and after defendant's trial); *Robinson v Mills*, 592 F3d 730, 737-738 (CA 6, 2010) (key witness was a paid confidential informant working for the local authorities before and during trial).
[26] *United States ex rel Smith v Fairman*, 769 F2d 386, 391 (CA 7, 1985) (police/lab ballistics report that gun police claimed the defendant used to shoot at them was not operable the day following the shooting); *see also Connick v Thompson*, 563 US 51, 57 (2011) (prosecutor conceded that crime lab reports on processing of crime scene evidence for blood were *Brady* material that should have been disclosed).
[27] *Giglio v United States*, 405 US 150, 152-155 (1972) (this rules applies even when the trial prosecutor did not know of the promise made by another prosecutor, who did not have authority to make the promise, that cooperator/coconspirator would not be prosecuted); *Haber v Wainwright*, 756 F2d 1520, 1523 (CA 11, 1985) ("Where the government fails to disclose evidence of any understanding or agreement as to future prosecution of a key government witness, due process may require reversal of the conviction. . . . ") (citations omitted); *Monroe v Angelone*, 323 F3d 286, 312-314 (CA 4, 2003) (promise not to prosecute key witness who was a convicted felon with felon in possession of a firearm); *United States v Sanfilppo*, 564 F2d 176, 179 (CA 5, 1977) (promise to witness that he would not be charged in a separate case if he testified).
[28] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999) ("[T]he prosecution has a duty to disclose charges pending against a witness."); *People v Torrez*, 90 Mich App 120, 123-125 (1979) (finding *Brady* violation for failure to disclose that informant witness had pending perjury charges); *United States v Kohring*, 637 F3d 895, 903-904 (CA 9, 2011) (key witness had pending criminal charges for sexual misconduct with minors, which not only showed potential motive and bias to testify favorably for the government but also showed in that investigation he had solicited perjury and tried to get a witness to be unavailable for testimony); *Cargle v Mullin*,317 F3d 1196, 1215 (CA 10, 2003) (recognizing the impeachment value of a witness having a pending criminal charge because it is relevant to show bias to testify favorably for the government).
[29] *See California v Trombetta*, 467 US 479, 485 (1984); *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed).
[30] *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020) (finding the prosecutor had a duty to disclose determination by another court that an investigator had testified untruthfully in that case); *United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999) (government police witness was the subject of an investigation into the truthfulness of his testimony in another case); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021) (in a prison contraband case, government should have disclosed that one of its corrections officer witnesses was under investigation in another case for similar allegations); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995) (an officer was "alleged to have taken money belonging to government informants, lying on search warrant applications, and stealing money during police searches").

Police notes (if preserved) documenting *Brady* material: including of interview(s) of witness(es), investigator's comments[31]
Promise to not pursue investigation/charges against a third-party that witness wants to protect[32]
Prosecutor misconduct[33]
Prosecutor's influential position that could impact testimony of a witness[34]
Prosecutor's theory of crime – any evidence that undermines that theory[35]
Scene of the crime – any information tending to show the defendant was not at the scene of the crime[36]
Search warrant affidavit[37]
Sentence -- any information that might impact the sentence the defendant could receive: including confession of a codefendant, defendant's intoxicated/drugged state during murders, prior inconsistent statement of witness as would lower amount of drugs the defendant sold, and evidence to bolster mitigation[38]
Transcript(s) of witness interviews, rather than a mere summary[39]
U-Visa/T-Visa application/assistance[40]
Victim Impact Statement (VIS)[41]
Witness's bias, anti-defendant -- any evidence that might show a witness is biased against defendant

[31] *Strickler v Greene*, 527 US 263, 281 (1999) (police officer notes of interviews with a witness because they contained inconsistent statements); *United States v Triumph Capital Group, Inc.*, 544 F3d 149, 162-165 (CA 2, 2008) (investigator's notes, which would have cast doubt on defendant's intent to commit the offense).

[32] *LaCaze v Warden Louisiana Correctional Institute for Women*, 645 F3d 728, 735-736 (CA 5, 2011), *amended on denial of rehearing en banc*, 647 F3d 1175 (CA 5, 2011) (police promised murderer that they would not arrest and prosecutor his 14-year-old son before he would make a statement implicating the defendant); *Harris v Lafler*, 553 F3d 1028, 1033-1035 (CA 6, 2009) (promise made to key witness that if he made a statement, which incriminated the defendant, they would release his girlfriend from custody).

[33] *United States v Scheer*, 168 F3d 445, 449-453 (CA 11, 1999) (failure to disclose that prosecutor had made a remark to a key witness who was on probation that the witness might have interpreted as threatening/intimidation; stating, "you are going to come through for us or for me" or be taken out in cuffs).

[34] *Reutter v Solem*, 888 F2d 578, 581-582 (CA 8, 1989) (a prosecutor was in a position to influence whether a cooperator obtained a commutation of his sentence, which was scheduled for a hearing shortly after the cooperator was to testify against the defendant).

[35] *Benn v Lambert*, 283 F3d 1040, 1060-1062 (CA 9, 2002) (expert report that fire was accidental as it undermined prosecution theory of motive, aggravating circumstances, and premeditation); *Hughbanks v. Hudson*, 2 F.4th 527, 538–39 (6th Cir. 2021) (evidence that would undermine the prosecution's theory of the case must be disclosed).

[36] *Kyles v Whitley*, 514 US 419, 420 (1995) (a list of license plates of cars parked near the murder scene which did not include a plate registered to the defendant).

[37] *United States v Kelly*, 35 F3d 929, 937 (CA 4, 1994) (search warrant affidavit, which included information that might have been used to impeach a key government witness).

[38] *Brady v Maryland*, 373 US 83, 87 (1963) (confession of codefendant); *Cone v Bell*, 556 US 449, 474-475 (2009) (defendant's intoxicated/drugged state when committing the murders as that might have impacted death sentence); *United States v Weintraub*, 871 F2d 1257, 1261-1265 (CA 5, 1989) (prior inconsistent statement of witness as to lower amount of drugs that defendant sold); *Cone v Bell*, 556 US 449, 472-474 (2009) (witness statements and police reports that would have bolstered his argument for sentence mitigation).

[39] *People v Christian*, 510 Mich 52, 81-90 (2022) (full transcript of interview with key prosecution witness; merely disclosing summary of interview not sufficient).

[40] *Roldan v Stroud*, 52 F4th 335, 338-339 (CA 7, 2022) (in context of a § 1983 action, the court recognized the need to disclose U-Visa assistance offered to a victim by police and/or prosecutor); *State v Huerta-Castro*, 390 P3d 185, 198-200 (NM Ct App 2016) (U-Visa application and supporting documents of the victims' mother was *Brady* material that should have been disclosed as prosecutor is imputed with knowledge of the members of the government's team, which included letters from members of the prosecutor's office and memos from the investigating detective); *but see Gomez v State*, 245 So3d 950, 954-955 (Dist Ct of App of FL, 4th Dist 2018) (finding no *Brady* violation for failure to produce victim's U-Visa application when state did not have possession or control of it and defense knew about it and could have subpoenaed it).

[41] A victim impact statement must be disclosed prior to or at sentencing. *See* MCL 780.764 (victim impact statements, generally); MCL 780.765 (oral victim impact statement during sentencing). But a victim impact statement received prior to determination of guilt if it could be used to impeach the victim's statements/testimony must be disclosed as well. *People v McCoy*, 2019 WL 4855875, MCOA No. 342015 (Oct. 1, 2019) (discussing alleged *Brady* violation for failure to turn over victim impact statement until sentencing, although not ruling it was required to be disclosed); *United States v Wright*, 848 F3d 1274, 1282 (CA 10, 2017) (finding that failure of the government to disclose victim impact statement made in coconspirator's case, which had impeachment evidence against the coconspirator who testified against defendant, did not undermine confidence in the outcome).

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Disclosure Requirements

Prosecutor's Evidence Disclosure Duties[1]

- MCR 6.201 (felony discovery rule); MCR 6.202 (disclosure of lab reports); MCR 6.610(E) (misdemeanor discovery rule)
- MRPC 3.8(d) (special disclosure responsibilities of a prosecutor)
- MCL 763.8 (custodial interrogations); MCL 767.19g (GJ testimony); MCL 767.40a (res gestae/trial Wits); MCLs 767A.5(6), (7); 767A.8 (investigative subpoenas); MCLs 768.27a; 768.27b; 768.27c (other-acts/stmts); MCL 780.702; MCL 780.702a (immunity)
- *Brady v Maryland*, 373 US 83 (1963) (duty, with or without request, to disclose exculpatory evidence, including evidence material to guilt or punishment); *Giglio v United States*, 405 US 150 (1972) (duty under *Brady* includes impeachment evidence)

***Brady/Giglio* Disclosure Rule: Prosecutor has an independent duty to disclose material, potentially favorable exculpatory and impeachment evidence related to guilt or punishment.**

- Prosecution must, with or without request by the defendant[2] and irrespective of good or bad faith of the prosecutor, disclose all material, potentially favorable evidence related to guilt or punishment to defense counsel, pro per Def., or standby counsel.[3] Favorable evidence is exculpatory evidence and impeachment evidence of any kind of all witnesses, including police officers, cooperators, experts, and victims.[4]

Prosecutor does not have a duty to create evidence.[5]

- Examples: voice print analysis; lineup using participants of defendant's choice; plaster casts of crime scene tire/foot impressions; testing of blood for third time; hardcopy of PBT result that never existed; GPS info. from cell phones; and interviews of all possible witnesses.[6]

Prosecutor has a duty to seek out evidence in governmental control.

- "[T]he individual 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."[7]
- This prosecutorial duty exists even if police and forensic examiners have their own duty[8] and across jurisdictional lines,[9] but not necessarily between independent state agencies, unless the other agency is involved in the investigation or prosecution.[10]

Examples of Evidence in governmental control (that prosecutor must seek out):

- *Brady* material known only to the police/law enforcement investigator, autopsy photos of ME, evidence at Crime Lab, court determination that a police witness had testified untruthfully.[11]

Examples of Evidence not in governmental control: (if prosecutor has actual possession disclosure rules apply)

- Counseling records possessed by another, documents in the possession of a cooperator, DOC mental health/custody records where it is not a DOC investigation, foreign government investigation evidence.[12]

The *in camera* review process can be used when evidence might be protected from disclosure.[13]

- The *in camera* review process is provided in MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 667 (1994).[14]

***Brady/Giglio* Lists**

- Check with your supervisor and/or your office's senior attorneys to find out if your office maintains a *Brady* list (information on officers who have incidents that must be disclosed) and follow your office's procedures to ensure compliance with *Brady/Giglio*.

Err on the side of disclosure.

- "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[15]
- A prosecutor's ethical or statutory obligation many require disclosure broader than *Brady*, so err on the side of disclosure.[16]

Examples of evidence that must be disclosed:

Alternate suspects	Benefits to any witness	Confession by another	Cooperator agreements	Cooperator confessions
Criminal Hx Key Wit.	Defenses, support info	D's impaired state	Elements – undermined	Expert change opinion
Expert undermine P	Expert bias	Eyewitness statements	False accusation of V	False testimony – fix
Identification info – all	Immigration assistance	Immunity agreements	Inconsistent statements	Informant-Wit: cred.
Informant-Wit: incentive	Informant-Wit: stmts	Informant-Wit: status	Key Wit: informant Hx	Lab reports
Non-Pros. Agreements	Pending charges for Wit.	Plea agreements	Police-Wit misconduct	Promise protect 3d party

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[1] These are the primary disclosure duties dealing with evidence that prosecutors often encounter, but a prosecutor must use their own due diligence in ensuring all required disclosures are made and in protecting from disclosure that which should not be disclosed.
[2] *Kyles v Whitley*, 514 US 419, 432-440 (1995).
[3] *People v Thurmond*, ___ Mich App ___ (2023) (finding no *Brady* violation because dashcam footage was provided to standby counsel).
[4] *Brady v Maryland*, 373 US 83, 87 (1963); *People v Chenault*, 495 Mich 142, 149-150 (2014); *Giglio v United States*, 405 US 150, 154-155 (1972).
[5] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *see also People v Anstey*, 476 Mich 436, 461 (2006).
[6] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *United States v Harvey*, 756 F2d 636, 643 (CA 8, 1985); *Richards v Solem*, 693 F2d 760, 766 (CA 8, 1982); *People v Green*, 310 Mich App 249, 256 (2015); *Baker v Barrett*, 16 F Supp 3d 815, 845 (ED Mi 2014); *People v Thurmond*, ___ Mich App ___ (2023) (MCOA No. 361302); *Kowalak v Scutt*, 712 F Supp 2d 657, 694 (ED MI 2010).
[7] *Kyles v Whitley*, 514 US 419, 438 (1995); *Strickler v Greene*, 527 US 263, 281 (1999).
[8] *See*, *Moldowan v City of Warren*, 578 F3d 351, 381 (CA 6, 2009); *Clark v Abdallah*, 131 F4th 432, 455 (CA 6, 2025) (police have *Brady*-like obligations and commit a constitutional deprivation if they withhold or suppress exculpatory evidence); *Clark v Louisville-Jefferson Cnty Metro Gov't*, 130 F4th 571, 582–83 (CA 6, 2025) (holding that *Brady* disclosure obligations also cover forensic examiners).
[9] *United States v Risha*, 445 F3d 298, 299 (CA 3, 2006).
[10] *Hall v. Mays*, 7 F4th 433, 446 (CA 6, 2021).
[11] *Kyles v Whitley*, 514 US 419, 420 (1995); *People v Dimambro*, 318 Mich App 204 (2016); *Horn v Stephenson*, 11 F4th 163, 172 (CA 2, 2021); *McCormick v Parker*, 821 F3d 1240, 1247 (CA 10, 2016); *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020); *People v Butsinas*, 2018 WL 521819, unpub MCOA No. 327799 (Jan 23, 2018).
[12] *People v Stanaway*, 446 Mich 643, 667 (1994); *United States v Graham*, 484 F3d 413 (CA 6, 2007); *Hall v Mays*, 7 F4th 433 (CA 6, 2021); *People v Walker*, 2021 WL 8442980, unpub MCOA Nos. 351789, 352198 (Dec 17, 2021); *United States v Ekiyor*, 89 F Supp 3d 928 (ED MI 2015).
[13] *United States v Prochilo*, 629 F3d 264, 268 (CA 1, 2011), citing *Pennsylvania v Ritchie*, 480 US 39, 58 & n.15 (1987); *People v Chenault*, 495 Mich 142, 152 n.4 (2014) (citing with approval *United States v Ruggiero*, 472 F2d 599, 604 (CA 2, 1973)).
[14] *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994).
[15] *United States v Agurs*, 427 US 97, 108 (1976); *Cone v Bell*, 556 US 449, 470 n.15 (2009); *Kyles v Whitley*, 514 US 419, 439 (1995).
[16] *Cone v Bell*, 556 US 449, 470 n.15 (2009) (referencing ABA MRPC 3.8(d)).

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	Prosecutor misconduct	Prosecutor influence	Pros. Theory: undermine	Scene of crime evidence	Search warrant affidavit
	Sentence impact info.	Transcript of Wit. Inter.	U-Visa or T-Visa	Vic. Impact Stmt (VIS)	Wit. Pro-Pros/Anti-D bias
	Wit. Credibility material	Wit. influence/intimid.	Wit. Competence (drug/mental hlth)	Police notes (if preserved) of *Brady* material	

Examples of evidence that caselaw says does not need to be disclosed (but you must decide if disclosure is required in your case):[17]

- Evidence that a civilian[18] witness is under investigation for an unrelated criminal matter, unless the civilian witness is told before testifying that he is under investigation because that goes to motive to testify favorably to the state.[19]

Examples of evidence that the caselaw is unclear whether disclosure is required (careful consideration required):

- Evidence that a victim applied for crime victim payments, particularly when police/prosecutor involved in program/application.[20]

Examples of evidence that may warrant *in camera* review to determine disclosure:

Privileged info., including what expert reviewed and medical/MH	Disclosure of identity of CI	Confidential security video (e.g. prison)
Internal Affairs investigation material[21]	Presentence investigation reports of Co-D	Attorney notes: of *Brady/Giglio* material[22]

Timing of disclosure

Brady is an ongoing obligation that results in a violation upon failure to disclose and upon delayed disclosure if the delay causes prejudice[23]

- In some circumstances, a trial court can effectively deal with a *Brady* issue by allowing the defendant time to review the *Brady* evidence and use it to the extent it is helpful. Typically, there is no violation if the evidence is disclosed in time to be used at trial.[24]

Grand jury: disclosure not required

- The prosecutor does not have a duty to disclose *Brady* material during grand jury proceedings.[25]

Preliminary examinations: disclosure not generally required

- As a general principle, there is no *Brady* violation for failure to provide *Brady* material prior to examination.[26]

Suppression hearing: disclosure likely required

- The prosecutor might have a duty to disclose favorable, material evidence for use by the defense prior to a suppression hearing, especially where challenge is to truthfulness of search warrant affidavit.[27]

Pre-plea: disclosure of **impeachment** evidence not required; **exculpatory** evidence unclear

- "[T]he Constitution does not require the Government to disclose material **impeachment** evidence prior to entering a plea agreement with a criminal defendant."[28] The federal circuits have not reached a consensus as to whether *Brady* requires **exculpatory** evidence to be disclosed prior to plea but at least one unpublished Michigan case suggests that it should.[29] Additionally, the Michigan Supreme Court has recently held that a prosecutor error in a habitual offender enhancement notice made a plea involuntary.[30]

Trial (prior to and during): disclosure required

- The prosecution must disclose *Brady* evidence prior to and during trial.[31]

Sentencing: disclosure required

- The prosecution must disclose *Brady* evidence prior to sentencing.[32]

Direct appeal: disclosure likely still required

- There is not a consensus among appellate courts as to whether or for how long a prosecutor's *Brady/Giglio* obligations persist after conviction and sentencing.[33] But at least one federal circuit has said: "[A] prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final . . . ."[34]

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[17] Even if the law allows for non-disclosure, you must decide whether to turn over the information anyway in a given case remembering that when in doubt to err on the side of disclosure.

[18] Investigations, even if in another matter, into wrongdoing(s) of law enforcement witness(es) involved in the defendant's case generally must be disclosed. *See, e.g. United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995).

[19] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999); *United States v Chitty*, 760 F2d 425, 428 (CA 2, 1985).

[20] *Moore v Marr*, 254 F3d 1235, 1244-1245 (CA 10, 2001).

[21] A prosecutor must exercise caution when dealing with material related to internal affairs investigations. Some material should not be disclosed and some material may warrant *in camera* review. *See, e.g.*, MCL 15.395; *Garrity v New Jersey*, 385 US 493 (1967); *Ostoin v Waterford Twp. Police Dept.*, 189 Mich App 334, 337 (1991).

[22] A prosecutor should **not** put themselves in the situation where they are the sole observer/participant in talking to a witness so that any disclosable material can come from another observer/participant rather than from the attorney notes, which usually contain work-product.

[23] *Pennsylvania v Ritchie*, 480 US 39, 59-60 (1987); *McNeill v Bagley*, 10 F4th 588, 600 (CA 6, 2021); *Robertson v Lucas*, 753 F3d 606, 621 (CA 6, 2014); *United States v Bencs*, 28 F3d 555, 560-561 (CA 6, 1994); *People v Fox*, 232 Mich App 541, 549-551 (1998); *see also Cunningham v. Shoop*, 23 F.4th 636, 675–76 (CA 6, 2022).

[24] *People v Hawkins*, 340 Mich App 155, 186 (2022); *United States v Presser*, 844 F2d 1275, 1283 (CA 6, 1988); *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004); *United States v Garner*, 507 F3d 399, 405 (CA 6, 2007).

[25] *United States v Williams*, 504 US 36, 49-53 (1992); *United States v Angel*, 355 F3d 462, 475 (CA 6, 2004).

[26] *People v Bosca*, 310 Mich App 1, 27-30 (2015), reversed in part on other grounds, *People v Bosca*, 509 Mich 851 (2022).

[27] *United States v Barton*, 995 F2d 931, 935 (CA 9, 1993); *United States v Gamez-Orduno*, 235 F3d 453, 461-462 (CA 9, 2000); but see *United States v Bowie*, 198 F3d 905, 912 (CA DC, 1999).

[28] *United States v Ruiz*, 536 US 622, 633 (2002) (emphasis added).

[29] *See Alvarez v City of Brownsville*, 904 F3d 382, 392 (CA 5, 2018); *People v David*, 2007 WL 2683655, unpub MCOA No. 268460 (Sept 13, 2007).

[30] *People v Guyton*, 511 Mich 291 (2023). The trend is toward full disclosure of exculpatory evidence as soon as possible.

[31] *United States v Headman*, 594 F3d 1179, 1183 (CA 10, 2010); *United States v Presser*, 844 F2d 1275, 1283-1284 (CA 6, 1988); *Joseph v Coyle*, 469 F3d 441, 472 (CA 6, 2006).

[32] *Brady v Maryland*, 373 US 83, 87 (1963).

[33] *Waterford v Washburn*, 455 F Supp 3d 579, 610-611 (MD TN 2020).

[34] *Fields v Wharrie*, 672 F3d 505 515-516 (CA 7, 2012).

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Post-conviction proceeding(s): disclosure likely not required beyond direct appeal
(but prosecutor cannot redact exculpatory material in manner that thwarts defendant's access to postconviction relief in the courts)

- "In *Osborne*, [ ], the Supreme Court noted that 'nothing in our precedents' suggests that the prosecutor's obligation to disclose *Brady* material to the defendant before trial continues after the defendant is convicted and the case is closed."[35]
- Redacting exculpatory evidence from investigative file in response to a public-records request post-trial can violate a defendant's right to access to the courts.[36]

Indefinitely: even if *Brady* is not the source of the duty, a prosecutor has an ethical duty to disclose certain favorable evidence indefinitely[37]

- MRPC 3.8(f) provides that a prosecutor has a continuing obligation to disclose/investigate "new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted . . . ."
- MRPC 3.8 (g) provides: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction."

Violations

Brady Violation: suppression by the prosecution of evidence favorable to the defendant that was material

- A *Brady* violation is established when the following three factors are shown:
  (1) the prosecution has suppressed evidence within the government's control, either willfully or inadvertently;
  (2) the evidence was favorable to the defendant either because it was exculpatory evidence or because it was impeachment evidence; &
  (3) the evidence was **"material"** such that withholding the evidence caused prejudice.[38]

"Material" definition: reasonable probability of a different result in the fairness of the trial
"Reasonable probability" definition: probability sufficient to undermine confidence in the outcome

- "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[39]
- The standard is not met based on a mere possibility of a different outcome, nor is the analysis whether it was more likely than not that defendant would have received a different verdict but rather whether defendant received a fair trial even without the evidence.[40]
- The materiality inquiry is not a sufficiency of the evidence analysis; the test is whether "the suppressed evidence could 'undermine confidence in the verdict."[41]
- A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[42]

Materiality is influenced by the entirety of the record[43]

- The materiality of the withheld evidence is considered in relation to the entire record such that significant withheld evidence might not undermine the confidence of the verdict because the other proofs were so strong, but relatively minor withheld evidence might undermine the confidence of the verdict when the verdict was already questionable.[44]

Materiality is determined by consideration of the net effect of all evidence withheld

- Although each instance of non-disclosure is looked at separately, the withheld evidence is not looked at item by item to determine materiality. Rather, the net effect/cumulative effect of all of the withheld evidence is considered and if the net effect "raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand . . . ."[45]

Materiality determination does not inherently distinguish between exculpatory or impeachment evidence, but the outcome-determination analysis can reveal distinctions[46]

- In analyzing alleged *Brady* violations, SCOTUS "has rejected any [ ] distinction between impeachment evidence and exculpatory evidence" because the *Giglio* Court held that impeachment evidence falls within the ambit of *Brady*.[47] Exculpatory evidence is not inherently more valuable than impeachment evidence and vice versa, but the effect of non-disclosure of each kind of evidence might be different depending on the proofs in a case. For example, suppressed impeachment evidence is often merely cumulative.[48]

Materiality depends on how critical the witness/evidence is in relation to the entire proofs

- "'The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.' Thus, 'when the undisclosed evidence is merely cumulative of other evidence . . ., no *Brady* violation occurs.' Similarly, when the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material. Conversely, if the impeaching evidence 'would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.'"[49]

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[35] *Gavitt v Born*, 835 F3d 623, 648 (CA 6, 2016), citing *District Attorney's Office for the Third Judicial Dist. v Osborne*, 557 US 52, 68-69 (2009).
[36] *Jackson v City of Cleveland*, 64 F4th 736, 750-752 (CA 6, 2023).
[37] *Imbler v Pachtman*, 424 US 409, 427 n.25 (1976).
[38] See *People v Chenault*, 495 Mich 142, 149-150 (2014); *People v Abcumby-Blair*, 335 Mich App 210, 217-218 (2020).
[39] *United States v Bagley*, 473 US 667, 682 (1985); see also *Turner v United States*, 582 US 313 (2017); *People v Chenault*, 495 Mich 142 (2014).
[40] *Montgomery v Bobby*, 654 F3d 668, 678 (CA 6, 2011); *Kyles v Whitley*, 514 US 419, 434 (1995) (citations omitted); *Wearry v Cain*, 577 US 385, 392 (2016) (citations omitted).
[41] *Mack v Bradshaw*, 88 F4th 1147, 1159 (CA 6, 2023), *cert denied*, 145 S Ct 243 (2024).
[42] *Kyles v Whitley*, 514 US 419, 434 (1995) (citations omitted); *Wearry v Cain*, 577 US 385, 392 (2016) (citations omitted).
[43] *United States v Agurs*, 427 US 97, 113 (1976).
[44] *See United States v Agurs*, 427 US 97 (1976); *Smith v Cain*, 565 US 73 (2012); *People v Chenault*, 495 Mich 142 (2014).
[45] *Kyles v Whitley*, 514 US 419, 420 (1995); *Gumm v Mitchell*, 775 F3d 345, 370 (CA 6, 2014).
[46] The timing of disclosure of exculpatory and impeachment evidence might differ, but not the analysis of a violation for failure to disclose. *See, e.g., United States v Ruiz*, 536 US 622, 633 (2002).
[47] *United States v Bagley*, 473 US 667, 676-677 (1985); *United States v Mullins*, 22 F3d 1365, 1372 (CA 6, 1994).
[48] *Jalowiec v Bradshaw*, 657 F3d 293, 313 (6th Cir. 2011), *as amended* (Nov 23, 2011).
[49] *United States v. Sipe*, 388 F3d 471, 478 (CA 5, 2004); *See, e.g., United States v Scheer*, 168 F3d 445, 452-453 (CA 11, 1999); *United States v Weintraub*, 871 F2d 1257, 1262 (CA 5, 1989); *Jefferson v United States*, 730 F3d 537, 550 (CA 6, 2013).

- "'In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.'"[50]
- "[T]here are some instances where specific impeachment evidence is so important (for issues such as the identity of the culprit) that it is material for *Brady* purposes even when a witness has already been effectively impeached on other issues."[51]

Materiality might be established even if the withheld evidence would not have been admissible if it could have led to admissible evidence

- Withheld *Brady* evidence is not material if it would have been inadmissible because it could not have affected the result of the proceeding. But if withheld evidence could have led to admissible evidence, a *Brady* violation can be found.[52]

Although defendant has no obligation to exercise diligence in obtaining *Brady* material, defendant's knowledge of and access to undisclosed material may result in there being no *Brady* violation found (Caution: regardless of whether a failure to disclose is later determined to be a violation, prosecutors must diligently disclose all *Brady* material, whether requested or not, even if Def. otherwise has access to the material)

- "[E]vidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim."[53] However, defendant's mere knowledge of a witness is not sufficient; the defendant must be aware of the essential exculpatory/impeachment evidence and the prosecution must disclose such evidence.[54]
- Examples include: (1) recorded jail calls defendant made to potential witnesses; (2) the ultimate disposition of criminal charges on a witness's criminal history printout; and (3) public/court records.[55]

Prosecutor's subjective mindset in failing to disclose *Brady/Giglio* evidence is irrelevant in determining whether a violation has occurred (but can be relevant in determining the remedy)

- For a *Brady* violation analysis it does not matter if the prosecutor acted in good faith or in bad faith or intentionally or inadvertently in failing to turn over evidence. The good or bad faith of the prosecutor is irrelevant in deciding the consequences to the criminal trial. "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[56]
- "Thus, even when the prosecutor's actions in suppressing exculpatory evidence are in flagrant bad faith, if the evidence at issue is not material, no *Brady* violation has occurred. . . . Conversely, where, as here, the prosecution has acted in good faith but simply misunderstood the scope of its *Brady* obligation, constitutional error has occurred if the exculpatory evidence at issue is material."[57]

Remedy: A new trial is the typical remedy for a *Brady* violation

- "The decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial."[58] However, "a new trial is generally not required where the testimony of the witness is corroborated by other testimony or whether the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."[59]

Remedy: Dismissal can be the remedy for flagrant prosecutorial misconduct

- "Although the appropriate remedy [for a *Brady/Giglio* violation] will usually be a new trial, . . . , a district court may dismiss the indictment when the prosecution's actions rise, as they did here, to the level of flagrant prosecutorial misconduct."[60]

Remedy: Exclusion of evidence/witness

- At least one court has imposed the remedy of exclusion of evidence/witness testimony for a *Brady* violation when the government's conduct did not rise to the level of flagrant misconduct but was not merely an innocent mistake.[61]

Potential consequences to a prosecutor who violates *Brady*

While the good or bad faith of a prosecutor is irrelevant in determining whether a *Brady* violation has occurred, it is relevant in determining the consequences to the prosecutor. Potential consequences include:

Contempt of court/OTSC.[62]	Loss of employment/disciplinary action.[63]	Potential civil lawsuit, although immunity might apply.[64]
Professional misconduct proceedings are possible, not historically common.[65]	Being chastised in a published court decision for misconduct.[66]	

[50] *United States v Bruce*, 984 F3d 884, 898 (CA 9, 2021), quoting *United States v Jernigan*, 492 F3d 1050, 1054 (CA 9, 2007).
[51] *United States v Walker*, 657 F3d 160, 188 (CA 3, 2011); *Dennis v Secretary, Pennsylvania DOC*, 834 F3d 263, 301 (CA 3, 2016).
[52] *Wood v Bartholomew*, 516 US 1, 6 (1995); *Barton v Warden, Southern Ohio Correctional Facility*, 786 F3d 450, 465 (CA 6, 2015); *United States v Dill*, 297 F3d 93, 104 (CA 2, 2002).
[53] *People v Chenault*, 495 Mich 142, 155 (2014).
[54] *Clark v Abdallah*, 131 F4th 432, 455–57 (CA 6, 2025) (prosecution should have disclosed information about why a witness changed her story, including that she received bond consideration and had been exposed to threats and coercion).
[55] *People v Richardson*, 2016 WL 3030860, unpub MCOA No. 322195 (May 26, 2016); *United States v Castano*, 906 F3d 458, 466 (CA 6, 2018); *United States v Ladoucer*, 573 F3d 628, 636 (CA 8, 2009).
[56] *Brady v Maryland*, 373 US 83, 87 (1963); *Smith v Phillips*, 455 US 209, 219 (1982); *United States v Agurs*, 427 US 97, 103 (1976); holding modified by *United States v Bagley*, 473 US 667 (1985).
[57] *Spicer v Roxbury Corr. Inst.*, 194 F3d 547, 559 (CA 4, 1999) (citation omitted); *Strickler v Greene*, 527 US 263, 288 (1999).
[58] *United States v Presser*, 844 F2d 1275, 1286 (CA 6, 1988); *United States v Bolton*, 908 F3d 75, 91 (CA 5, 2018).
[59] *People v Lester*, 232 Mich App 262, 282 (1998), overruled on other grounds by *People v Chenault*, 495 Mich 142 (2014).
[60] *United States v Chapman*, 524 F3d 1073, 1086 (CA 9, 2008); *see also United States v Garrison*, 888 F3d 1057, 1065 (CA 9, 2018); *United States v Driscoll*, 984 F3d 103, 109 (CA DC, 2021); *United States v Lopez*, 577 F3d 1053, 1068 (CA 9, 2009).
[61] *See United States v Frazier*, 203 F Supp 3d 1128, 1134-1135 (W.D. Wash. 2016).
[62] *Mansfield v Williamson County*, 30 F4th 276, 278-79 (CA 5, 2022); *see also*, *United States v Jones*, 686 F Supp 2d 147, 147-149 (D. Mass. 2010).
[63] *See United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992).
[64] *Connick v Thompson*, 563 US 51, 54 (2011); *Price v Montgomery County, Kentucky, et al.*, __ F4th __ (CA 6, 2023) (No. 21-6076); *but see Harris v Bornhorst*, 513 F3d 503, 520-522 (CA 6, 2008); s*ee also, e.g. Smith v Holtz*, 210 F3d 186, 201 (CA3 2000).
[65] MRPC 3.8, 8.4; *Connick v Thompson*, 563 US 51, 66 (2011); Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 Drake L Rev 307 (2018).
[66] *United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992).

Brady & *Giglio*: Disclosure Requirements

updated 04/01/2025

Prosecutor's Evidence Disclosure Duties[1]

- MCR 6.201 (felony discovery rule; linked); MCR 6.202 (disclosure of lab reports upon receipt linked); MCR 6.610(E) (misdemeanor discovery rule; linked)
- MRPC 3.8(d) (special responsibilities of a prosecutor – disclosures included; linked)
- MCL 28.214(4) (authority to disclose defendant's LEIN information to the defendant; linked)
- MCL 763.8 (custodial interrogations involving major felonies, duty to disclose copy of recorded statement; linked)
- MCL 767.19g (furnishing testimony of witness to person indicted by grand jury; linked)
- MCL 767.40a (duty to disclose res gestae witnesses & witnesses intended to be called at trial; linked)
- MCLs 767A.5(6), (7); 767A.8 (disclosures related to investigative subpoenas; link MCL 767A.5; link MCL 767A.8)
- MCLs 768.27a; 768.27b; 768.27c (disclosures related to other-acts/statements in specific cases; link MCL 768.27a; link MCL 768.27b; link MCL 768.27c)
- MCL 780.702; MCL 780.702a (disclosures related to grants of immunity; link MCL 780.702; link MCL 780.702a)
- *Brady v Maryland*, 373 US 83 (1963) (duty, with or without request, to disclose exculpatory evidence, including evidence material to guilt or punishment)
- *Giglio v United States*, 405 US 150 (1972) (duty under *Brady* includes impeachment evidence)

Brady/Giglio Disclosure Rule:[2] Prosecutor has an independent duty to disclose material, potentially favorable exculpatory and impeachment evidence related to guilt or punishment.

- Prosecution must, with or without request by the defendant,[3] disclose all material, potentially favorable evidence related to guilt or punishment to defense counsel, pro per Def., or standby counsel.[4] Favorable evidence is exculpatory evidence and impeachment evidence of any kind of all witnesses, including police officers, cooperators, experts, and victims.
- The *Brady* holding:[5]

  "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."
- The *Giglio* holding (extending *Brady* to relevant impeachment evidence):[6]

  "[T]he Government's case depended almost entirely on [the testimony of a witness who had been told he would not be prosecuted if he testified]; without it there could have been no indictment and no evidence to carry the case to the jury. [His] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."

Prosecutor does not have a duty to create evidence.

- Although the prosecution has a duty to disclose any *Brady/Giglio* evidence, it does not have a duty to create such evidence.[7]
- Examples of evidence the prosecution does not have to create include: voice print analysis of phone recordings; lineup using participants of defendant's choice; plaster casts of crime scene tire/foot impressions; testing of blood for third time; hardcopy of PBT result that never existed; GPS information from cell phones; and interviews of all possible witnesses.[8]

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[1] These are the primary disclosure duties dealing with evidence that prosecutors often encounter, but a prosecutor must use their own due diligence in ensuring all required disclosures are made and in protecting from disclosure that which should not be disclosed. For example, these do not deal with disclosures required by certain specific statutory obligations of a prosecutor. *See, e.g.*, MCL 600.2163a (dealing with protections and procedures for minor, developmentally-disabled, and vulnerable adult witnesses that include disclosure and protection from disclosure requirements); MCL 201.10 (dealing with Removals from Office and disclosures/accesses required). Nor do they deal with when a defendant raises a particular defense. See, e.g. MCL 768.20 (alibi); MCL 768.20a (insanity defense). Nor do they deal with notice requirements, such as MRE 404(b) (other acts evidence) and MCL 769.13 (notice to seek enhanced sentence). For an example of item(s) protected from disclosure, see MCL 15.395 (Confidentiality and protections from disclosure of involuntary statements of law enforcement officers).

[2] The obligation is often referred to as "*Brady/Giglio*" to reflect that *Brady* dealt with exculpatory evidence and *Giglio* extended *Brady* to impeachment evidence; this document uses "*Brady*" to encompass both *Brady* (exculpatory) and *Giglio* (impeachment) unless otherwise indicated.

[3] *Kyles v Whitley*, 514 US 419, 432-440 (1995).

[4] *People v Thurmond*, ___ Mich App ___ (2023) (finding no *Brady* violation because dashcam footage was provided to standby counsel).

[5] *Brady v Maryland*, 373 US 83, 87 (1963); see also *Smith v Cain*, 565 US 73 (2012) (reaffirming *Brady* and discussing materiality of statements of a witness give 5 days apart); *People v Chenault*, 495 Mich 142, 149-150 (2014) (recognizing applicability of *Brady* in Michigan).

[6] *Giglio v United States*, 405 US 150, 154-155 (1972).

[7] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980); *see also People v Anstey*, 476 Mich 436, 461 (2006).

[8] *United States v Sukumolachan*, 610 F.2d 685, 687 (CA 9, 1980) (prosecution did not have to create voiceprint analyses of telephone recordings so that defendant could attempt to prove one call was an impersonation); *United States v Harvey*, 756 F2d 636, 643 (CA 8, 1985) (prosecution does not have to arrange a lineup using participants of defendant's choice); *Richards v Solem*, 693 F2d 760, 766 (CA 8, 1982) (prosecution was under no duty to "take plaster casts of tire and foot tracks at the scene of the crime for comparison with [defendant's] car and feet"); *People v Green*, 310 Mich App 249, 256 (2015) ("[The prosecution] is required to disclose evidence that has been developed, [but] it is not required to develop evidence, including testing a blood sample for a third time, that defendant hopes will provide him with a defense.") *Baker v Barrett*, 16 F Supp 3d 815, 845 (ED Mi 2014) (finding no *Brady* violation for failure to produce a hard copy of a PBT result when there was no evidence that such a hard copy printout ever existed);); *People v Thurmond*, ___ Mich App ___ (2023) (MCOA No. 361302) (prosecution had no duty to develop GPS evidence from cell phones they searched for other purposes); *Kowalak v Scutt*, 712 F Supp 2d 657, 694 (ED Mi 2010) (prosecutor has no obligation under *Brady* to interview all possible witnesses in an effort to assist the defense) (citation omitted).

Brady & *Giglio*: Disclosure Requirements

updated 04/01/2025

Prosecutor has a duty to seek out evidence in governmental control.

- It does not matter if a prosecutor does not know of the *Brady* evidence. A prosecutor is held responsible for all evidence within **government** control; "the individual 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."[9]
- This prosecutorial duty exists even though many courts recognize a derivative obligation on the part of police to provide the *Brady* evidence to the prosecutor and a similar obligation exists for forensic examiners.[10]
- This duty may even exist across jurisdictional lines such that a federal prosecutor may be imputed with knowledge possessed by a state prosecutor and vice versa.[11]
- This duty does not necessarily exist, however, between independent state agencies, such as the MDOC, unless the other agency is involved in the investigation or prosecution.[12]

Examples of Evidence in governmental control (that prosecutor must seek out):

- *Brady* material known only to the police/law enforcement investigator and not shared with the prosecutor, such as witness statements, informant statements, and list of license plate numbers.[13]
- Autopsy photos in possession of medical examiner.[14]
- Evidence at the MSP Crime Lab or other local lab, as these are agencies directly related to and involved with the criminal investigation/prosecution.[15]
- Court determination in another case prosecuted by the same prosecutor's office that a police witness had testified untruthfully.[16]

Examples of Evidence not in governmental control:

(if prosecutor has actual possession of such records, they are subject to *Brady/Giglio* disclosure rules)

- Counseling records that "the prosecutor has not at any time had access to the records . . . ." Such records are not "'investigative' records of a governmental agency."[17]
- Documents in the possession and control of a cooperating witness because that witness was not an agent of the government and is not akin to a police officer.[18]
- DOC mental health/custody records of an inmate-witness as a prosecutor does not have an obligation to seek out evidence from another sovereign or state agency that is not involved in the particular case.[19]
- Evidence uncovered in law enforcement investigations by foreign governments or agencies.[20]

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[9] *Kyles v Whitley*, 514 US 419, 438 (1995); *Strickler v Greene*, 527 US 263, 281 (1999).

[10] *See, e.g.*, *Moldowan v City of Warren*, 578 F3d 351, 381 (CA 6, 2009) (listing cases that have made this holding and stating: "Although the prosecutor's office bears primary responsibility for carrying out the state's actual 'disclosure' obligations under *Brady*, the police bear . . . an equally important '*Brady*-derived' responsibility to turn over potentially exculpatory evidence to the prosecutor's office.") (citation omitted); *Clark v Abdallah*, 131 F4th 432, 455 (CA 6, 2025) (police have *Brady*-like obligations and commit a constitutional deprivation if they withhold or suppress exculpatory evidence); *Clark v Louisville-Jefferson Cnty Metro Gov't*, 130 F4th 571, 582–83 (CA 6, 2025) (holding that *Brady* disclosure obligations also cover forensic examiners).

[11] *United States v Risha*, 445 F3d 298, 299 (CA 3, 2006) (No evidence has been advanced that the federal prosecutors in Risha's case had actual knowledge of Caito's expectations or of a pending plea agreement. The question ultimately presented here is whether cross-jurisdiction constructive knowledge can be imputed to the federal prosecution because of close involvement between the federal prosecution and state agents, or because impeachment information may have been "readily available." Under certain fact findings, such knowledge might be imputed.").

[12] *Hall v Mays*, 7 F4th 433, 446 (CA 6, 2021) (recognizing the precedent that "a prosecutor does not have a duty to secure evidence from another sovereign (or state agency) that had no involvement whatsoever in a particular case"), *cert. denied*, 212 L. Ed. 2d 611, 142 S. Ct. 2655 (2022).

[13] *Kyles v Whitley*, 514 US 419, 420 (1995).

[14] *People v Dimambro*, 318 Mich App 204 (2016).

[15] See MCL 12.201 et seq (The Forensic Laboratory Funding Act); *Horn v Stephenson*, 11 F4th 163, 172 (CA 2, 2021) ("*Brady* applies to forensic examiners in state crime laboratories. . . .").

[16] *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020) (including allegations of false statements in search warrant affidavits).

[17] *People v Stanaway*, 446 Mich 643, 667 (1994) ("The disclosure requirements of *Brady* . . . are directly applicable where the prosecutor possesses the record.") (citation reference omitted).

[18] *United States v Graham*, 484 F3d 413, 417 (CA 6, 2007).

[19] *Hall v Mays*, 7 F4th 433, 446 (CA 6, 2021) ("We are not inclined to break new ground by holding that the prosecutor has an affirmative duty to pursue and obtain psychological records for its witnesses, even inmate witnesses . . . ."), *cert. denied*, 212 L. Ed. 2d 611, 142 S. Ct. 2655 (2022); *see also People v Walker*, 2021 WL 8442980, unpub MCOA Nos. 351789, 352198 (Dec 17, 2021) ("The prosecution [does] not have an obligation to learn information possessed by other governmental agencies which had no involvement in the investigation or prosecution of its case."; no duty to seek/obtain DOC information about the custodial status of a prosecution witness when the DOC was not involved in the case).

[20] *United States v Ekiyor*, 89 F Supp 3d 928, 937 (ED MI 2015).

Brady & *Giglio*: Disclosure Requirements

updated 04/01/2025

The *in camera* review process can be used when evidence might be protected from disclosure.

- "When the defendant seeks access to specific materials that the government maintains are not discoverable under *Brady*, however, a trial court may in some instances conduct an *in camera* review of the disputed materials."[21]
- "[T]here [is] no suppression when the government provide[s] the requested evidence to the trial court for an *in camera* inspection and ruling."[22]
- The *in camera* review process is provided in MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 667 (1994).[23]

Brady/Giglio Lists

- Many prosecutors' offices maintain a list of police officers that have history that is required to be disclosed under *Brady/Giglio*. These are often referred to as "*Brady* Lists." Check with your supervisor and/or your office's senior attorneys to find out if your office maintains such a list and follow your office's procedures to ensure compliance with *Brady/Giglio*.

Err on the side of disclosure.

- "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[24]
- "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[25]
- "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."[26]

Examples of evidence that must be disclosed:

- See separate Quick Reference Guide titled: "*Brady & Giglio*: Examples of Required Disclosures"

Examples of evidence that caselaw says does not need to be disclosed (but you must decide):[27]

- Evidence that a civilian[28] witness is under investigation for an unrelated criminal matter (as opposed to having pending charges) generally does not need to be disclosed, unless the civilian witness is told before testifying that he is under investigation because that goes to motive to testify favorably to the state.[29]

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[21] *United States v Prochilo*, 629 F3d 264, 268 (CA 1, 2011), citing *Pennsylvania v Ritchie*, 480 US 39, 58 & n.15 (1987) (approving of court reviewing disputed material *in camera* to determine if it is material).

[22] *People v Chenault*, 495 Mich 142, 152 n.4 (2014) (citing with approval *United States v Ruggiero*, 472 F2d 599, 604 (CA 2, 1973)).

[23] *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994) ("Where the defendant has made the required showing [of a 'good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense'], in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislatures interest in protecting the confidentiality of the therapeutic setting.")

[24] *United States v Agurs*, 427 US 97, 108 (1976); *Cone v Bell*, 556 US 449, 470 n.15 (2009) ("[T]he prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").

[25] *Kyles v Whitley*, 514 US 419, 439 (1995) (quoting *Berger v United States* 295 US 78, 88 (1935)).

[26] *Cone v Bell*, 556 US 449, 470 n.15 (2009) (referencing ABA MRPC 3.8(d)).

[27] Just because the caselaw allows for non-disclosure does not mean you should not disclose. Each case is different and each office's practices are different. Therefore, exercise your own due diligence in seeking out guidance from your office and analyzing the material based on the facts and circumstances of your case, remembering to err on the side of disclosure.

[28] Investigations, even if in another matter, into wrongdoing(s) of law enforcement witness(es) involved in the defendant's case generally must be disclosed. *See, e.g. United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999) (government police witness was the subject of an investigation into the truthfulness of his testimony in another case); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021) (in a prison contraband case, government should have disclosed that one of its corrections officer witnesses was under investigation in another case for similar allegations); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995) (government should have disclosed that that an officer was "alleged to have taken money belonging to government informants, lying on search warrant applications, and stealing money during police searches).

[29] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999) ("[T]he prosecution has a duty to disclose charges pending against a witness. . . . However, defendant has cited no authority supporting the conclusion that the prosecution has a duty to disclose that a witness is under investigation in an unrelated matter, nor are we disposed to so hold in the absence of precedent."); *United States v Chitty*, 760 F2d 425, 428 (CA 2, 1985) ("The information that [the witness] had been told that he was under investigation was disclosable pursuant to *Brady,* . . .; it provided a motive to testify favorably to the Government, and the fact was known to the prosecutor's office . . . .") (citation omitted).

Brady & Giglio: Disclosure Requirements

updated 04/01/2025

	Examples of evidence that the caselaw is unclear whether disclosure is required: (such evidence, therefore, requires careful consideration by a prosecutor as disclosure may be required)
	• Evidence that a victim applied for crime victim payments, particularly when the program administering such payments is run with the help of the prosecutor's office.[30]
	Examples of evidence that may warrant *in camera* review to determine disclosure:
	• Privileged communications with doctors and/or contained within counseling records.[31] • Privileged or confidential information reviewed by a government expert.[32] • Confidential security camera footage of a prison.[33] • Disclosure of the identity of a confidential informant may, sometimes, be required.[34] • Presentence investigation reports of coconspirators/codefendants.[35] • Attorney notes of interviews of witnesses[36] that reveal exculpatory/impeachment information must be disclosed but a method for doing so can include disclosure to court for *in camera* review.[37] • Internal affairs investigation material[38]
Timing of disclosure	
	• See separate Quick Reference Guide titled: "*Brady & Giglio*: Timing of Disclosure"
Prosecutor's duty to disclose exists regardless of whether a failure to disclose is later determined to be a *Brady* violation.	
	• "[S]aying that a particular nondisclosure was not a *Brady* violation in no way suggests that the prosecutor did not have a duty to disclose the information."[39] • Thus, see separate Quick Reference Guide titled: "*Brady & Giglio*: Violations" for guidance on violations.

[30] *Moore v Marr*, 254 F3d 1235, 1244-1245 (CA 10, 2001) (discussing reasons that crime victim payments might be used to challenge credibility of the victim, including financial incentive, but declining to decide if such evidence is favorable because even if favorable the evidence in that case was not material as the other evidence of guilt was overwhelming so that there was not proof that failure to disclose was outcome-determinative).

[31] MCL 767.5a(2); MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 677, 678-679 (1994); *Pennsylvania v Ritchie*, 480 US 39, 43 (1987) (information in counseling records).

[32] *United States v White*, 492 F3d 380, 408-413 (CA 6, 2007).

[33] *Piggie v Cotton*, 344 F3d 674, 679 (CA 7 2003).

[34] *See California v Trombetta*, 467 US 479, 485 (1984) ("[U]nder some circumstances [the government] may be required to disclose the identity of undercover informants who possess evidence critical to the defense."), citing *Roviaro v United States*, 353 US 53 (1957); *People v Underwood*, 447 Mich 695,703-704 (1994) (use of an *in camera* hearing is the proper procedure for determining what, if any, information related to a confidential informant is required to be disclosed); *see also*, *People v Henry* (aft. rem.), 305 Mich App 127, 156 (2014) ("[W]hen a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an *in camera* hearing to determine if the informant could offer any testimony beneficial to the defense.").

[35] *United States v Trevino*, 89 F3d 187, 192 (CA 4, 1996) ("We conclude that a district court is under no duty to conduct an *in camera* examination of a requested PSR unless the accused has first clearly specified the information contained in the report that he expects will reveal exculpatory or impeachment evidence.").

[36] A prosecutor should **not** put themselves in the situation where they are the sole observer/participant in talking to a witness so that any disclosable material can come from another observer/participant rather than from the attorney notes, which usually contain work-product.

[37] *Paradis v Arave*, 240 F3d 1169, 1176-1178 (CA 9, 2001) (disclosure required of prosecutor notes of medical examiner's opinions shortly after victims' bodies were found and examined as they were potential impeachment evidence related to the time and location of the deaths); *United States v Dupuy*, 760 F2d 1492, 1500-1502 (CA 9, 1985) (prosecutor's notes taken during plea negotiations with codefendants that prosecutor agreed to keep confidential later proved to contain potentially exculpatory evidence for the defendant so it was proper for prosecutor to disclose those notes to the trial court for *in camera* review; "By submitting the issue to the judge, the prosecutor satisfied her duty to disclose exculpatory material. . . . Consultation with the judge is particularly appropriate when the Government has legitimate reasons for protecting the confidentiality of the material requested, for the trial judge can then weigh the Government's need for confidentiality against the defendant's need to use the material in order to obtain a fair trial.") (citations omitted); *Bell v Bell*, 512 F3d 223, 232-233 (CA 6, 2008) (prosecutor notes of interview with inmate who sought consideration from government in exchange for his testimony that memorialized the consideration sought by the inmate were favorable; but not material); *but see People v Holtzman*, 234 Mich App 166, 188-190 (1999) (discussing that prosecutor notes of witness interviews were not "statements" under the reciprocal discovery rule); *United States v Henke*, 222 F3d 633, 642-643 (CA 9, 2000) (court was not required to conduct *in camera* review of prosecutor notes of pretrial interviews of witnesses that were not disclosed as claimed work-product because defendant made no showing that there might be exculpatory information in the notes).

[38] A prosecutor must exercise caution when dealing with material related to internal affairs investigations. Some material should not be disclosed and some material may warrant *in camera* review. *See, e.g.*, MCL 15.395 (Confidentiality and protections from disclosure of involuntary statements of law enforcement officers); *Garrity v New Jersey*, 385 US 493 (1967) (precluding admission in a criminal prosecution of involuntary statements of police officers); *Ostoin v Waterford Twp. Police Dept.*, 189 Mich App 334, 337 (1991) (holding, in a case dealing with a police internal affairs investigative file, that Michigan recognizes "a qualified privilege which protects from disclosure documents reflecting a governmental agency's evaluative or deliberative processes" but not the "'objective facts' upon which decisions are based" and finding that court should have conducted an *in camera* review of contested personnel files).

[39] *Bell v Bell*, 512 F3d 223, 235 n7 (CA 6, 2008).

Brady & *Giglio*: Examples of Required Disclosures (Annotated) updated 04/01/2025

Item
Alternate, legitimate suspects information: including eyewitness statements tending to identify another person as the perpetrator, another vehicle was seen speeding away from the crime scene, confession by another person, others seen at the scene[1]
Benefits of any kind given by a government actor (e.g. police, prosecutor, member of office) to a witness/codefendant/cooperator before or during trial even if not explicitly in exchange for testimony because it reflects tacit understanding that person will be helpful to the government or creates a sense of obligation on the part of a witness to testify favorably to the government. This can be in the form of help, favors, special treatment, inducements, or leniency: including charges not being authorized, pretrial release, pre-parole release, reinstatement of goodtime credits, sentence recommendation to probation, writing letters to assist in prison transfer/parole decision/sentencing/resolution of other criminal charges, promise to share with other prosecutors and judges the cooperation, providing money for relocation, offering a reward, delayed filing of warrant, not instituting forfeiture proceedings, not enforcing civil liability, inmate visitation privileges, lax inmate supervision, allowing inmates to make long-distance calls, placement in protective custody, payments to witness, interest-free loans to an informant, sentencing benefit promised to cooperator[2]
Confession by another person[3]

[1] "'Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of "legitimate suspects."'" *Hughbanks v Hudson*, 2 F4th 527, 536-537 (CA 6, 2021) (son of victim was legitimate suspect due to his motive and post-murder actions), quoting *Gumm v Mitchell*, 775 F3d 345, 364 (CA 6, 2014) (a suspect who was reported to have confessed is a legitimate suspect); *compare McNeill v Bagley*, 10 F4th 588, 598-599 (CA 6, 2021) (report containing information about an alternative suspect was not favorable to the defendant because the alternative suspect was definitively and quickly removed as a suspect); *United States v Robinson*, 39 F3d 1115, 1116-1119 (CA 10, 1994) (eyewitness statement that tended to identify a prosecution witness/former codefendant as the real suspect); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (evidence that another vehicle was seen speeding away from the scene); *DiSimone v Phillips*, 461 F3d 181, 195 (CA 2, 2006) (evidence that another person confessed to stabbing the victim); *Turner v United States*, 582 US 313, 323 (2017) (other persons were seen at the scene of a murder prior to police arrival); *Turner v United States*, 582 US 313, 323 (2017) (statements of a witness who named another suspect in the murder even though that witness had credibility issues); *In re Jackson*, 12 F4th 604, 610 (CA 6, 2021) (evidence that eyewitness gave a statement implicating an alternative suspect, which did not match identification of the defendant).

[2] *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed); *Singh v Prunty*, 142 F3d 1157, 1162 (CA 9, 1998) (charges not being authorized, pretrial release); *Douglas v Workman*, 560 F3d 1156, 1165, 1174-1175 (CA 10, 2009) (pre-parole release and reinstatement of goodtime credits); *United States v Gerard*, 491 F2d 1300, 1303-1304 (CA 9, 1974) (sentencing recommendation for probation); *Jackson v Brown*, 513 F3d 1057, 1070-1072 (CA 9, 2008) (prosecutor promised one prisoner-witness to write a letter recommending a prison transfer; and police promised another witness they would bring his cooperation to the attention of judges and prosecutors regarding his pending cases); *United States v Bigeleisen*, 625 F2d 203, 205, 208 (CA 8, 1980) (in exchange for testimony, prosecutor promised to write letter to witness's sentencing judge and parole commission outlining his cooperation); *United States v Talley*, 164 F3d 989, 1003 (CA 6, 1999) (money for relocation in exchange for testimony); *Sivak v Hardison*, 658 F3d 898, 909-910 (CA 9, 2011) (letters from prosecutors seeking consideration for cooperator in cases pending in other jurisdictions and with the parole board; a letter documenting consideration sought by the cooperator from out-of-state prosecutor; and a letter from trial prosecutor documenting the assistance given to the cooperator by the prosecutor's office); *United States v Bagley*, 473 US 667, 683-684 (1985) (witnesses were told there was a possibility they would be given a reward if their assistance was satisfactory to the government); *Benn v Lambert*, 283 F3d 1040, 1057 (CA 9, 2002) (during trial at which cooperator was testifying prosecutor arranged for cooperator to be released from custody after traffic offense led to arrest on warrants, cooperator not being charged with offenses, and delayed filing of a probation violation warrant); *United States v Shaffer*, 789 F2d 682, 689 (CA 9, 1986) (court concluded cooperator was paid in the form of leniency for his cooperation because the prosecution had, among other things, not initiated forfeiture proceedings against cooperator for assets related to drug dealings, had not enforced a civil liability, and had paid some of his expenses); *United States v Boyd*, 55 F3d 239, 244-45 (CA 7, 1995) (gang-member witnesses who were in custody received "scandalous" favors from the prosecutor's office including visitation privileges within the prosecutor's offices, lax supervision allowing the witnesses to obtain drugs, have sex, and steal, and ability to make long distance phone calls); *United States v Librach*, 520 F2d 550, 553 (CA 8, 1975) (government failed to disclose that witness was placed in protective government custody and had received nearly $10,000 in payments from the government); *Wilson v Beard*, 589 F3d 651, 666-667 (CA 10, 2009) (officer provided interest-free loan to informant during his time as an informant); *Quezada v Scribner*, 611 F3d 1165, 1168-1169 (CA 9, 2010) (relocation payments made to witness in relation to cooperation in another case); *Kennell v Dormire*, 873 F3d 637, 639 (CA 8, 2017) (relocation payments and assistance given to a witness a year before the defendant's trial); *Wolfe v Clarke*, 691 F3d 410, 417-418 (CA 4, 2012) (murderer-witness/cooperator was told by police that if he implicated the defendant in a murder-for-hire scheme and testified to the same that he might have his murder charges reduced or receive a benefit at sentencing).

[3] *DiSimone v Phillips*, 461 F3d 181, 195 (CA 2, 2006) (evidence that another person confessed to stabbing the victim).

Cooperator/codefendant/confederate agreement(s) in their entirety -- whether formal, informal, or tactic agreements (but not mere hope) -- even with witnesses the prosecution is choosing not to call[4]
Cooperator/codefendant/confederate confession[5]
Criminal history of a key witness/codefendant[6]
Defendant's defenses – any information that tends to support the defense(s): including duress, lack of conspiracy, insanity, necessity[7]
Defendant's intoxicated/drugged state during commission of the crime(s)[8]
Elements of offense – any information that casts doubt upon any element of the offense[9]
Expert changed opinion from original report[10]
Expert report that undermines prosecution's theory of the case[11]
Expert witness bias/involvement as more than disinterested professional[12]
Eyewitness statements[13]

[4] *Bell v Bell*, 512 F3d 223, 233 (CA 6, 2008) ("It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*.. . . The existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate. . . . A witness's expectation of a future benefit is not determinative of the questions of whether a tacit agreement subject to disclosure existed."); *Douglas v Workman*, 560 F3d 1156, 1174-1175 (CA 10, 2009) (linchpin witness was given a deal in exchange for his testimony that was not disclosed and witness denied any deal had been made); *Akrawi v Booker*, 572 F3d 252, 263 (CA 6, 2009) (informal agreement to reduce charges a witness had in one county in exchange for his testimony in another county); *Blankenship v Estelle*, 545 F2d 510, 513-514 (CA 5, 1977) (inmate claimed to have heard cooperator say he and another cooperator had a deal with the prosecutor that if they testified against the defendant their charges would be dropped, and after trial they were dropped, although at trial the impression was left with the jury that the cooperators had indictments pending without any additional information as to an intent to dismiss); *United States v Kojayan*, 8 F3d 1315, 1318-1319 (CA 9, 1993) (non-testifying witness had a cooperation agreement and, therefore, could have been called as this could have led to a missing witness instruction or the testimony of the witness); *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed); *Silva v Brown*, 416 F3d 980, 986-987 (CA 9, 2005) (agreement with codefendant to have murder charges dismissed against him if he did not seek psychiatric evaluation and testified against one of the other defendants); *Tassin v Cain*, 17 F3d 770, 774, 778-779 (CA 5, 2008) (agreement that a cooperator had with the prosecutor and court that she would receive a favorable sentence if she waived spousal privilege and that it would be the most favorable sentence if she testified consistent with her police statement); but see *People v Smith*, ___ Mich App ___ (2025) (a witness's subject hope of securing a deal does not establish that a deal actually existed that would have required disclosure).

[5] *Brady v Maryland*, 373 US 83, 84-86 (1963) (confession of confederate/codefendant that he was the person who committed the murder during the course of a robbery perpetrated by confederate and defendant for guilt determination and sentencing purposes).

[6] *United States v Bernal-Obeso*, 989 F2d 331, 332-333, 336 (1993) (noting prosecution's obligation to disclose informant's criminal history); *Ouimette v Moran*, 942 F2d 1, 2, 10-11 (CA 1, 1991) (prosecutor did not disclose extensive criminal history of its key witness and did not disclose the nature of several deals that the witness had made with the government in exchange for his testimony); *United States v Auten*, 632 F2d 478, 481 (CA 5, 1980) (criminal history of codefendant granted immunity even though prosecution had not run the criminal history records).

[7] *United States v Alzate*, 47 F3d 1103, 1110 (CA 11, 1995) (prosecutor failed to disclose that officer told prosecutor during trial that his representations to the jury about an issue impacting defendant's duress defense were false; evidence defendant claimed existed did exist); *United States v Aviles-Colon*, 536 F3d 1, 19-21 (CA 1, 2008) (evidence that defendant and codefendant had been "at war" with each other, as it supported defendant's claim that he was not part of a conspiracy with that codefendant); *Cone v Bell*, 556 US 449, 472-474 (2009) (witness statements and police reports that would have corroborated defendant's insanity defense); *United States v Cessa*, 861 F3d 121, 131 (CA 5, 2017) ("'[C]ourts routinely find that evidence supporting an affirmative defense is exculpatory . . . ."); *United States v Udechukwu*, 11 F3d 1101, 1106 (CA 1, 1993) (*Brady* violation for prosecutor's failure to disclose evidence that corroborated defendant's claim of duress); *United States v Spagnoulo*, 960 F2d 990, 994-995 (CA 11, 1992) (*Brady* violation for prosecutor's failure to disclose psychological report that cast doubt on the defendant's competence and might have supported an insanity defense).

[8] *Cone v Bell*, 556 US 449, 474-475 (2009) (defendant's intoxicated/drugged state when committing the murders as that might have impacted death sentence).

[9] *United States v Triumph Capital Group, Inc.*, 544 F3d 149, 162-165 (CA 2, 2008) (investigator's notes, which would have cast doubt on defendant's intent to commit the offense).

[10] *People v Burger*, 331 Mich App 504, 518-519 (2020) (fire investigators' (experts') changed opinions about how many points of origin of an incendiary fire).

[11] *Benn v Lambert*, 283 F3d 1040, 1060-1062 (CA 9, 2002) (expert report that fire was accidental as it undermined prosecution theory of motive, aggravating circumstances, and premeditation).

[12] *Schledwitz v United States*, 169 F3d 1003, 1014-1015 (CA 6, 1999) (expert witness was not merely a "neutral and disinterested" expert but rather had been involved in the investigation of the defendant for years).

[13] *United States v Robinson*, 39 F3d 1115, 1116-1119 (CA 10, 1994) (eyewitness statement that tended to identify a prosecution witness/former codefendant as the drug courier rather than the defendant); *Kyles v Whitley*, 514 US 419, 420 (1995) (contemporaneous eyewitness statements taken following a murder that gave details about the perpetrator that were inconsistent with each other and did not match the defendant's physical appearance calling into doubt identification); *Turner v United States*, 582 US 313, 323 (2017) (statement of a witness who passed by the scene of the crime shortly after it was committed and shortly before it was discovered)

False accusation of victim in the past[14]
False/misleading testimony – any information that would clear-up, correct, or remedy such testimony[15]
Identification information – any information related to who committed the crime, including suspect description(s), misidentification(s) of defendant, inconsistencies, records that might demonstrate identification, misidentification by an informant, inconsistent statements of identification, and evidence that might undermine the strength of identification[16]
Immigration assistance/prevention of deportation: including permission to remain in the US, ability to travel freely, U-Visa/T-Visa assistance/application[17]
Immunity agreement(s)[18]
Inconsistent statement(s) of a witness/cooperator/codefendant in any form: including letters written to the police, written notes shown to police but not retained, oral statements, multiple police reports[19]
Informant-witness credibility/misbehavior evidence in current case or past cases: including history of committing crimes, "regularly" lying, using drugs, mental health issues[20]

[14] *United States v Velarde*, 485 F3d 553, 561-563 (CA 10, 2007) (victim made false accusations of a similar nature in the past that could have led to cross-examination material even if not admissible in its own right).

[15] *United States v Alzate*, 47 F3d 1103, 1110 (CA 11, 1995) (prosecutor failed to disclose that officer told prosecutor during trial that his representations to the jury about an issue impacting defendant's duress defense were false; evidence defendant claimed existed did exist).

[16] *Kyles v Whitley*, 514 US 419, 420 (1995) (contemporaneous eyewitness statements taken following a murder that gave details about the perpetrator that were inconsistent with each other and did not match the defendant's physical appearance calling into doubt identification); *United States v Garner*, 507 F3d 399, 405-407 (CA 6, 2007) (cell phone records of a carjacking victim whose phone was stolen during the carjacking as they showed use of the phone after the crime possibly informing the issue of identity of the perpetrators); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (information that the confidential informant provided misidentification of the defendant); *Smith v Cain*, 565 US 73, 75-76 (2012) (witness identified the defendant at trial as one of the perpetrators but had made statements, which were not disclosed, on the night of the murder and days later that he could not identify the perpetrators); *People v Chenault*, 495 Mich 142, 156-157 (2014) (videotaped statements of prosecution witnesses that might have been used for impeachment and to undermine strength of identification); *In re Jackson*, 12 F4th 604, 610 (CA 6, 2021) (eyewitness gave a statement implicating an alternative suspect, which did not match defendant).

[17] *United States v Blanco*, 392 F3d 382, 92 (CA 9, 2004) (cooperator received special immigration treatment by the INS and the DEA); *United States v Sipe*, 388 F3d 471, 476, 488-489 (CA 5, 2004) (prosecutor told defense that the only assistance to the alien witnesses was permission to remain and work in the US, they had in fact been given social security cards, were paid witness and travel fees, allowed to travel to and from Mexico, allowed to travel out of state, and allowed to use government phones for personal matters); *Roldan v Stroud*, 52 F4th 335, 338-339 (CA 7, 2022) (in context of a § 1983 action, the court recognized the need to disclose U-Visa assistance offered to a victim by police and/or prosecutor); *State v Huerta-Castro*, 390 P3d 185, 198-200 (NM Ct App 2016) (U-Visa application and supporting documents of the victims' mother was *Brady* material that should have been disclosed as prosecutor is imputed with knowledge of the members of the government's team, which included letters from members of the prosecutor's office and memos from the investigating detective); *but see Gomez v State*, 245 So3d 950, 954-955 (Dist Ct of App of FL, 4th Dist 2018) (finding no *Brady* violation for failure to produce victim's U-Visa application when state did not have possession or control of it and defense knew about it and could have subpoenaed it).

[18] *Horton v Mayle*, 408 F3d 570, 578 (CA 9, 2005) ("We hold that the prosecution's failure to disclose the deal between the police and [the witness for immunity] violated *Brady*.").

[19] *United States v Weintraub*, 871 F2d 1257, 1261-1265 (CA 5, 1989) (prior inconsistent statement of witness as to lower amount of drugs that defendant sold); *Strickler v Greene*, 527 US 263, 281 (1999) (letters from witness to officer casting doubt on significant portions of the witness's testimony because they contained inconsistent statements); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements); *Youngblood v West Virginia*, 547 US 867, 869-870 (2006) (written note of victims, purportedly shown to but not retained by an investigator, that was inconsistent to trial testimony as it contradicted claim that sexual assault occurred and supported defendant's claim of consent); *Graves v Dretke*, 442 F3d 334, 342-344 (CA 5, 2006) (inconsistent statement of cooperator/codefendant, who tried to protect his wife from prosecution by asking not to be asked about her participation in the crime, that wife was present for crime); *Smith v Cain*, 565 US 73, 75-76 (2012) (witness identified the defendant at trial as one of the perpetrators but had made statements, which were not disclosed, on the night of the murder and days later that he could not identify the perpetrators); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of inconsistent statements of two prosecution witnesses).

[20] *Benn v Lambert*, 283 F3d 1040, 1054-1056 (CA9, 2002); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (misbehavior of a confidential informant either during the current case or in other cases, such as using illegal drugs, criminal conduct during time as an informant); *Gonzalez v Wong*, 667 F3d 965, 983-984 (CA 9, 2011) (medical/psychological records of a "jailhouse informant" witness had mental health issues and had a history of lying).

Informant-witness incentives to testify against the defendant[21]
Informant-witness statements/inconsistent statements[22]
Informant-witness status as an informant[23]
Investigative subpoena transcripts: subject to the procedures outlined by MCL 767A.1 et seq and the appellate court, disclosure can be required of transcripts of testimony during investigative subpoenas of defendant, codefendants, and accomplices; testifying witnesses; non-testifying witnesses if the transcripts contain exculpatory information; and non-testifying witnesses without exculpatory information.[24]
Key witness's status as an informant before, during, or after controlled buys with defendant and/or before or during trial in current case or another case[25]
Laboratory reports: including ballistic report and crime scene processing[26]
Non-prosecution agreement(s) given to a witness/cooperator (whether known by the trial prosecutor or not)[27]
Pending criminal charges against a witness[28]
Plea agreement(s), in their entirety, made with witnesses or codefendants/cooperators[29]
Police misconduct: including court determination in another case that office lied, other evidence that officer lied, evidence that officer is under investigation for criminal behavior[30]

[21] *United States v Steinberg*, 99 F3d 1486, 1491 (CA 9, 1996) (informant witness owed the defendant money, giving him an incentive to send defendant to prison), *disapproved of on other grounds*, *United States v Foster*, 165 F3d 689 (CA 9, 1999).

[22] *Kyles v Whitley*, 514 US 419, 420 (1995) (informant statements even though the informant never testified); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (impeachment evidence of key witnesses, including deals with witnesses, informant history, and inconsistent statements).

[23] *Banks v Dretke*, 540 US 668, 691 (2004).

[24] *People v Pruitt*, 229 Mich App 82, 88-89 (1998).

[25] *Banks v Dretke*, 540 US 668, 691 (2004); *United States v Shaffer*, 789 F2d 682, 688-689 (CA 9, 1986) (key witness was informant for government in earlier, different drug investigation); *United States v Torres*, 569 F3d 1277, 1282-1283 (CA 10, 2009) (CI worked as DEA informant before and after controlled buys with defendant); *Robinson v Mills*, 592 F3d 730, 737 (CA 6, 2010) (key government witness worked as paid informant in other criminal cases before and after defendant's trial); *Robinson v Mills*, 592 F3d 730, 737-738 (CA 6, 2010) (key witness was a paid confidential informant working for the local authorities before and during trial).

[26] *United States ex rel Smith v Fairman*, 769 F2d 386, 391 (CA 7, 1985) (police/lab ballistics report that gun police claimed the defendant used to shoot at them was not operable the day following the shooting); *see also Connick v Thompson*, 563 US 51, 57 (2011) (prosecutor conceded that crime lab reports on processing of crime scene evidence for blood were *Brady* material that should have been disclosed).

[27] *Giglio v United States*, 405 US 150, 152-155 (1972) (this rules applies even when the trial prosecutor did not know of the promise made by another prosecutor, who did not have authority to make the promise, that cooperator/coconspirator would not be prosecuted); *Haber v Wainwright*, 756 F2d 1520, 1523 (CA 11, 1985) ("Where the government fails to disclose evidence of any understanding or agreement as to future prosecution of a key government witness, due process may require reversal of the conviction. . . . ") (citations omitted); *Monroe v Angelone*, 323 F3d 286, 312-314 (CA 4, 2003) (promise not to prosecute key witness who was a convicted felon with felon in possession of a firearm); *United States v Sanfilppo*, 564 F2d 176, 179 (CA 5, 1977) (promise to witness that he would not be charged in a separate case if he testified).

[28] *People v Brownridge* (on remand), 237 Mich App 210, 215 (1999) ("[T]he prosecution has a duty to disclose charges pending against a witness."); *People v Torrez*, 90 Mich App 120, 123-125 (1979) (finding *Brady* violation for failure to disclose that informant witness had pending perjury charges); *United States v Kohring*, 637 F3d 895, 903-904 (CA 9, 2011) (key witness had pending criminal charges for sexual misconduct with minors, which not only showed potential motive and bias to testify favorably for the government but also showed in that investigation he had solicited perjury and tried to get a witness to be unavailable for testimony); *Cargle v Mullin*,317 F3d 1196, 1215 (CA 10, 2003) (recognizing the impeachment value of a witness having a pending criminal charge because it is relevant to show bias to testify favorably for the government).

[29] *See California v Trombetta*, 467 US 479, 485 (1984); *United States v Smith*, 77 F3d 511, 513-516 (CA DC, 1996) (prosecutor disclosed part of plea agreement but did not disclose, and should have, that cooperator was going to have two other felony cases dismissed); but see *People v Smith*, ___ Mich App ___ (2025) (a witness's subject hope of securing a deal does not establish that a deal actually existed that would have required disclosure).

[30] *People v Abcumby-Blair*, 335 Mich App 210, 221-222 (2020) (finding the prosecutor had a duty to disclose determination by another court that an investigator had testified untruthfully in that case); *United States v Bowie*, 198 F3d 905, 909 (CA DC, 1999) (government police witness was the subject of an investigation into the truthfulness of his testimony in another case); *United States v Bruce*, 984 F3d 884, 896-898 (CA 9, 2021) (in a prison contraband case, government should have disclosed that one of its corrections officer witnesses was under investigation in another case for similar allegations); *United States v Veras*, 51 F3d 1365, 1374-1375 (CA 7, 1995) (an officer was "alleged to have taken money belonging to government informants, lying on search warrant applications, and stealing money during police searches").

Police notes (if preserved) documenting *Brady* material: including of interview(s) of witness(es), investigator's comments[31]
Promise to not pursue investigation/charges against a third-party that witness wants to protect[32]
Prosecutor misconduct[33]
Prosecutor's influential position that could impact testimony of a witness[34]
Prosecutor's theory of crime – any evidence that undermines that theory[35]
Scene of the crime – any information tending to show the defendant was not at the scene of the crime[36]
Search warrant affidavit[37]
Sentence -- any information that might impact the sentence the defendant could receive: including confession of a codefendant, defendant's intoxicated/drugged state during murders, prior inconsistent statement of witness as would lower amount of drugs the defendant sold, and evidence to bolster mitigation[38]
Transcript(s) of witness interviews, rather than a mere summary[39]
U-Visa/T-Visa application/assistance[40]
Victim Impact Statement (VIS)[41]

[31] *Strickler v Greene*, 527 US 263, 281 (1999) (police officer notes of interviews with a witness because they contained inconsistent statements); *United States v Triumph Capital Group, Inc.*, 544 F3d 149, 162-165 (CA 2, 2008) (investigator's notes, which would have cast doubt on defendant's intent to commit the offense).

[32] *LaCaze v Warden Louisiana Correctional Institute for Women*, 645 F3d 728, 735-736 (CA 5, 2011), *amended on denial of rehearing en banc*, 647 F3d 1175 (CA 5, 2011) (police promised murderer that they would not arrest and prosecutor his 14-year-old son before he would make a statement implicating the defendant); *Harris v Lafler*, 553 F3d 1028, 1033-1035 (CA 6, 2009) (promise made to key witness that if he made a statement, which incriminated the defendant, they would release his girlfriend from custody).

[33] *United States v Scheer*, 168 F3d 445, 449-453 (CA 11, 1999) (failure to disclose that prosecutor had made a remark to a key witness who was on probation that the witness might have interpreted as threatening/intimidation; stating, "you are going to come through for us or for me" or be taken out in cuffs).

[34] *Reutter v Solem*, 888 F2d 578, 581-582 (CA 8, 1989) (a prosecutor was in a position to influence whether a cooperator obtained a commutation of his sentence, which was scheduled for a hearing shortly after the cooperator was to testify against the defendant).

[35] *Benn v Lambert*, 283 F3d 1040, 1060-1062 (CA 9, 2002) (expert report that fire was accidental as it undermined prosecution theory of motive, aggravating circumstances, and premeditation); *Hughbanks v. Hudson*, 2 F.4th 527, 538–39 (6th Cir. 2021) (evidence that would undermine the prosecution's theory of the case must be disclosed).

[36] *Kyles v Whitley*, 514 US 419, 420 (1995) (a list of license plates of cars parked near the murder scene which did not include a plate registered to the defendant).

[37] *United States v Kelly*, 35 F3d 929, 937 (CA 4, 1994) (search warrant affidavit, which included information that might have been used to impeach a key government witness).

[38] *Brady v Maryland*, 373 US 83, 87 (1963) (confession of codefendant); *Cone v Bell*, 556 US 449, 474-475 (2009) (defendant's intoxicated/drugged state when committing the murders as that might have impacted death sentence); *United States v Weintraub*, 871 F2d 1257, 1261-1265 (CA 5, 1989) (prior inconsistent statement of witness as to lower amount of drugs that defendant sold); *Cone v Bell*, 556 US 449, 472-474 (2009) (witness statements and police reports that would have bolstered his argument for sentence mitigation).

[39] *People v Christian*, 510 Mich 52, 81-90 (2022) (full transcript of interview with key prosecution witness; merely disclosing summary of interview not sufficient).

[40] *Roldan v Stroud*, 52 F4th 335, 338-339 (CA 7, 2022) (in context of a § 1983 action, the court recognized the need to disclose U-Visa assistance offered to a victim by police and/or prosecutor); *State v Huerta-Castro*, 390 P3d 185, 198-200 (NM Ct App 2016) (U-Visa application and supporting documents of the victims' mother was *Brady* material that should have been disclosed as prosecutor is imputed with knowledge of the members of the government's team, which included letters from members of the prosecutor's office and memos from the investigating detective); *but see Gomez v State*, 245 So3d 950, 954-955 (Dist Ct of App of FL, 4th Dist 2018) (finding no *Brady* violation for failure to produce victim's U-Visa application when state did not have possession or control of it and defense knew about it and could have subpoenaed it).

[41] A victim impact statement must be disclosed prior to or at sentencing. *See* MCL 780.764 (victim impact statements, generally); MCL 780.765 (oral victim impact statement during sentencing). But a victim impact statement received prior to determination of guilt if it could be used to impeach the victim's statements/testimony must be disclosed as well. *People v McCoy*, 2019 WL 4855875, unpub MCOA No. 342015 (Oct. 1, 2019) (discussing alleged *Brady* violation for failure to turn over victim impact statement until sentencing, although not ruling it was required to be disclosed); *United States v Wright*, 848 F3d 1274, 1282 (CA 10, 2017) (finding that failure of the government to disclose victim impact statement made in coconspirator's case, which had impeachment evidence against the coconspirator who testified against defendant, did not undermine confidence in the outcome).

Witness's bias, anti-defendant -- any evidence that might show a witness is biased against defendant: including that witness owed defendant money, witness disliked defendant/had animosity toward defendant, witness and defendant were at war with each other[42]
Witness's bias, pro-prosecutor -- any evidence that might show a witness would be biased for the prosecution: including that prosecutor could influence whether a prisoner-witness would get commutation, that witness was told he is under investigation for a criminal offense[43]
Witness's competency to testify/provide information – any evidence that the witness's ability to testify/make observations was affected: including evidence of drug/alcohol use, evidence of mental health issues[44]
Witness's credibility – any evidence that might be used to challenge the witness on cross-examination including a photograph that calls into question a witness's ability to see/hear, prior false accusation made by victim/witness, witness's action in seeking consideration for testimony even if not given any, videotaped statement of witness, behavior during interrogation by police, another witness's statement that witness lied[45]
Witness's intimidation/influence by another witness, the police, or even by the prosecutor[46]

[42] *United States v Steinberg*, 99 F3d 1486, 1491 (CA 9, 1996) (informant witness owed the defendant money, giving him an incentive to send defendant to prison), *disapproved of on other grounds*, *United States v Foster*, 165 F3d 689 (CA 9, 1999); *United States v Sipe*, 388 F3d 471, 477 (CA 9, 2004) (fact that key witness personally disliked the defendant or had animosity toward the defendant, which was not revealed until PSR); *United States v Aviles-Colon*, 536 F3d 1, 19-21 (CA 1, 2008) (evidence that defendant and codefendant had been "at war" with each other, as it supported defendant's claim that he was not part of a conspiracy with that codefendant).

[43] *Reutter v Solem*, 888 F2d 578, 581-582 (CA 8, 1989) (prosecutor was in a position to influence whether a cooperator obtained a commutation of his sentence, which was scheduled for a hearing shortly after the cooperator was to testify against the defendant); *United States v Chitty*, 760 F2d 425, 428 (CA 2, 1985) ("The information that [the witness] had been told that he was under investigation was disclosable pursuant to *Brady,* . . .; it provided a motive to testify favorably to the Government, and the fact was known to the prosecutor's office . . . .") (citation omitted).

[44] *Benn v Lambert*, 283 F3d 1040, 1054-1056 (CA9, 2002) (evidence that key witness was using drugs during trial); *Wilson v Beard*, 589 F3d 651, 660-62 (CA 3, 2009) (witnesses' mental health problems that might have affected their testimony, including being prescribed psychotropic medications during relevant time frame leading up to testimony, had a history of mental health problems, and was experiencing mental health issues on the day of testimony); *Gonzalez v Wong*, 667 F3d 965, 983-984 (CA 9, 2011) (medical/psychological records of a "jailhouse informant" witness had mental health issues and had a history of lying); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of the witness admitting to being on drugs when the witness met with investigators).

[45] *People v McMullan*, 284 Mich App 149, 157 (2009) (""[P]ursuant to [*Brady*], the prosecutor must disclose any information that would materially affect the credibility of his witnesses."); *Ballinger v Kerby*, 3 F3d 1371, 1376 (CA 10, 1993) (evidence, such as a photograph calling into doubt whether a witness could have seen what he claimed to have seen, that would impact credibility of a prosecution witness); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (evidence that would have allowed more effective cross-examination of prosecution witnesses); *United States v Velarde*, 485 F3d 553, 561-563 (CA 10, 2007) (victim made false accusations of a similar nature in the past that could have led to cross-examination material even if not admissible in its own right); *Bell v Bell*, 512 F3d 223, 232-233 (CA 6, 2008) (inmate sought out consideration from government in exchange for his testimony against the defendant and those demands/requests were memorialized in notes made by the prosecutor when the prosecutor met with the witness); *People v Chenault*, 495 Mich 142, 156-157 (2014) (videotaped statements of prosecution witnesses that might have been used for impeachment and to undermine strength of identification); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of information that a witness had vacillated during intense interviewing techniques); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of a relative of an eyewitness saying that contrary to the witness's claim the witness never told her about the crime); *United States v Walter*, 870 F3d 622, 626, 629-630 (CA 7, 2017) (evidence, in the form of another witness's statement to a police officer during a trial break, that cooperator was still dealing drugs while out on bond and cooperating with the government since that evidence would have challenged the cooperator's credibility because it contradicted his testimony).

[46] *United States v O'Conner*, 64 F3d 355, 357-359 (CA 8, 1995) (per curiam) (witnesses attempted to influence the testimony of another witness by threatening him and his family); *United States v Kohring*, 637 F3d 895, 903, 905 (CA 9, 2010) (alleged attempts by key witness to secured perjured testimony from one witness and unavailability of another witness in different case); *In re Jackson*, 12 F4th 604, 610 (CA 6, 2021) (witness's claim that the police coerced her testimony were exculpatory and impeaching and should have been disclosed); *United States v Scheer*, 168 F3d 445, 449-453 (CA 11, 1999) (failure to disclose that prosecutor had made a remark to a key witness who was on probation that the witness might have interpreted as threatening/intimidation of a witness; the prosecutor telling the witness "you are going to come through for us or for me" or be taken out in cuffs).

Brady & *Giglio*: Examples of Required Disclosures (Unannotated) updated 04/01/2025

Item
Alternate, legitimate suspects information: including eyewitness statements tending to identify another person as the perpetrator, another vehicle was seen speeding away from the crime scene, confession by another person, others seen at the scene
Benefits of any kind given by a government actor (e.g. police, prosecutor, member of office) to a witness/codefendant/cooperator before or during trial even if not explicitly in exchange for testimony because it reflects tacit understanding that person will be helpful to the government or creates a sense of obligation on the part of a witness to testify favorably to the government. This can be in the form of help, favors, special treatment, inducements, or leniency: including charges not being authorized, pretrial release, pre-parole release, reinstatement of goodtime credits, sentence recommendation to probation, writing letters to assist in prison transfer/parole decision/sentencing/resolution of other criminal charges, promise to share with other prosecutors and judges the cooperation, providing money for relocation, offering a reward, delayed filing of warrant, not instituting forfeiture proceedings, not enforcing civil liability, inmate visitation privileges, lax inmate supervision, allowing inmates to make long-distance calls, placement in protective custody, payments to witness, interest-free loans to an informant, sentencing benefit promised to cooperator
Confession by another person
Cooperator/codefendant/confederate agreement(s) in their entirety -- whether formal, informal, or tactic agreements (but not mere hope) -- even with witnesses the prosecution is choosing not to call
Cooperator/codefendant/confederate confession
Criminal history of a key witness/codefendant
Defendant's defenses – any information that tends to support the defense(s): including duress, lack of conspiracy, insanity, necessity
Defendant's intoxicated/drugged state during commission of the crime(s)
Elements of offense – any information that casts doubt upon any element of the offense
Expert changed opinion from original report
Expert report that undermines prosecution's theory of the case
Expert witness bias/involvement as more than disinterested professional
Eyewitness statements
False accusation of victim in the past
False/misleading testimony – any information that would clear-up, correct, or remedy such testimony
Identification information – any information related to who committed the crime, including suspect description(s), misidentification(s) of defendant, inconsistencies, records that might demonstrate identification, misidentification by an informant, inconsistent statements of identification, and evidence that might undermine the strength of identification
Immigration assistance/prevention of deportation: including permission to remain in US, ability to travel freely, U-Visa/T-Visa assistance/application
Immunity agreement(s)
Inconsistent statement(s) of a witness/cooperator/codefendant in any form: including letters written to the police, written notes shown to police but not retained, oral statements, multiple police reports
Informant-witness credibility/misbehavior evidence in current case or past cases: including history of committing crimes, "regularly" lying, using drugs, mental health issues
Informant-witness incentives to testify against the defendant
Informant-witness statements/inconsistent statements
Informant-witness status as an informant

Investigative subpoena transcripts: subject to the procedures outlined by MCL 767A.1 et seq and the appellate court, disclosure can be required of transcripts of testimony during investigative subpoenas of defendant, codefendants, and accomplices; testifying witnesses; non-testifying witnesses if the transcripts contain exculpatory information; and non-testifying witnesses without exculpatory information.
Key witness's status as an informant before, during, or after controlled buys with defendant and/or before or during trial in current case or another case
Laboratory reports: including ballistic report and crime scene processing
Non-prosecution agreement(s) given to a witness/cooperator (whether known by the trial prosecutor or not)
Pending criminal charges against a witness
Plea agreement(s), in their entirety, made with witnesses or codefendants/cooperators
Police misconduct: including court determination in another case that office lied, other evidence that officer lied, evidence that officer is under investigation for criminal behavior
Police notes (if preserved) documenting *Brady* material: including of interview(s) of witness(es), investigator's comments
Promise to not pursue investigation/charges against a third-party that witness wants to protect
Prosecutor misconduct
Prosecutor's influential position that could impact testimony of a witness
Prosecutor's theory of crime – any evidence that undermines that theory
Scene of the crime – any information tending to show the defendant was not at the scene of the crime
Search warrant affidavit
Sentence -- any information that might impact the sentence the defendant could receive: including confession of a codefendant, defendant's intoxicated/drugged state during murders, prior inconsistent statement of witness as would lower amount of drugs the defendant sold, and evidence to bolster mitigation
Transcript(s) of witness interviews, rather than a mere summary
U-Visa/T-Visa application/assistance
Victim Impact Statement (VIS)
Witness's bias, anti-defendant -- any evidence that might show a witness is biased against defendant including that witness owed defendant money, witness disliked defendant/had animosity toward defendant, witness and defendant were at war with each other
Witness's bias, pro-prosecutor -- any evidence that might show a witness would be biased for the prosecution: including that prosecutor could influence whether a prisoner-witness would get commutation, that witness was told he is under investigation for a criminal offense
Witness's competency to testify/provide information – any evidence that the witness's ability to testify/make observations was affected: including evidence of drug/alcohol use, evidence of mental health issues
Witness's credibility – any evidence that might be used to challenge the witness on cross-examination including a photograph that calls into question a witness's ability to see/hear, prior false accusation made by victim/witness, witness's action in seeking consideration for testimony even if not given any, videotaped statement of witness, behavior during interrogation by police, another witness's statement that witness lied
Witness's intimidation/influence by another witness, the police, or even by the prosecutor

Brady & *Giglio*: Timing of Disclosure

updated 04/01/2025

Brady is an ongoing obligation that results in a violation upon complete failure to disclose and upon delayed disclosure if the delay causes prejudice such that the defendant is unable to use the evidence; the sooner disclosure occurs the more chance there is for any potential prejudice to be cured including through a recess or adjournment
• The duty to disclose under *Brady* is ongoing; starting once the case it brought and continuing thereafter.[1] • "'Generally speaking, *Brady* does not apply to delayed disclosure, but only to a complete failure to disclose,' unless there is prejudice arising from the delay."[2] • In some circumstances, a trial court can effectively deal with a *Brady* issue by allowing the defendant time to review the *Brady* evidence and use it to the extent it is helpful.[3] • "[S]o long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated."[4] • "Any disadvantage that a defendant might suffer because of the tardiness of impeachment material can be cured by asking for a recess."[5] • "The failure of the government to turn over [cell phone] records within a timeframe that would allow [the defendant's] counsel to investigate them prejudiced defendant."[6]
Grand jury: disclosure not required
• The prosecutor does not have a duty to disclose *Brady* material during grand jury proceedings.[7] • "The government . . . has no judicially enforceable duty to provide a grand jury with exculpatory evidence."[8]
Preliminary examinations: disclosure not generally required
• As a general principle, there is no *Brady* violation for failure to provide *Brady* material prior to examination that would only have created conflicting evidence because conflicting evidence is a matter for the jury, not the examination judge, and the defendant should still be bound over.[9]
Suppression hearing: disclosure likely required where challenge is to truthfulness of search warrant affidavit but otherwise the caselaw is unclear
• The prosecutor might have a duty to disclose favorable, material evidence for use by the defense prior to a suppression hearing.[10]
Pre-plea: disclosure of **impeachment** evidence not required; **exculpatory** evidence unclear
• "[T]he Constitution does not require the Government to disclose material **impeachment** evidence prior to entering a plea agreement with a criminal defendant."[11]

[1] *Pennsylvania v Ritchie*, 480 US 39, 59-60 (1987).
[2] *McNeill v Bagley*, 10 F4th 588, 600 (CA 6, 2021); *Robertson v Lucas*, 753 F3d 606, 621 (CA 6, 2014) ("'In general, the principles announced in *Brady* do not apply to a tardy disclosure of exculpatory information, but to a complete failure to disclose. If previously undisclosed evidence is disclosed ... during trial, no *Brady* violation occurs unless the defendant has been prejudiced by the delay in disclosure.'"), quoting *United States v Word*, 806 F2d 658, 665 (CA 6, 1986); see also *United States v Bencs*, 28 F3d 555, 560-561 (CA 6, 1994); *People v Fox*, 232 Mich App 541, 549-551 (1998) (discussing lack of prejudice in late-disclosure of *Brady* material); *see also Cunningham v. Shoop*, 23 F.4th 636, 675–76 (CA 6, 2022), *cert. denied*, 214 L. Ed. 2d 241, 143 S. Ct. 37 (2022) (discussing that delay in *Brady* disclosure can cause prejudice but finding in that case no prejudice from the in-trial disclosure of material to aid in cross-examination and noting that the defendant did not request an adjournment and, when asked, the defense counsel said he was ready to cross-examine the witness).
[3] *People v Hawkins*, 340 Mich App 155, 186 (2022) (finding no *Brady* violation requiring a remedy because "the district court dealt with the prosecution's failure to disclose [the evidence] by granting defendant an adjournment and time to analyze that evidence and use it to the extent that it provided any benefit to defendant. . . . [The court] corrected the potential of any due-process violation and prevented any unfairness . . . .").
[4] *United States v Presser*, 844 F2d 1275, 1283 (CA 6, 1988).
[5] *United States v Crayton*, 357 F3d 560, 569 (CA 6, 2004).
[6] *United States v Garner*, 507 F3d 399, 405 (CA 6, 2007) (law enforcement had received the records 5 days before trial but they were not turned over to the defendant until the start of trial, depriving the defendant of 5 days in which he could have investigated the records)
[7] *United States v Williams*, 504 US 36, 49-53 (1992).
[8] *United States v Angel*, 355 F3d 462, 475 (CA 6, 2004).
[9] *People v Bosca*, 310 Mich App 1, 27-30 (2015), reversed in part on other grounds, *People v Bosca*, 509 Mich 851 (2022).
[10] *United States v Barton*, 995 F2d 931, 935 (CA 9, 1993) ("[W]e hold that the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."); *United States v Gamez-Orduno*, 235 F3d 453, 461-462 (CA 9, 2000) (finding obligation); but see *United States v Bowie*, 198 F3d 905, 912 (CA DC, 1999) ("[I]t is hardly clear that the *Brady* line of Supreme Court cases applies to suppression hearings. Suppression hearings do not determine a defendant's guilt or punishment, yet *Brady* rests on the idea that due process is violated when the withheld evidence is 'material either to guilt or to punishment' . . . ." (citation omitted).
[11] *United States v Ruiz*, 536 US 622, 633 (2002) (emphasis added). The *Ruiz* Court did not, however, address whether withholding of exculpatory evidence prior to a plea would violate *Brady*. *Id.* at 630-33. The Court did emphasize that pre-plea disclosure of evidence of factual innocence alleviates concerns of an innocent person pleading guilty. *Id.* at 631.

- The federal circuits have not reached a consensus as to whether *Brady* requires **exculpatory** evidence to be disclosed prior to plea but at least one unpublished Michigan case suggests that it should.[12]
- The Michigan Supreme Court has recently held that a prosecutor error in a habitual offender enhancement notice made a plea involuntary.[13]

Trial (prior to and during): disclosure required

- The prosecution must disclose *Brady* evidence prior to and during trial.[14]

Sentencing: disclosure required

- The prosecution must disclose *Brady* evidence prior to sentencing.[15]

Direct appeal: disclosure likely still required

- There is not a consensus among appellate courts as to whether or for how long a prosecutor's *Brady/Giglio* obligations persist after conviction and sentencing.[16]
- A prosecutor's *Brady/Giglio* obligations continue past the original trial until the conviction becomes final, which does not occur until a defendant exhausts all direct appeals afforded him, and including any retrial. "Accordingly, a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness."[17]

Post-conviction proceeding(s): disclosure likely not required beyond direct appeal

(but prosecutor cannot redact exculpatory material in manner that thwarts defendant's access to postconviction relief in the courts)

- The *Brady* rule generally does not extend to postconviction proceedings; a prosecutor does not have a *Brady* obligation to disclose material exculpatory evidence in postconviction proceedings.[18]
- "In *Osborne*, 557 U.S. at 68, 129 S. Ct. 2308, the Supreme Court noted that 'nothing in our precedents' suggests that the prosecutor's obligation to disclose *Brady* material to the defendant before trial continues after the defendant is convicted and the case is closed."[19]
- Redacting exculpatory evidence from investigative file in response to a public-records request post-trial can violate a defendant's right to access to the courts.[20]

Indefinitely: even if *Brady* is not the source of the obligation, a prosecutor has an ethical duty under MRPC 3.8 to disclose certain favorable evidence indefinitely

- "[A]fter 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."[21]
- MRPC 3.8(f) provides, in pertinent part, that a prosecutor has a continuing obligation to disclose and investigate certain "new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted . . . ."
- MRPC 3.8 (g) provides: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction."

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[12] *See Alvarez v City of Brownsville*, 904 F3d 382, 392-394 (CA 5, 2018) (reviewing federal circuit caselaw addressing disclosure of exculpatory *Brady* material before a plea and noting a lack of consensus among the circuits); *People v David*, 2007 WL 2683655, unpub MCOA No. 268460 (Sept 13, 2007) (discussing that defendant was deprived of due process of law for failure of prosecution to ensure that the defense counsel could review *Brady* material before trial and noting that one of the considerations was that defense counsel was unable to advise the defendant of the propriety of accepting a plea offer).

[13] *People v Guyton*, 511 Mich 291 (2023). The trend is toward full disclosure of exculpatory evidence as soon as possible.

[14] *United States v Headman*, 594 F3d 1179, 1183 (CA 10, 2010) ("Although *Brady* claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence (such as impeachment evidence) that is unavailable to the government until the trial is underway."); *United States v Presser*, 844 F2d 1275, 1283-1284 (CA 6, 1988) (discussing disclosure of impeachment evidence during trial and ability of court to cure any prejudice); *Joseph v Coyle*, 469 F3d 441, 472 (CA 6, 2006) (same).

[15] *Brady v Maryland*, 373 US 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[16] *Waterford v Washburn*, 455 F Supp 3d 579, 610-611 (MD TN 2020) (discussing lack of consensus among appellate courts and citing cases).

[17] *Fields v Wharrie*, 672 F3d 505 515-516 (CA 7, 2012).

[18] *District Attorney's Office for the Third Judicial Dist. v Osborne*, 557 US 52, 68-69 (2009) ("Osborne's right to due process is not parallel to a trial right but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.").

[19] *Gavitt v Born*, 835 F3d 623, 648 (CA 6, 2016).

[20] *Jackson v City of Cleveland*, 64 F4th 736, 750-752 (CA 6, 2023).

[21] *Imbler v Pachtman*, 424 US 409, 427 n.25 (1976).

including that witness owed defendant money, witness disliked defendant/had animosity toward defendant, witness and defendant were at war with each other[42]
Witness's bias, pro-prosecutor -- any evidence that might show a witness would be biased for the prosecution: including that prosecutor could influence whether a prisoner-witness would get commutation, that witness was told he is under investigation for a criminal offense[43]
Witness's competency to testify/provide information – any evidence that the witness's ability to testify/make observations was affected: including evidence of drug/alcohol use, evidence of mental health issues[44]
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[45] *People v McMullan*, 284 Mich App 149, 157 (2009) (""[P]ursuant to [*Brady*], the prosecutor must disclose any information that would materially affect the credibility of his witnesses."); *Ballinger v Kerby*, 3 F3d 1371, 1376 (CA 10, 1993) (evidence, such as a photograph calling into doubt whether a witness could have seen what he claimed to have seen, that would impact credibility of a prosecution witness); *Monroe v Angelone*, 323 F3d 286, 313, 316 n.20 (CA 4, 2003) (evidence that would have allowed more effective cross-examination of prosecution witnesses); *United States v Velarde*, 485 F3d 553, 561-563 (CA 10, 2007) (victim made false accusations of a similar nature in the past that could have led to cross-examination material even if not admissible in its own right); *Bell v Bell*, 512 F3d 223, 232-233 (CA 6, 2008) (inmate sought out consideration from government in exchange for his testimony against the defendant and those demands/requests were memorialized in notes made by the prosecutor when the prosecutor met with the witness); *People v Chenault*, 495 Mich 142, 156-157 (2014) (videotaped statements of prosecution witnesses that might have been used for impeachment and to undermine strength of identification); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of information that a witness had vacillated during intense interviewing techniques); *Turner v United States*, 582 US 313, 323 (2017) (impeachment evidence in the form of a relative of an eyewitness saying that contrary to the witness's claim the witness never told her about the crime); *United States v Walter*, 870 F3d 622, 626, 629-630 (CA 7, 2017) (evidence, in the form of another witness's statement to a police officer during a trial break, that cooperator was still dealing drugs while out on bond and cooperating with the government since that evidence would have challenged the cooperator's credibility because it contradicted his testimony).

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Brady & *Giglio*: Violations

updated 04/01/2025

Brady Violation: suppression by the prosecution of evidence favorable to the defendant that was material

- "[S]aying that a particular nondisclosure was not a *Brady* violation in no way suggests that the prosecutor did not have a duty to disclose the information."[1]
- A *Brady* violation is established when the following three factors are shown:
  (1) the prosecution has suppressed evidence within the government's control, either willfully or inadvertently;
  (2) the evidence was favorable to the defendant either because it was exculpatory evidence or because it was impeachment evidence; and
  (3) the evidence was **"material"** such that withholding the evidence caused prejudice.[2]

"Material" definition: reasonable probability of a different result in the fairness of the trial
"Reasonable probability" definition: probability sufficient to undermine confidence in the outcome

- "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[3]
- "[T]he *Brady* standard is not met if the [defendant] shows merely a reasonable *possibility* that the suppressed evidence might have produced a different outcome; rather, a reasonable *probability* is required."[4]
- "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[5]
- "'Material evidence' is that which is '... so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.'"[6]
- "Evidence qualifies as material when there is "'any reasonable likelihood' it could have 'affected the judgment of the jury.' . . . To prevail on [a] *Brady* claim, [a defendant] need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. . . . He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict."[7]
- The materiality inquiry is not a sufficiency of the evidence analysis; the test is whether "the suppressed evidence could 'undermine confidence in the verdict."[8]

Materiality is influenced by the entirety of the record

- *Brady* materiality "must be evaluated in the context of the entire record."[9]
- The materiality of the withheld evidence is considered in relation to the entire record such that significant withheld evidence might not undermine the confidence of the verdict because the other proofs were so strong, but relatively minor withheld evidence might undermine the confidence of the verdict when the verdict was already questionable.[10]

Materiality is determined by consideration of the net effect of all evidence withheld

- Although each instance of non-disclosure is looked at separately, the withheld evidence is not looked at item by item to determine materiality. Rather, the net effect of all of the withheld evidence is considered and if the net effect "raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand . . . ."[11]
- "When the prosecution fails to turn over numerous pieces of favorable evidence, the proper focus of *Brady*'s materiality inquiry is on the cumulative effect of the unsuppressed evidence on the jury's verdict."[12]

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[1] *Bell v Bell*, 512 F3d 223, 235 n7 (CA 6, 2008).
[2] See *People v Chenault*, 495 Mich 142, 149-150 (2014); *People v Abcumby-Blair*, 335 Mich App 210, 217-218 (2020).
[3] *United States v Bagley*, 473 US 667, 682 (1985); see also *Turner v United States*, 582 US 313 (2017); *People v Chenault*, 495 Mich 142 (2014).
[4] *Montgomery v Bobby*, 654 F3d 668, 678 (CA 6, 2011) (emphasis in original).
[5] *Kyles v Whitley*, 514 US 419, 434 (1995) (citations omitted).
[6] *United States v Clark*, 988 F2d 1459, 1467 (CA 6, 1993) (citing *United States v Agurs*, 427 US 97, 107 (1976)).
[7] *Wearry v Cain*, 577 US 385, 392 (2016) (citations omitted).
[8] *Mack v Bradshaw*, 88 F4th 1147, 1159 (CA 6, 2023), *cert denied*, 145 S Ct 243 (2024).
[9] *United States v Agurs*, 427 US 97, 113 (1976).
[10] *See United States v Agurs*, 427 US 97 (1976); *Smith v Cain*, 565 US 73 (2012); *People v Chenault*, 495 Mich 142 (2014).
[11] *Kyles v Whitley*, 514 US 419, 420 (1995).
[12] *Gumm v Mitchell*, 775 F3d 345, 370 (CA 6, 2014).

Brady & *Giglio*: Violations

updated 04/01/2025

Materiality determination does not inherently distinguish between exculpatory or impeachment evidence, but the outcome-determination analysis can reveal distinctions[13]
• In analyzing alleged *Brady* violations, SCOTUS "has rejected any [ ] distinction between impeachment evidence and exculpatory evidence" because the *Giglio* Court held that impeachment evidence falls within the ambit of *Brady*.[14] • "Exculpatory evidence is not inherently more valuable, because the *Brady* materiality prong is not a sufficiency-of-the-evidence test, but there are relevant distinctions between impeachment and exculpatory evidence for *Brady* purposes. For instance, '[w]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.'"[15]
Materiality depends on how critical the witness/evidence is in relation to the entire proofs
• "'The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.' Thus, 'when the undisclosed evidence is merely cumulative of other evidence . . ., no *Brady* violation occurs.' Similarly, when the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material. Conversely, if the impeaching evidence 'would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.'"[16] • "'In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.'"[17] • The outcome-determinative analysis "is informed by the importance and specificity of [the witness's] testimony, particularly when compared with that of other prosecution witnesses."[18] • "[T]here are some instances where specific impeachment evidence is so important (for issues such as the identity of the culprit) that it is material for *Brady* purposes even when a witness has already been effectively impeached on other issues."[19] • "'[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.'"[20]
Materiality might be established even if the withheld evidence would not have been admissible if the withheld evidence could have led to admissible evidence
• Withheld *Brady* evidence is not material if it would have been inadmissible because it could not have affected the result of the proceeding.[21] • If withheld evidence could have led to admissible evidence, a *Brady* violation can be found.[22]

[13] The timing of disclosure of exculpatory and impeachment evidence might differ, but not the analysis of a violation for failure to disclose. *United States v Ruiz*, 536 US 622, 633 (2002) (holding that impeachment evidence does not need to be disclosed prior to a plea). The *Ruiz* Court did not, however, address whether withholding of exculpatory evidence prior to a plea would violate *Brady*. *Id.* at 630-33. The Court did emphasize that pre-plea disclosure of evidence of factual innocence alleviates concerns of an innocent person pleading guilty. *Id.* at 631.

[14] *United States v Bagley*, 473 US 667, 676-677 (1985); *United States v Mullins*, 22 F3d 1365, 1372 (CA 6, 1994) ("Clearly, *Brady* recognizes no distinction between evidence which serves to impeach a government witness' credibility and evidence which is directly exculpatory of the defendant. Both are "evidence favorable to the accused" and must be disclosed.").

[15] *Jalowiec v Bradshaw*, 657 F3d 293, 313 (6th Cir. 2011), *as amended* (Nov 23, 2011), quoting *Robinson v Mills,* 592 F3d 730, 736 (6th Cir.2010).

[16] *United States v. Sipe*, 388 F3d 471, 478 (CA 5, 2004) (quoted citations contained in footnotes omitted).

[17] *United States v Bruce*, 984 F3d 884, 898 (CA 9, 2021), quoting *United States v Jernigan*, 492 F3d 1050, 1054 (CA 9, 2007).

[18] *See, e.g., United States v Scheer*, 168 F3d 445, 452-453 (CA 11, 1999); *United States v Weintraub*, 871 F2d 1257, 1262 (CA 5, 1989) ("Courts have found, for example, that impeachment evidence improperly withheld was not material where the testimony of the witness who might have been impeached was strongly corroborated by additional evidence supporting a guilty verdict. . . . In contrast, where the withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.") (citation omitted).

[19] *United States v Walker*, 657 F3d 160, 188 (CA 3, 2011); *Dennis v Secretary, Pennsylvania DOC*, 834 F3d 263, 301 (CA 3, 2016) ("[W]ithholding impeachment material that is germane to a critical aspect of the case – as here, the identity of the perpetrator – violates *Brady*.").

[20] *Jefferson v United States*, 730 F3d 537, 550 (CA 6, 2013).

[21] *Wood v Bartholomew*, 516 US 1, 6 (1995) (discussing polygraph result of key witness, which would not have been admissible even to impeach absent stipulation of parties).

[22] *Barton v Warden, Southern Ohio Correctional Facility*, 786 F3d 450, 465 (CA 6, 2015) ("[I]n admissible material might nonetheless be considered 'material under *Brady* if it would 'lead directly' to admissible evidence.") (citations omitted); *United States v Dill*, 297 F3d 93, 104 (CA 2, 2002).

Brady & *Giglio*: Violations

updated 04/01/2025

Although Def. has no obligation to exercise diligence in obtaining *Brady* material, Def.'s knowledge of & access to undisclosed material may result in no *Brady* violation being found
(Caution: regardless of whether a failure to disclose is later determined to be a violation, prosecutors must diligently disclose all *Brady* material, whether requested or not, even if defendant otherwise has access to the material)

- "[E]vidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim."[23] However, defendant's mere knowledge of a witness is not sufficient; the defendant must be aware of the essential exculpatory/impeachment evidence and the prosecution must disclose such evidence.[24]
- Examples include: (1) recorded jail calls defendant made to potential witnesses; (2) the ultimate disposition of criminal charges on a witness's criminal history printout; and (3) public/court records.[25]

Prosecutor's subjective mindset in failing to disclose *Brady/Giglio* evidence is irrelevant in determining whether a violation has occurred (but can be relevant in determining the remedy)

- For a *Brady* violation analysis it does not matter if the prosecutor acted in good faith or in bad faith or intentionally or inadvertently in failing to turn over evidence. The good or bad faith of the prosecutor is irrelevant in deciding the consequences to the criminal trial. "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[26]
- "Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[27]
- "[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment."[28]
- "Thus, even when the prosecutor's actions in suppressing exculpatory evidence are in flagrant bad faith, if the evidence at issue is not material, no *Brady* violation has occurred. . . . Conversely, where, as here, the prosecution has acted in good faith but simply misunderstood the scope of its *Brady* obligation, constitutional error has occurred if the exculpatory evidence at issue is material."[29]

Remedy: A new trial is the typical remedy for a *Brady* violation

- "The decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial and that the remedy is available to a defendant only after a first trial has ended in a conviction and only after a defendant shows that there is a reasonable probability that had the *Brady* evidence been disclosed in time for use at trial, the first trial would not have resulted in a conviction. . . ."[30]
- "The usual remedy for a *Brady* violation is a new trial."[31]
- However, "a new trial is generally not required where the testimony of the witness is corroborated by other testimony or whether the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."[32]

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[23] *People v Chenault*, 495 Mich 142, 155 (2014).
[24] *Clark v Abdallah*, 131 F4th 432, 455–57 (CA 6, 2025) (prosecution should have disclosed information about why a witness changed her story, including that she received bond consideration and had been exposed to threats and coercion).
[25] *People v Richardson*, 2016 WL 3030860, unpub MCOA No. 322195 (May 26, 2016) (finding no *Brady* violation when prosecutor did not provide defendant with copies of defendant's jail calls because there was no evidence of suppression and stating: "Defendant cannot reasonably claim that the prosecution 'suppressed' evidence of defendant's own telephone conversations, as defendant would have been fully informed of the substance of those conversations and aware of any conclusions to be drawn therefrom."); *United States v Castano*, 906 F3d 458, 466 (CA 6, 2018) (finding no suppression by the government of *Brady/Giglio* material when defendant received the same criminal history printout as the prosecutor had even though the ultimate dispositions of certain offenses were not listed); *United States v Ladoucer*, 573 F3d 628, 636 (CA 8, 2009) (concluding that the government's failure to provide defendant with a copy of the state-court trial transcript of a witness's testimony in an unrelated case was not a *Brady* violation because "the transcript was as available to [the defendant] as it was to the Government" and the defendant knew of the witness's involvement in the unrelated trial; thus the defendant could not show the Government suppressed evidence).
[26] *Brady v Maryland*, 373 US 83, 87 (1963).
[27] *Smith v Phillips*, 455 US 209, 219 (1982); *United States v Agurs*, 427 US 97, 103 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."); mod. by *United States v Bagley*, 473 US 667 (1985).
[28] *Strickler v Greene*, 527 US 263, 288 (1999).
[29] *Spicer v Roxbury Corr. Inst.*, 194 F3d 547, 559 (CA 4, 1999) (citation omitted).
[30] *United States v Presser*, 844 F2d 1275, 1286 (CA 6, 1988).
[31] *United States v Bolton*, 908 F3d 75, 91 (CA 5, 2018).
[32] *People v Lester*, 232 Mich App 262, 282 (1998), overruled on other grounds by *People v Chenault*, 495 Mich 142 (2014).

Brady & *Giglio*: Violations

updated 04/01/2025

Remedy: Dismissal can be the remedy for flagrant prosecutorial misconduct
• "The remedy for a *Brady* violation is a new trial, but dismissal is an appropriate remedy of last resort 'where no other remedy would cure prejudice against a defendant.'"[33] • "Although the appropriate remedy [for a *Brady/Giglio* violation] will usually be a new trial, . . . , a district court may dismiss the indictment when the prosecution's actions rise, as they did here, to the level of flagrant prosecutorial misconduct."[34] • Dismissal of an indictment for violation of due process is warranted when the government's conduct was "'so grossly shocking and so outrageous as to violate the universal sense of justice.'"[35]
Remedy: Exclusion of evidence/witness
• At least one court imposed the remedy of exclusion of evidence/witness testimony for a *Brady* violation when the government's conduct did not rise to the level of flagrant misconduct but was not merely an innocent mistake.[36]
Potential consequences to a prosecutor who violates *Brady*
While the good or bad faith of a prosecutor is irrelevant in determining whether a *Brady* violation has occurred, it is relevant in determining the consequences to the prosecutor. Acts of a prosecutor in failing to turn over *Brady* evidence can result in the following consequences, for example: • Contempt of court/order to show cause.[37] • Professional misconduct hearing/proceedings are possible, although not historically common.[38] • Potential civil lawsuit, although immunity might apply.[39] • Loss of employment/disciplinary action.[40] • Being named and chastised in a published court decision for misconduct.[41]

[33] *United States v Driscoll*, 984 F3d 103, 109 (CA DC, 2021).

[34] *United States v Chapman*, 524 F3d 1073, 1086 (CA 9, 2008) (citation omitted) (prosecutor assured court that all *Brady* material had been turned over but had no discovery log to support that claim, during trial prosecutor turned over 650 pages of material that "consisted of rap sheets, plea agreements, cooperation agreements, and other information related to numerous government witnesses, including at least three important witnesses whose testimony was already complete"); *see also United States v Garrison*, 888 F3d 1057, 1065 (CA 9, 2018) ("District courts have discretion in shaping the remedies for *Brady* and *Giglio* violations. . . . Remedies for such violations, however, 'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.' . . . Because dismissing an indictment is a 'drastic step,' it is 'disfavored.' . . . But, where a defendant was prejudiced by the late disclosure and there was flagrant prosecutorial misconduct, dismissal with prejudice may be an appropriate remedy. . . .") (citations omitted).

[35] *United States v Lopez*, 577 F3d 1053, 1068 (CA 9, 2009) (citation omitted).

[36] *See United States v Frazier*, 203 F Supp 3d 1128, 1134-1135 (W.D. Wash. 2016) (finding that exclusion and suppression of all evidence derived from a confidential informant was the proper remedy for government's *Brady* violations related to that CI; "the Court is convinced that the Government's agents have taken a cavalier attitude toward their *Brady* obligations;" additionally, the government's unwillingness to own up to its misconduct warranted the remedy of exclusion).

[37] *Mansfield v Williamson County*, 30 F4th 276, 278-279 (CA 5, 2022) (discussing fact that an assistant prosecutor, who suppressed exculpatory evidence, "was convicted of criminal contempt, for which he served jail time and surrendered his law license"); *see also*, *United States v Jones*, 686 F Supp 2d 147, 147-149 (D. Mass. 2010) (discussing court's order to show cause why an AUSA should not have been sanctioned, including potential costs, for "her egregious error in failing to produce plainly exculpatory information" and finding that her error was "unintentional rather than deliberate," due at least in part to failure of her office to properly train her on her discovery obligations and noting: "If this matter had involved intentional misconduct, a significant sanction would have been required.")

[38] MRPC 3.8, 8.4; *Connick v Thompson*, 563 US 51, 66 (2011) ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."); s*ee also* Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 Drake L Rev 307 (2018) (discussing the intersection of *Brady* and ABA Model Rule of Professional Conduct 3.8 and discussing professional misconduct actions throughout the nation on this issue).

[39] *Connick v Thompson*, 563 US 51, 54 (2011) (holding that "a district attorney's office may [not] be held liable under § 1983 for failure to train based on a single *Brady* violation); *Price v Montgomery County, Kentucky, et al.*, __ F4th __ (CA 6, 2023) (No. 21-6076) ("[P]rosecutors maintain their immunity when intentionally failing to disclose exculpatory evidence."); *but see Harris v Bornhorst*, 513 F3d 503, 520-522 (CA 6, 2008) (recognizing that a *Brady* violation on the part of a prosecutor might rise to the level of a fraud on the court such that it could support a claim for malicious prosecution); s*ee also, e.g. Smith v Holtz*, 210 F3d 186, 201 (CA3 2000) (defendant sued several parties in a § 1983 case, including the prosecutor's office, for violating his civil rights by, in part, withholding potentially exculpatory *Brady* physical evidence that might have cast doubt on the location of the homicide; the jury concluded that the evidence was not material and exculpatory and the Third Circuit affirmed, stating: "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished by consideration of the suppressed lifters and quartz particles, and Smith has therefore not established that he is entitled to compensation for the unethical conduct of some of those involved in the prosecution.").

[40] *See United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992) (discussing various options to deal with prosecutor misconduct related to a *Brady* violation and specifically stating that the district court would be justified in pursuing contempt of court proceedings, "[t]he Attorney General should examine the conduct of [the prosecutor] to consider whether or not he should be subject to departmental discipline as well;" and the appellate court has caused him to suffer the sanction of chastising him by name in a published opinion).

[41] *United States v Isgro*, 974 F2d 1091, 1099 (CA 9, 1992).

Michigan Prosecutors' Justice Initiative

Best Practice Recommendations

2023

Michigan Prosecutors' Justice Initiative (MPJI)
Best Practices Committee

The Michigan Prosecutors' Justice Initiative (MPJI) Best Practices Committee was established in 2014 to ensure justice is delivered with the highest degree of integrity through the development of professional standards designed to improve public safety, protect the rights of the accused, secure justice for crime victims, and hold offenders accountable. The committee meets on a regular basis to discuss the challenging issues of the day and to provide guidance on a variety of subjects.

Policies adopted by the MPJI and approved by the Board of Directors of the Prosecuting Attorneys Association of Michigan are contained within this document and serve as guidance for prosecutors on a variety of issues.

MJPI Mission Statement:

Ensure justice is delivered with the highest degree of integrity through the development of professional standards designed to improve public safety, protect the rights of the accused, secure justice for crime victims and hold offenders accountable.

MICHIGAN PROSECUTORS' JUSTICE INITIATIVE (MPJI)
BEST PRACTICES

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Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Brady/Giglio Material

In *Brady v Maryland*, 373 US 83, (1963), the United States Supreme Court held that it is the duty of the prosecuting attorney in a criminal trial to disclose to the defense, material information that is favorable to the defendant. Failure to disclose such evidence may violate due process if the evidence is material to either guilt or punishment, regardless of the "good faith or bad faith of the prosecution." In *Giglio v United States*, 405 US 150 (1972), the Court made clear that *Brady* information includes not only information directly related to the crime, but also, under certain circumstances, information that would negatively affect the credibility of a prosecution witness.

Because prosecutors have an obligation to assure a defendant is provided a fair trial, to meet the demands of disclosure under *Brady* and its progeny, as well as applicable statutes and court rules, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors remain well-informed as to the legal requirements of *Brady* and its progeny, as well as any laws or court rules which bear on these obligations. Continuing education in this area is essential, particularly for new prosecutors.
- Prosecutors shall be responsible for knowing applicable discovery obligations, as well as the duty to disclose material exculpatory and impeachment evidence. This obligation should not be delegated to support staff but is the responsibility of the case attorney.
- In order to fulfill the constitutional requirement of *Giglio*, prosecutors should contact police agencies within their jurisdiction to advise them of the duty to disclose impeachment evidence and to develop procedures to determine whether such information exists concerning a law enforcement officer.
- *Brady/Giglio* materials must be disclosed even in the absence of a request from the defendant and must be disclosed in a timely manner.
- Prosecutors should coordinate with police agencies to ensure that all supplemental reports and case information are turned over to the prosecution.
- Prosecutors should determine whether their office possesses potential impeachment evidence regarding a witness. This determination should include, but is not limited to, for example, searching the case management system used by the prosecutor's office to determine whether the witness has been charged with or convicted of an impeachable crime, or has agreed to cooperate pursuant to a plea agreement.
- If there is a question regarding the necessity of disclosing any particular piece of information, it may be advisable to file a motion with the court for an in-camera review to obtain a ruling.

- When conducting a *Brady/Giglio* review, prosecutors should use their individual discretion to determine the disclosable facts specific to each case. If uncertain whether disclosure is appropriate, the case attorney should review the applicable law and consult with other staff and/or prosecution resources, always against the backdrop of the obligation to ensure the defendant's right to a fair trial.
- Prosecutors should adopt office practices and procedures to assist in fulfilling these obligations.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Adopted by PAAM: June 17, 2016

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Canine Advocates

In *People v. Johnson*, 315 Mich App 163 (2016), the Michigan Court of Appeals held that courts possess the inherent authority to control their courtrooms, including whether a support animal can be used to assist a witness instead of a support person. In an effort to ensure the state of the law did not change, the legislature enacted PA 282 of 2018, which codified the *Johnson* ruling. As a result, canine advocates are now permitted in courts across the state for children and vulnerable adults who are testifying or being interviewed.

With the proliferation of canine advocates in prosecutor's offices across the state, prosecutors have an obligation to ensure that these canine advocates and their handlers are all meeting the same minimum standards for a proper canine advocate program. As such, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- The canine advocate must be trained to meet the Assistance Dog International standards for guide or service work pursuant to PA 282 of 2018.
- The canine advocate must be covered under a liability insurance policy.
- Prosecutors should adopt office practices and procedures to assist in satisfying these standards.

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Adopted by PAAM: June 7, 2019

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Continuous Legal Education

In order to ensure that prosecutors maintain a level of knowledge and skill necessary for duties required, and to improve their abilities to seek justice for victims, defendants and their communities, ongoing legal education is recommended. Specifically, PAAM recommends:

- All assistant prosecutors participate in a minimum of 30 hours of legal education over the course of a two-year period.
- New assistant prosecutors undergo an orientation to provide an understanding of their responsibilities in the criminal justice system, office protocol and technical skills. Included within this orientation would be a minimum of one-hour trainings on the Michigan Rules of Professional Responsibility, ethics and *Brady/Giglio* issues.
- Legal education should include areas of substantive law (e.g., domestic violence), rules of evidence, discovery, forensic evidence, trial advocacy and other matters relevant to their duties as prosecutors. Ethics education, either as a component to a larger subject or as a stand-alone, should be a component of a prosecutor's training.
- The prosecuting attorney for each office shall determine the suitability of the legal education, which may include but is not limited to training performed within the office, offered by the Prosecuting Attorneys Association of Michigan (PAAM) or the Prosecuting Attorneys Coordinating Council (PACC), and trainings offered by other acceptable local, statewide, or national organizations. Legal education can be fulfilled by attendance at trainings, online participation, review of online or written documents or materials or any other method that the prosecuting attorney approves.
- Prosecutors should seek funding in their budgets to meet these standards, emphasizing the essential role that training has in assuring the fair, efficient and effective performance of prosecutorial duties. Counties should be responsive to such requests by providing a serviceable level of funding for training, including appropriate staffing to allow for same.

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Adopted by PAAM: June 17, 2016

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Conflict of Interest/Special Prosecutors

Central to the integrity of the criminal justice system is a prosecuting official free of bias or conflict that would undermine faith in the independence of the office. A prosecutor's ability to ensure the guilty are held accountable, the innocent are protected, and the interests of crime victims and the community are safeguarded requires such independence.

Prosecutors are elected to represent the People of the State of Michigan in their community and not any one entity or individual. Because of that unique position in the criminal justice system, disqualification is not a decision to be taken lightly.

Seeking to maintain the dignity and honor of the profession and compliance with the high standard of professionalism required to maintain the public trust, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors should be knowledgeable of the Michigan Rules of Professional Conduct as to this subject, including relevant case law, statutes, and ethics opinions.
- An elected prosecutor who has a conflict will require recusal of the entire prosecutor's office. A supervising prosecutor with a conflict may require office recusal depending on the screening procedures in place.
- Procedures within a prosecutor's office should be established to address actual or potential conflicts, which include the creation of firewalls and conflict teams or supervisors to ensure conflicts are identified and necessary screening occurs. The manner in which conflicts or potential conflicts are handled should be documented. National Prosecution Standards (NDAA) 1-3.4.
- As soon as a conflict is discovered that requires the disqualification of a prosecutor's office, the prosecuting attorney should seek a special prosecutor by submitting a petition and supporting documents (e.g., police report) to the Department of Attorney General, pursuant to MCL 49.160. The petition should articulate the basis for the disqualification and rely on more than a mere claim that someone might question whether the prosecutor should be disqualified. A copy of the petition and supporting documents should be provided to the Prosecuting Attorneys Coordinating Council. If the supporting documents are voluminous, a summary of the case or investigation should be provided. The procedure for appointment of special prosecutors as established by PAAM should be followed.
- A prosecutor should not accept appointment as a special prosecutor unless the prosecutor is confident that they possess the ability, expertise, staff, and other support and resources necessary to prosecute a case through conclusion, including any interlocutory or post-conviction appeals.

- Once the appointment of a special prosecutor is made, the disqualified prosecuting attorney should refrain from discussing the merits and any potential disposition of the case with the special prosecutor or the media. This does not limit contact between offices to ensure that all relevant material is transferred to the special prosecutor. It is generally permissible for the disqualified prosecutor to provide general information to the Special Prosecutor, including information about victim services available in that county. The Special Prosecutor should be responsible for all victim notifications and ensuring that the requirements of the Crime Victim's Rights Act are observed. Additionally, the special prosecutor should notify the disqualified prosecuting attorney as to the disposition of the case upon its conclusion. Nothing in this recommendation should be construed to limit consultation by the Special Prosecutor with any victim under the Crime Victim's Rights Act.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Adopted by PAAM: February 10, 2017

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Domestic and Intimate Partner Violence

Cases involving domestic and intimate partner violence (DV/IPV) are some of the most complex and challenging cases that prosecutors handle on a daily basis. A significant part of the case load for all offices, these cases frequently present complicated circumstances and may involve long-term and repeated involvement in the criminal justice system. DC/IPV cases impact not only the families involved, but the community as a whole. These cases have a higher incidence of lethality requiring a coordinated approach between local law enforcement, prosecutors, and sometimes community-based advocates to ensure the safety of the victim, law enforcement, and the community. For those reasons, PAAM recommends the following best practices.

Prosecutor's offices should adopt policies for handling DV/IPV cases to ensure these cases are handled in a way that best serves the goals of victim and community safety, offender accountability, and treatment while recognizing that most DV/IPV is a patterned crime requiring continuing engagement with victims and offenders. Policies should be drafted in such a way to address both the physical and psychological aspects unique to these cases. For example, the timing of the prosecution may have a significant effect on the outcome of the case and is something that should be considered in a policy. When possible, policies that minimize dependence on the victim and maximize reliance on other potential evidence should be considered. These policies should be updated and reviewed by the prosecutor or senior management annually to ensure they continue to promote the previously stated goals. Whenever possible, policies such as those in the attached sample should be implemented. At a minimum, policies should address:

- Timeliness of the warrant review
- Charging decisions
- Bond conditions and violations
- Plea negotiations and sentencing recommendations
- Dismissals
- Personal Protection Orders
- Use of evidence that does not rely on the victim, as permitted by law. (For example, MCL 768.27b; MCL 768.27c).

- Prosecutors should ensure that attorneys handling DV/IPV cases have the appropriate level of training regarding issues specific to those cases. Recommended trainings to maintain the appropriate skill level include but are not limited to: PAAM's Building a DV prosecution, DV Trial Advocacy, DV Homicide Trial Advocacy, and Jury Selection in DV/IPV Cases.
- Prosecutors must work with their local police agencies to determine whether they have implemented written policies for responding to DV/IPV calls as required by MCL 776.22.
- When possible, prosecutors should engage other community partners to provide a coordinated response for DV/IPV cases, using available community resources. For offices able to do so, it is encouraged that prosecutors work with community partners to implement a coordinated community response to DV/IPV such as the Praxis International Blueprint for Safety.
- Prosecutors should meet regularly with law enforcement and other community partners to discuss and address regularly occurring issues.
- Being cognizant of the dynamics of domestic violence, prosecutors should prioritize maintaining the victim's present and future safety when deciding how to address a victim's failure to appear or recantation. Prosecutors should consider pursuing evidence-based prosecutions where possible in those situations.
- Prosecutors should ensure that staff is familiar with community resources available to victims of DV/IPV and have the ability to refer victims to those resources.
- Whenever possible, prosecutors should seek to maintain the same victim advocate throughout a pending case and use vertical prosecution.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Adopted by PAAM: April 16, 2021

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Eyewitness Identification and Procedures

In order to ensure that identification procedures are conducted in a fair and reliable manner, PAAM recommends:

- All law enforcement agencies should adopt clear, written policies and training on photo array and live lineup administration. In addition, agencies should provide their officers with training on the variables that affect eyewitness identification, on practices for minimizing contamination, and on effective eyewitness identification protocols.
- To the extent practicable, considering the size of the agency as well as personnel and staffing issues, all law enforcement agencies should adopt blind or blinded administration of both photo arrays and live lineups as a preferred practice. However, because a fair and impartial identification procedure can be conducted by an investigator familiar with the case, a blind administrator is not required.
- Law enforcement agencies should adopt and use a standard set of easily understood instructions when engaging a witness in an identification procedure.
- Law enforcement should document a witness' level of confidence verbatim at the time of an identification.
- The identification procedure should be documented. To the extent practicable, considering the costs and availability of appropriate technology, video recording of eyewitness identification procedures is preferred.

It is significant to note that these recommendations do *not* recommend or require that a sequential or simultaneous method of conducting eyewitness identifications be adopted.

While the 2012 policy-writing guide produced by the State Bar of Michigan's Eyewitness Identification Task Force recommended a sequential method of conducting eyewitness identification procedures, the science underlying that recommendation is unsettled. According to a subsequent 2014 report by the National Academy of Sciences, the Academy specifically chose *not* to endorse sequential identification procedures as preferred over simultaneous identification procedures. The Academy report states "... the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved." Some research has suggested that accurate identifications are lost using a sequential procedure and that simultaneous presentation is better at identifying the guilty and excluding the innocent. The Academy recommends further social science research in this area. As the science further develops, current practices will need to be reevaluated.

Based on the unsettled nature of the underlying science, PAAM makes no recommendation as to which identification procedure is preferred. Either sequential or simultaneous identification procedures can be adopted by local police agencies and prosecutors. Whichever procedure is adopted, however, the recommendations identified by PAAM will help ensure that identification procedures will be conducted in a fair and reliable manner. PAAM recommends that as additional research in this area is conducted, current practice should be reevaluated.

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Adopted by PAAM: April 17, 2015

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Investigations of Judges

Overseeing, instituting, or reviewing a complaint of potential criminal conduct involving a judge in a prosecutor's jurisdiction raises a serious potential conflict of interest for the county prosecutor that must be carefully reviewed and considered before the prosecutor should proceed.

Among the concerns that are inherent in allegations against judges:

- That the prosecutor's independence could be threatened by a risk of retaliation by the judge, or by the judge's colleagues that sit on the bench in that county;
- The potential that a decision to decline prosecution could appear to be motivated by favoritism;
- The potential that a decision to file charges could appear to be motivated by concerns other than the impartial administration of justice.

These concerns exist not only with a decision whether to file charges, but also if charges are filed, decisions about whether a plea agreement or sentencing recommendation should be offered, as well as what terms and conditions such an offer should include.

Additionally, if a prosecutor becomes involved in reviewing a criminal complaint against a judge, the judge may be required to disqualify themselves in any case involving the Prosecutor's Office.[1] Otherwise, the propriety of any judicial decision by a judge under investigation or facing charges could reasonably be questioned as either an attempt to curry favor with the prosecutor or an attempt to intimidate or threaten the prosecutor. Moreover, any conviction in such a case could be subject to attack on appeal. Disqualification of a judge from hearing cases involving the Prosecutor's Office would, in most jurisdictions, have a devastating impact on how criminal cases are heard and prosecuted in that county.

Accordingly, to avoid these potential conflicts of interest, a county prosecutor should carefully weigh the circumstances in determining whether to become involved in the investigation or review of complaints of criminal conduct by a judge in the prosecutor's jurisdiction.[2] As soon

[1]See *Rippo v Baker*, 137 S Ct 905 (2017).

[2]This recommendation does not apply to the Attorney General's Office. The Attorney General is uniquely situated because they have statewide jurisdiction over every judge in

as a prosecutor learns of any circumstances encompassing possible criminal conduct by a judge, the county prosecutor should determine whether recusal of the Prosecutor's Office from any further involvement is appropriate. If recusal is appropriate, the prosecutor must promptly notify the Attorney General of the need for recusal so that the Attorney General can take necessary action. The Prosecutor should fully cooperate with the Attorney General and any investigating authority.

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Adopted by PAAM: February 8, 2019

the State of Michigan and the concerns that would apply to a county prosecutor that would raise a potential conflict of interest would not generally exist.

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Outside Employment and Activities

A full-time position as an assistant prosecuting attorney entails a full-time commitment. It requires a dedication to serving the public and working to ensure justice. It is important that our pursuit of justice not be subject to a conflict of interest that would detract from a prosecutor's primary function.

Accordingly, a prosecutor should endeavor to avoid creating unnecessary conflicts of interest that would require disqualification. In order to reduce the potential for unnecessary conflicts of interest, each prosecutor should develop a policy governing outside employment and activities of assistant prosecutors that addresses the following:

- Identify whether outside employment or activities are permissible or not. Areas of possible outside employment or activities that should be reviewed include: representation of private clients, preparation of legal documents such as wills and trusts, representation of family members in estate or other matters, teaching, board memberships, community activities, or other non-legal employment.
- If outside employment or activities are permitted, the areas of such employment or activity should be identified in advance and a procedure for notice and prior approval of such employment or activity is recommended as well as confirmation of restrictions on the use of office resources.
- Under no circumstances should outside employment or activities interfere with an assistant prosecutor's professional obligations or those of the prosecutor's office.
- Because conflicts of interest can be created by outside employment and activities of non-attorney members of the prosecutor's office, an outside employment policy should be developed for those employees.

A prosecutor may also wish to consider procedures governing work-related presentations or activities outside the office.

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Adopted by PAAM: April 13, 2018

Prosecuting Attorneys Association of Michigan

BEST PRACTICE RECOMMENDATION

Post-Conviction Review

> "The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v United States*, 295 US 78, 88; 55 S Ct 629, 633; 79 L Ed 1314 (1935).

As ministers of justice, prosecutors not only have the obligation to hold those guilty of a crime accountable, but also to take swift corrective action when there is credible evidence that a convicted person is factually innocent. A prosecutor's ethical obligation to do justice does not end once a conviction is obtained. Accordingly, Michigan Rule of Professional Conduct 3.8 lists specific duties for a prosecutor:

> (f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.
>
> (g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction.
>
> (h) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Because prosecutors have an obligation to remedy circumstances in which an innocent person was convicted, the Prosecuting Attorneys Association of Michigan recommends the following practice when a prosecutor learns of new evidence that was not considered by the trier of fact, that creates a reasonable likelihood that a convicted person is innocent:

- The prosecutor must disclose the evidence in accordance with MRPC 3.8.
- The prosecutor's office should:
    - Conduct a thorough examination of the file, including any evidence and transcripts to determine whether the claim alleges facts that would exonerate the person convicted of the crime. To facilitate an impartial review and depending on the facts and circumstances of the individual case, the prosecutor may wish to use an independent internal review process or request assistance or request review from an outside prosecutorial or investigative agency.
    - Review any post-conviction pleadings to determine whether the evidence claimed as new was previously considered.
    - If the claim involves additional forensic analysis of physical evidence, assist in obtaining the additional analysis when possible.
    - Request any additional investigation regarding the new evidence that will help determine the credibility of that evidence.

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Adopted by PAAM: February 21, 2020

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Prosecutor and Law Enforcement Communication to the Media

Prosecuting attorneys and law enforcement must act in a judicious manner to ensure and maintain an impartial trial for all involved in a criminal case. The Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors observe Michigan Rules of Professional Conduct Rule 3.6, which provides in pertinent part:

  "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materiality prejudicing an adjudicative proceeding in the matter. A statement is likely to have a substantial likelihood of materiality prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to…"

  - The character or credibility of a party, suspect or witness, or the expected testimony of a witness.
  - The possibility of a plea of guilty or the existence or contents of a confession, admission or statement given by a defendant or suspect or that person's refusal to give a statement.
  - The performance or result of any examination or test, or the failure to submit to same, or the identity or nature of physical evidence.
  - Any opinion as to guilt or innocence of a defendant or suspect.
  - Information that is likely to be inadmissible at trial, and if disclosed would create a substantial risk of prejudice.
  - The fact that a defendant has been charged with a crime unless there is included a statement explaining the presumption of innocence.

- Rule 3.8 provides that prosecutors shall exercise reasonable care to prevent law enforcement in a criminal case from making extrajudicial statements that a prosecutor is prohibited from making under Rule 3.6. Consequently, all Prosecuting Attorney Offices should adopt clear, written policies on what may be communicated to media outlets by local law enforcement before, during and after a criminal case to comply with Rules 3.6 and 3.8. This will include, but not be limited to, guidelines for the use of social media relative to a pending investigation, criminal proceeding, or outcome of a case. The Prosecuting Attorney shall meet

with chiefs and sheriffs to clarify communications policies as needed. To the extent practicable, the Prosecuting Attorney's Office should provide police agencies with training and/or explanation of the Michigan Rules of Professional Conduct (MRPC) 3.6 and 3.8.

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Adopted by PAAM: June 19, 2015

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Restitution

Crime victims have constitutional and statutory rights to full, maximal, and complete restitution from defendants who cause financial harm by their course of criminal conduct. Receipt of full restitution is one measure for victims that justice has been accomplished.

Prosecutors are champions of justice on behalf of the People of the State of Michigan in their community. Prosecutors are also advocates for victims, especially at sentencing hearings where restitution is a cornerstone of a valid sentence.

The Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors and victim advocates should be knowledgeable of standards for defining, calculating, ordering, enforcing, collecting, and disbursing restitution that benefits their crime victims, including statutes like the William Van Regenmorter Crime Victim's Rights Act (CVRA) and the Code of Criminal Procedure (CCP), and relevant case law. Prosecutors should provide local training for victim advocates, probation/parole officers, court staff and judges about restitution.
- Prosecutors should, after consultation with the law enforcement agency, support returning property to victims or rightful owners at the earliest possible date, unless the prosecutor determines a need to retain items as evidence, to protect a defendant's right to fair trial, or to otherwise comply with requirements of the CVRA (e.g., MCL 780.754(4)) or other laws. In appropriate cases, property should be photographed before release and the victim urged to retain it until the case is adjudicated.
- Restitution information can influence what charge should be issued. Police investigations should provide prosecutors with property value or victim loss information that is critical to determining the level of an appropriate charge.
- Consultation with victims should address financial losses directly and proximately caused by the crimes that might be prosecuted. Prosecutors should solicit restitution data and supporting documentation from victims early in the case, before plea negotiations have concluded whenever possible.
- Prosecutors can bridge information gaps to create a more efficient restitution process. All restitution information received by prosecutors should be forwarded to the court or its probation staff before sentencing to assist the court ordering full, accurate restitution. Victim identification and contact information should be provided to court clerks or probation officers so restitution collections can be disbursed quickly.
- District court judges sometimes sentence defendants without presentence reports or a restitution investigation. Examples include larcenies and malicious property damage crimes. Prosecutors should assist misdemeanor courts in ordering full restitution by providing information at the earliest, most appropriate opportunity that restitution may be outstanding.

- Prosecutors should be cognizant of how their charging or plea negotiation decisions will affect the victim's opportunity to receive restitution.
- The CVRA and CCP do not provide authority for restitution in civil infractions. Before negotiating a charged crime to a civil infraction, prosecutors should carefully review and consider the impact on victim restitution.
- Restitution for losses caused by the defendant's uncharged criminal conduct should be included in the prosecutor's negotiated plea agreement, where possible and appropriate.
- Prosecutors should support imposition of full restitution orders to all people or entities that pay the direct victim's losses as provided by law, including insurance companies.
- Prosecutors should advocate for and encourage courts to use available processes to enforce restitution orders. Examples include garnishing income and tax refunds, perfecting liens on defendants' personal and real property, convening regular show cause hearings and issuing sanctions against defendants not paying restitution to their abilities, and assigning personnel dedicated to investigating and enforcing defendants' financial obligations.

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Adopted by PAAM: February 9, 2019

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Social Media

Given the predominance of social media within society, it is understandable that prosecutors and staff will participate in its use. In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal website, social networking or affinity website, web bulletin board, or a chat room, as well as any other form of electronic communication.

It is essential for participants in social media to be aware that all communications made via social media are public in nature. As such, it is recommended that every prosecutor office adopt a policy addressing social media, which includes the following recommendations:

- All social media posts must comport with standards relating to ethics, harassment, discrimination, and case confidentiality. Those guidelines arise from applicable law, ethical rules, as well as individual office policies, mission, and values.
- Applicable office policies include, but are not limited to, those pertaining to sexual harassment, victim's rights, confidentiality and disclosure, media policy, and those relating to the use of equipment and services, including internet policy. Posts should not disclose confidential or proprietary information, particularly regarding current or anticipated cases, or other office information.
- All social media behavior must comport with the Michigan Rules of Professional Conduct. Including but not limited to, MRPC 3.6 – Trial Publicity and MRPC 3.8 – Special Responsibilities of a Prosecutor.
- The highest level of professionalism is expected from prosecutors using social media. As with all public interactions, prosecutors must apply common sense. Posts should be appropriate and contain respectful content. It is unacceptable to use ethnic slurs, personal insults, obscenity, or engage in conduct via social media that would reflect negatively on the prosecutor's office, and/or otherwise embarrass the County.
- Prosecutor staff should not utilize office logos and/or images, including those of staff members, unless authorized to do so.
- Posts should be honest, accurate, and express only personal opinions. Prosecutor staff should not represent themselves as a spokesperson for their office. All media inquiries should be forwarded to the appropriate supervisor or designated staff member. Posts should be clear that any views do not represent the views of the elected Prosecutor, the county, and/or fellow co-workers.

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Adopted by PAAM: April 13, 2018

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Victim Notification and Case Review

All prosecuting attorneys' offices face challenges due to the ever-expanding number and complexity of their voluminous duties. One of a prosecutor's most important obligations is to ensure crime victim rights are protected. This includes making sure these victims receive pertinent information about criminal cases they are associated with and have the opportunity to provide meaningful input on the resolution of those cases. This best practice document is designed to summarize the requirements imposed upon prosecuting attorneys under the Article I, Section 24 of the Michigan Constitution, and the William Van Regenmorter Crime Victim's Rights Act (CVRA), and offer additional guidance regarding case review and victim notification beyond those required by law. This additional guidance does not establish specific mandates or timelines apart from those already established by the Michigan Constitution and CVRA, in recognition of the differing individual circumstances and availability of resources between prosecutors' offices throughout the state.

State of Michigan Constitution, Article I, Section 24:

> (1) Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> > The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
> >
> > The right to timely disposition of the case following arrest of the accused.
> >
> > The right to be reasonably protected from the accused throughout the criminal justice process.
> >
> > The right to notification of court proceedings.
> >
> > The right to attend trial and all other court proceedings the accused has the right to attend.
> >
> > The right to confer with the prosecution.
> >
> > The right to make a statement to the court at sentencing.
> >
> > The right to restitution.
> >
> > The right to information about the conviction, sentence, imprisonment, and release of the accused.
>
> (2) The legislature may provide by law for the enforcement of this section.
>
> (3) The legislature may provide for an assessment against convicted defendants to pay for crime victims' rights.

Requirements Imposed on the Prosecuting Attorneys under the William Van Regenmorter Crime Victim's Rights Act[1]

I. Not later than 7 days after the defendant's arraignment for a crime in an adult case and within 72 hours after the Prosecuting Attorney files a juvenile petition in a juvenile case, the Prosecuting Attorney's Office shall give to the victim the following information in writing:[2]

- A brief statement of the procedural steps in the processing of a criminal case;
- A specific list of the rights and procedures that apply to victims;
- A convenient means for the victim to notify the Prosecuting Attorney that the victim chooses to exercise their victim's rights;
- Details and eligibility requirements for applying for crime victim compensation;
- Suggested procedures if the victim is subjected to threats or intimidation; and
- The person to contact for further information.

II. When the defendant is a juvenile, the Prosecuting Attorney shall provide the victim with the telephone number of the juvenile facility at which the defendant has been placed if a placement has been made and inform the victim that he or she may contact the juvenile facility to determine whether the juvenile has been released.[3]

III. The Prosecuting Attorney shall provide the victim with a form to receive certain notices from other agencies upon conviction of a defendant that results in any term of probation, imprisonment, placement at a juvenile facility, or hospitalization.[4]

IV. A victim shall be offered an opportunity to consult with the Prosecuting Attorney to have his or her views heard before the finalization of any negotiation that may result in the following:[5]

- Dismissal;
- Plea or sentence bargain; and
- Pretrial diversion (programming offered in lieu of authorizing formal charges).

V. The Prosecuting Attorney shall do the following in a manner that is reasonably calculated to give prompt actual notice upon request made by the victim:

- Give notice of any scheduled court proceeding and any changes in that schedule.[6]

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[1] MCL 780.751 to 780.834.
[2] MCL 780.756(1) and MCL 780.786(2).
[3] MCL 780.785(1).
[4] MCL 780.763a and MCL 780.791a.
[5] MCL 780.756(3) and MCL 780.786b(2).
[6] MCL 780.756(2).

- Confer with the victim prior to the selection of the jury and prior to the trial;[7]
- Give notice of the defendant's conviction and the crimes for which the defendant was convicted;[8] and
- Give notice of the time and place of sentencing.[9]

VI. Regarding the right to make a victim impact statement, upon request of the victim, the Prosecuting Attorney shall notify the victim of the following in a manner that is reasonably calculated to give prompt actual notice:

- The victim's right to make an oral or written impact statement at the time of sentencing in court, or submit a written statement to the judge;[10]
- The victim's right to make an oral or written impact statement to the pre-sentence investigator and inform the victim that any statement made by the victim and included in the presentence report will be made available to the defendant;[11]
- The address and telephone number of the probation agent that will be preparing the pre-sentence investigation report;[12] and
- That his or her impact statement may include, but is not limited to the following:[13]
    - An explanation of the nature and extent of any physical, physiological, or emotional harm or trauma suffered by the victim;
    - An explanation of the extent of any economic loss or property damage suffered by the victim;
    - An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage; and
    - The victim's recommendation for an appropriate sentence.

VII. The Prosecuting Attorney shall do the following upon request made by the victim:[14]

- Give notice that the defendant filed an appeal of his or her conviction or sentence or that the prosecution filed an appeal;
- Give notice of whether the defendant has been ordered released on bail or other recognizance pending his or her appeal (the Prosecuting Attorney shall use any reasonable means to make this notification within 24 hours of the Prosecuting Attorney being notified of the defendant's order of release);
- Give notice of the time and place of any appellate court oral arguments and any changes to the time and place of those arguments;

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[7] MCL 780.760.
[8] MCL 780.763(1)(a)-(b) MCL 780.791(1)(a)&(c).
[9] MCL 780.763(1)(g).
[10] MCL 780.763(1)(f) and MCL 780.791(1)(b).
[11] MCL 780.763(1)(c)&(e) and MCL 780.791(2)(a)&(c).
[12] MCL 780.763(1)(d) and MCL 780.791(2)(b).
[13] MCL 780.763(3) and MCL 780.791(3).
[14] MCL 780.768a(1)(a)-(d)&(3) and MCL 780.791(1)(a)-(d)&(3).

- Give notice of the result of the appeal (the Prosecuting Attorney shall use any reasonable means to make this notification within 24 hours of the Prosecuting Attorney being notified of the result);
- Provide the victim with a brief explanation of the appeal process and the possible dispositions;
- Give notice of any review hearing held for a juvenile defendant;[15]
- Give written notice of the final disposition of the case within 30 days of the final disposition (note: written notice is not required in juvenile cases);[16] and
- Give notice to the victim of a defendant's application to set aside conviction when the defendant's conviction was for an assaultive crime or serious misdemeanor.[17]

Additional Best Practices for Case Review and Victim Notification

Preauthorization Communications with Victims

Although formal notification requirements are not established for prosecutors for the period prior to charge authorization, a process to reach out to victims in certain types of cases often proves helpful (examples of such cases may include fatal car crashes, overdose deaths, etc.). Developing a system to acknowledge receipt of an investigation that may require additional documentation or significant review can enhance victim interaction from the onset and serve to establish a positive long-term relationship throughout the pendency of a case. Prosecutorial staff who reach out to victims should be mindful when leaving information to victims to ensure that safety and privacy concerns are protected.

Expedited Review

Certain types of cases necessitate expedited review (assaultive crimes, stalking, crimes involving the use of weapons, etc.). Each office should establish a realistic review period for these cases given resource limitations. Relevant staff need to be advised of the applicable review period to facilitate expedited review. Timely decision making on these matters is crucial to obtaining pretrial release orders that can serve to protect the health, safety and welfare of a victim and the public. Requests for additional investigation should also be prioritized by investigating agencies on cases of this type to avoid undue delay.

Standard Review

Each office should establish a realistic review period to make a final determination on submitted cases. Offices may want to consider developing a process they wish to follow for

[15] MCL 780.770b.
[16] MCL 780.772 and MCL 780.793.
[17] MCL 780.772a and MCL 780.796a.

notifying victims in cases where charges are declined in lieu of deferring that notification to law enforcement agencies.

Deferred Review

There may be cases where an extended review period is necessary or beneficial for various reasons (additional investigation needed, lab or other analysis needed of forensic evidence, deferring charging decisions due to potential impacts on other pending cases, potential diversion, etc.) in lieu of closing a case. Offices may wish to consider a process to inform crime victims of reasons for the delay in authorization, to set realistic expectations as to if/when the case will proceed, and to update crime victims if/when charges are eventually sought or an alternative resolution is reached. Multiple means of contacting victims who may be transient should be sought to ensure they can be notified if/when the case is authorized, or other resolutions are reached. Depending on the nature of the case and the length of the delay in authorization, prosecutors may wish to re-contact crime victims to seek their input before proceeding to authorize charges. Victims should be promptly updated when charges are being authorized or an appropriate alternative resolution is reached.

Policy for Tracking Requests for Additional Investigation

Offices are encouraged to develop a policy to ensure warrant requests that are returned to the originating agency for further investigation are tracked and regularly reviewed for updates on the requested additional investigative efforts. It is easy for these requests to not have sufficient follow through for a variety of reasons (requests not making it back to the investigating officer, officers not being able to complete the requests in a timely manner due to other matters being perceived as more immediate/urgent, a failure to get the requested information back to the reviewing prosecutor once the investigation is completed, etc.). A policy should be developed for informing victims if their cases are pending further investigation and the expected time that the additional investigative tasks should take. Victims should once again be informed when the additional investigation has been completed and a charging decision made.

APA Qualifications / Training for Case Review

To the extent possible, cases involving certain sensitive subject matters (i.e., Criminal Sexual Conduct, Domestic Violence, Child Abuse, Elder Abuse, etc.) should be reviewed by APAs with appropriate levels of experience and training and/or submitted to a supervisor prior to a final charging decision being made. PAAM, the National District Attorneys Association, and other similar organizations have a number of trainings that specifically address dealing

with the unique needs, concerns, and challenges facing victims of these types of crimes and how they should be addressed.

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Adopted by PAAM: April 16, 2021



Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION

Cases Involving Use of Facial Recognition Technology

Facial recognition technology is the automated computer search of a facial image in a biometric data base. Its use combined with facial identification, a manual examination of two facial images for the purposes of determining if they are the same person, has emerged as a tool in law enforcement to assist in identifying people in a variety of different circumstances. Cases involving missing persons and identification of deceased persons are often aided with use of this technology. The investigation of criminal cases is also an area where this technology is used. Because there are limitations inherent in facial recognition technology, its role in identification of suspects must be carefully considered. Accordingly, when an investigation leading to request for charges against a suspect involves use of facial recognition technology PAAM recommends:

- In any criminal case involving the use of facial recognition technology to identify a suspect, there must be additional evidence that does not rely upon the use of facial recognition technology to support the identification. Such evidence must corroborate the identity of the suspect.
- Prosecutors should require that any use of facial recognition technology during the course of an investigation be disclosed in police or other reports and that all videos, pictures, and visual evidence used for the identification be explicitly listed in those reports. This information should be carefully reviewed by the attorney reviewing the request for charges to ensure that facial recognition information is not the sole basis for suspect identification.
- When a request for charges is submitted that involves the use of facial recognition technology, the video or image originally submitted for analysis and the image generated for the potential suspect should be submitted for review by the attorney making the charging decision. That attorney should ensure that those images have a resemblance or closely match before further review or investigation. If it is determined that the images do not have a resemblance, the charging request should be denied at that time.
- Interviews of complainants or eyewitnesses should demonstrate an ability to identify the suspect without consideration of facial recognition technology. Pertinent information includes, but is not limited to, prior familiarity with the suspect, any distinguishing characteristics, emotional trauma from the incident, certainty of the identification, opportunity to view the suspect, any visual impairments of the witness, whether the witness was under the influence of alcohol or any controlled substances, and any other facts pertinent to the case.
- The investigation must detail any line-up or identification procedures and the basis for each witness' identification of the suspect, including, but not limited to: certainty

of the witness in the selection of the suspect if an identification procedure was used; what factors led to the selection; whether the photographs or visual evidence presented was of sufficient quality to make an identification; any instructions or statements made by police prior to the line-up or procedure; and why the identification was made. The investigation should reflect the ability of any witness to identify the suspect in court and should document any additional measures taken to verify that the facial recognition identification matched the physical features of the suspect.

- At the preliminary examination or pretrial stage, the attorney handling the case should review the identification procedures used and again verify the credibility and sufficiency of the evidence. Witnesses should be interviewed to confirm whether an in-court identification can be made and if so, that such identification is sufficiently based on reliable evidence and procedures. Witnesses should be told that they should honestly state whether or not they can identify the suspect. If the person in court is not believed to be the person that committed the crime, witnesses must be advised to state that fact.
- If a live line-up is requested, the attorney handling the case should ensure that witnesses are not able to see the defendant in the courtroom and determine whether a live line-up would be a prudent for the case. If prudent, the attorney should agree to the live line-up provided a delay would not prejudice the case.
- Facial recognition technology must not be used as the only evidence in court to identify a suspect.

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Safeguarding Child Sexually Abusive Material (CSAM) in Criminal Cases

Cases involving Child Sexually Abusive Material (CSAM), as defined by MCL 750.145c, pose unique challenges relating to the access and possession of such images for evidentiary purposes. CSAM is illegal; it is contraband just like a controlled substance is contraband. Prosecutors must remember this basic fact and treat CSAM as the contraband that it is. This best practice is intended to guide offices in handling such evidence in a way that comports with the law and protects the victims of these crimes from further disclosure of the images, as well as protecting unauthorized employees from viewing these images.

MCL 750.145c describes the various forms of CSAM and prohibits making, creating, possessing, or sharing such images, including intentionally creating a reproduction, copy, or print of CSAM material. Police officers, MDHHS employees, and judicial officers and employees acting within the scope of their duties are exempted from the prohibitions regarding possession and access, as are a party or witness in a criminal or civil proceeding who is acting within the scope of that proceeding. MCL 750.145c(5). However, caution is required when handling such pieces of evidence.

MCL 750.145c(11) prohibits allowing a defendant to "copy, photograph, duplicate, or otherwise reproduce" photographs or other "pictorial evidence" if the prosecutor makes the evidence "reasonably available to the defendant." The statute provides that a court "shall deny" any such request of a defendant to obtain a copy or reproduce such evidence in any manner. Reasonably available is defined as providing "an opportunity to the defendant and his or her attorney, and any person the defendant may seek to qualify as an expert witness at trial, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney."

Several distinct concerns arise for a prosecutor's office to consider when handling images of CSAM: (1) receipt of images from law enforcement agencies; (2) storage and handling the images once received from law enforcement; (3) discovery of images; (4) transporting the images to court proceedings; (5) use of such images for evidentiary purposes; (6) long term evidence retention of such images once a case has concluded; and (7) work-related exposure to the images.

Receipt of Images from Law Enforcement Agencies

CSAM must be treated differently than non-contraband digital/photographic evidence. Although possession and access of CSAM by a police officer and prosecutor acting within the scope of their duties is specifically protected by MCL 750.145c(5), other activities related to CSAM are not specifically listed. Thus, care and consideration must be given for how police agencies provide such evidence to the assigned APA or approved designee.

Police agencies should be trained to take every effort to safeguard CSAM from repeated viewings, including minimizing the need for the assigned prosecutor to search through digital media to find the most pertinent images. Thus, officers should be trained to draft their reports with significant detail about where to locate relevant image(s) within digital media, including identifying an image by any applicable numbering system contained within the media, and how the relevant image(s) depict CSAM, including details about apparent or known age of the child.

The best method to allow review of CSAM by the assigned APA is for the APA and the investigator to arrange a meeting for review of the CSAM on the viewing device of the investigator. The assigned APA would never possess the CSAM, and the CSAM would never be stored within the prosecutor's office. Instead, the APA would review the material with the investigator who would maintain custody and control of the material at all times. The material would never be accessed from, downloaded onto, or otherwise used on any prosecutor computer, displayer, or device.

If circumstances are such that CSAM evidence needs to come to the Office of the Prosecuting Attorney (OPA), then the material must be treated as the contraband that it is and safeguarded to ensure possession and access only by authorized person(s).

A prosecutor's office should instruct their law enforcement partners and OPA staff of the requirement to handle CSAM appropriately, including:

(1) Police agencies should not upload the images to a prosecutor's unsecured case management program(s). Rather, the police should treat CSAM as the contraband material it is and arrange for personal delivery to the prosecutor's office whenever possible. In instances where CSAM needs to be delivered electronically, it must be done in the manner detailed in the section regarding Storage and Handling in the Prosecutor's Office.

(2) Such material should not be sent to a prosecutor's office among other non-contraband physical items that must be sorted and identified as being associated with a particular case. Rather, it should be personally delivered to the assigned APA or approved designee.

(3) The CSAM evidence should be clearly labeled on the outside with adequate information to identify the case it is associated with, the assigned APA, and the fact that the contents should not be accessed without approval from the assigned APA or approved designee.

(4) The prosecutor's office should establish, and train staff on, the standard practice for the personal delivery of CSAM directly to the assigned APA or approved designee.

(5) The prosecutor's office should also establish, and train staff on, how to handle receipt of CSAM when it was not delivered pursuant to the standard practice due to certain exigent circumstances. At a minimum this should include the following:

(a) documenting when and how the material was received from the police agency;

(b) an articulation of the reasons why the standard practice could not be followed;

(c) not uploading the material to the case management system(s),

(d) personally delivering the material to the assigned APA or approved designee ASAP, as opposed to leaving the material on the assigned APA's desk or on the staff member's desk, and

(e) documenting when and how the material was transferred to the assigned APA or approved designee.

Storage and Handling in the Prosecutor's Office

CSAM must be safeguarded in a manner that reasonably ensures that only those permitted by statute have access to the material. It should also be safeguarded to ensure that only those authorized persons who absolutely must access the material do so, because each viewing of CSAM is further victimization of the child and is potentially harmful to the viewer.

Thus, when CSAM is maintained within the OPA, the assigned APA or approved designee to the case should serve as the primary custodian for the material. In this capacity, the assigned APA or approved designee should maintain a log documenting access to the material by any person. The log should include at a minimum the date, time, location, person(s) accessing, and purpose for the access. The entries should be made contemporaneously with the access. The log should be retained as a record in the case file.

CSAM in any form, including but not limited to digital media, photographs, or copies, must be conspicuously, clearly, and visibly labeled on the outside to allow ready identification of the material as CSAM without the need to examine the contents. The labeling must be affixed in such a way that unlabeled material does not become separated from its labeled envelope or container. The CSAM must be securely stored when not in use by an authorized

individual for case review, preparation, or court proceedings. Secure storage may include a designated locked location to which only key-holding person(s) have access. This can include a room, office, cabinet, drawer, security containers, or vault, or an electronic equivalent secured storage. Access to any secure storage must be limited to authorized individuals.

When CSAM is used for case review, preparation, or court proceedings, the authorized individual must:

- Have constant physical control of the CSAM.
- View such material in a location and manner that ensures unauthorized individuals are not able to view the images.

When viewing digital images of CSAM, authorized individuals should, when possible, use a virtual standalone environment (VSE) installed on a standalone laptop computer at the determination of the office. The VSE should be configured in a manner that requires it to run "offline" and disconnected from any network. When reviewing CSAM in a VSE, authorized individuals must ensure that no unauthorized individuals view the CSAM images.

- Prior to reviewing CSAM images, the authorized individual should notify their agency's IT department and/or supervising attorney of the need to use a prosecutor device for access of CSAM.
- Viewing of CSAM images by authorized individuals must only occur within the prosecutor's office, a law enforcement office, or the courtroom.
- When review of CSAM images for case review, preparation, or court proceedings is complete, the authorized individual must immediately return the images to secure storage.

CSAM images should never be reproduced in any manner.

Discovery

As previously mentioned, CSAM images should never be reproduced in any manner, and that includes for providing discovery.

When possible, the defense should view CSAM images at a law enforcement facility. Where use of a law enforcement facility is not feasible, compliance with criminal discovery obligations may require that a prosecutor's office allow the defense to view the CSAM images at the prosecutor's office. If this occurs, the same guidelines previously outlined for authorized individuals must be followed, including properly filling out the access log. Whether at a law enforcement facility or at the OPA, the defense should not be allowed unsupervised access to the material.

If appropriate, assigned APAs are encouraged to consider seeking protective orders to manage the review of CSAM by the defense within the OPA or at a law enforcement facility. Requested protections could include time, place, and manner of viewing restrictions, including supervised viewing only. Protections could also include, under appropriate circumstances, restrictions on the defense having any recording device with them when viewing the material, such as a cell phone.

Under no circumstance should defense counsel duplicate, remove, record, or otherwise obtain possession of CSAM images from the prosecutor's office or a law enforcement facility. The assigned APA should document what material was made available to the defense, when, where, and how for proper tracking of the prosecutor's discovery obligations.

Law enforcement, the assigned APA, and the defense counsel must work together to determine the appropriate time, place, and manner for an in-custody defendant to be able to review the evidence. Often this is accomplished by the investigator arranging for review of the material by the defendant and defense counsel under the supervision of the investigator using the investigator's viewing device. The assigned APA can seek any necessary order from the court to facilitate review.

A pro se defendant presents unique challenges but ultimately receives no different considerations than a represented defendant. If a pro se defendant objects to any restrictions placed on review of the material, the assigned APA should seek order(s) from the court.\

Transporting the Images to Court Proceedings

Authorized individuals must maintain control and custody of CSAM images when they are being produced as evidence for court proceedings. This includes:

- Protecting CSAM images from disclosure to unauthorized individuals.
- Designation of one authorized individual to transport and maintain control and custody of CSAM images during the entire court proceeding and return of such evidence to secure storage immediately upon completion of the court proceedings.
- Control and custody include securing the CSAM images during the court proceeding(s) to preclude access by anyone. Thus, the assigned APA should be mindful of not leaving CSAM unattended in the courtroom during breaks and must not leave CSAM in the courtroom when court recesses for the evening. Even if the judge indicates that the courtroom will be locked, nighttime cleaning crews often have access to locked areas of the courthouse as do other members of the courthouse staff. The locked courtroom is not a secure location.

Use for Evidentiary Purposes

As mentioned above, CSAM images *should never be reproduced in any manner*. That includes preparation of exhibits. CSAM evidence requires careful and considered treatment by the prosecution in all aspects, from preparation of exhibits to publication to the jury. The assigned APA must ensure that the evidence is managed in a way that only individuals who must view the images are permitted to view the images, such as the jury. Thus, the following practices should be observed:

(1) People's exhibits: In preparing exhibits, the assigned APA must implement a method that allows proper identification and preservation of the exhibit without reproducing the images. When dealing with images on digital media, the images should be identified as exhibits in a manner that allows ready access and easy location within the media of the exhibit. Examples include:

- the originals of already existing hard-copy photographs can be marked as exhibits, but copies thereof must not be made;
- digital photographs can be identified as exhibits by marking the storage media (e.g., disc or thumb drive) as an exhibit then further describing which image on that media is your exhibit and where to locate it;
- alternatively, an identical copy of a digital photograph on storage media or a storage device can be made to that storage media/device such that a folder containing the People's exhibits and a folder containing the Defendant's exhibits could be created within the original media/device for easy access to the exhibits without running afoul of the law per MCL 750.145c(1)(j);
- videos can be identified as exhibits by marking the storage media (e.g., disc or thumb drive) as an exhibit then further describing which video on that media is your exhibit and where to locate it;
- if only a portion of a video is the exhibit, then you must describe which portion in reference to the original, you must not make a snippet from that original video or otherwise manipulate the video in any way.

(2) Defense exhibits: The same practices that apply to the People's exhibits apply to defense exhibits. The images should not be reproduced in any manner just because the defense has asked for a defense exhibit. Rather, the relevant images should be identified by the defense and marked by the prosecutor as contained within the digital media and be readily accessed and easily located. The prosecutor will assist the defense with presentation of this evidence during court proceedings.

(3) Witness preparation: The assigned APA must ensure that the time, place, and manner of witness preparation complies with the limitations on handling CSAM.

(4) Use of exhibits in court: Many courtrooms are equipped with systems that allow projection of images from the courtroom throughout the courthouse to various screens. In some instances, any employee of the courthouse can access courtroom feeds on their computers. Therefore, care must be taken to ensure that the feed from a courtroom in which CSAM will be displayed is not operational when the CSAM is being displayed or the cameras within the courtroom must be positioned in such a way as to not capture and broadcast the images. Additionally, many courtrooms now broadcast their proceedings to the internet in some fashion, such as via Zoom. When handling a CSAM prosecution, the assigned APA must ensure that the images are not broadcast on Zoom or through any other method.

(5) Use of exhibits with witness(es): When admitting or using the exhibits with witness(es), care must be taken to ensure that accidental exposure of the images to others does not occur. Therefore, possession of the images or the device displaying the images should be maintained with the assigned APA as opposed to being handed to the witness. Additionally, the screen of any device displaying the images should be positioned in a way that allows only the witness to see the image(s).

(6) Publication to the jury: When images are to be published to the jury, care should be taken to ensure that only the jury can see the images, not courtroom observers. The same care exercised with witnesses must be exercised with the jury, including but not limited to the APA maintaining possession of the images or device displaying the images, repositioning of the display screen(s), and, if necessary, requesting the court to block off part of the gallery to prevent observers from being seated where they could observe evidence being shown to the jury.

(7) Jury request to review evidence during deliberations: If a deliberating jury requests to see the admitted CSAM evidence, care must be taken to ensure that the evidence is not vulnerable to inadvertent exposure to others. Additionally, care should be taken to ensure that material is not subject to potential copying or recording, like from cell phones. The most prudent course would be to call the jury back into the courtroom for review of the evidence under the same controlled circumstances that existed when the material was published to the jury.

(8) Special considerations for exhibits with audio: Often, the visual images contained on a video are the admissible portion of the video and, thus, the audio portion of the video would be turned off because it is not admissible. When audio is itself part of the admissible evidence, care must be taken to ensure that the audio is not broadcast in a way that allows observers to hear the audio. A "sound recording" is CSAM under MCL 750.145c(1)(o).

Long Term Evidence Retention upon Completion of Criminal Case

CSAM is contraband and must continue to be treated as such once the criminal case in completed. CSAM should never be maintained in the prosecutor's files. Upon conclusion of such a case, the prosecutor's office must return CSAM evidence to the originating law enforcement agency. The law enforcement agency should be instructed that the material is evidence that must be preserved pending any appeal pursuant to office record retention policy. Any review of evidence necessary for appeal or post-conviction proceedings must be done in accordance with the procedures stated within this best practice.

Work-related Exposure to CSAM Images

Exposure to CSAM can potentially lead to secondary trauma to the viewer. Thus, prosecutors' offices should offer:

(1) CSAM training to APAs before being assigned to such cases, including educating the APAs on the best practices requirements and, if necessary, additional training on how to meet the best practices;

(2) Guidance in identifying stress-related symptoms at work and at home and methods of stress relief/proper well-being care;

(3) Information about mental health resources available to APAs to seek help in dealing with any secondary-trauma or stress related to handling CSAM cases;

(4) Guidance and mentoring from attorneys who can assist in prosecution of CSAM cases/the adverse effects therefrom;

(5) Education about how to communicate with family, friends, or peer supports about handling of these cases and the exposure and effects on the APA without exposing the details of the traumatic images to those people; and

(6) reassurance that every prosecutor responds differently to CSAM cases and there is no "right" way to respond but rather the APA needs to be aware of their own reactions and not ignore any impact that might be occurring.

A good resource for additional information about handling work-related exposure to CSAM can be found in the following publication: A Judge's Guide to Exposure to Child Sexual Exploitation and Abuse Material for Court Personnel and Jurors (linked).

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

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