

# *Brady & Giglio*

Kansas County & District Attorney's Association

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A PROSECUTOR'S  
GUIDE TO  
PRODUCING  
EVIDENCE.

# 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.

KCDAA would like to thank the Michigan Prosecuting Attorney's Coordinating Council 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.

### **KRPC 3.8 Advocate: 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 offense, and, in connection with sentencing, disclose to the defense and 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) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and the extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and 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 or this rule.

**A PROSECUTOR'S DUTIES UNDER BRADY AND GIGLIO MUST BE VIEWED IN LIGHT OF THESE SPECIAL DUTIES AND 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 Kansas, see *State v. Warrior*, 294 Kan. 484, 505-06, 277 P.3d 1111, 1127 (2012); *See also State v. Francis*, 282 Kan. 120, 149-50, 145 P.3d 48, 71 (2006) (citing *State v. Quinn*, 219 Kan. 831, Syl. P3, 549 P.2d 1000 (1976)). It was also 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. Ed. 2d 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.

## **GIGLIO: THE REQUIREMENT TO DISCLOSE IMPEACHMENT EVIDENCE**

*Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), extended the scope of *Brady* to include relevant impeachment evidence. As the Court explained in *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 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

## FAVORABLE EVIDENCE KNOWN TO THE POLICE

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 U.S. 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 *State v. Francis*, 282 Kan. at 150 (citing *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

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 U.S. 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. See also *Youngblood v. West Virginia*, 547 U.S. 867, 869–70, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006) (confirming that *Brady* reaches evidence known to the police but not the prosecutor)

## 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 U.S. at 281–82. See *State v. Warrior*, 294 Kan. 484, 506, 277 P.3d 1111, 1127 (2012) (citing *Wilkins v. State*, 286 Kan. 971, 989, 190 P.3d 957 (2008); *Haddock v. State*, 282 Kan. 475, 5069, 146 P.3d 187 (2006)) See also, *Skinner v. Switzer*, 526 U.S. 521, 536, 131 S. Ct. 1289, 179 L. Ed. 2d 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, *State v. Deweese*, 305 Kan. 699, 710, 387 P.3d 809, 816 (2017) (citing *Warrior*, 294 Kan. at 505-06). 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 U.S. 449, 470 n.15, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). See also, *Kyles*, 514 U.S. at 439–40; *US v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 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.

### SUPPRESSION

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.*” *State v. Warrior*, 294 Kan. 484, 505-06, 277 P.3d 1111, 1127 (2012) (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 U.S. 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 U.S. at 110 (citations omitted).

In *Warrior*, the Kansas Supreme overruled the previous sliding-scale test used by Kansas courts for addressing *Brady* claims. Instead, the court adopted the narrower uniform test for materiality which had been established in *United States v. Bagley*, 473 U.S. at 682. Specifically, the new test states that: “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.” *State v. Warrior*, 294 Kan. 484, 507-08, 277 P.3d 1111, 1128 (2012) (citing *Bagley*, 473 U.S. at 682; *accord Cone v. Bell*, 556 U.S. 449, 470, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)). The Kansas Supreme Court has additionally held that, “a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is material to the guilt or innocence of the defendant. Suppression of such evidence is a violation of the defendant’s Fourteenth Amendment due process rights.” *State v. Francis*, 282 Kan. 128, 149-50, 145 P.3d 48, 71 (2006) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)).

This may not be as far reaching as it seems. The Kansas Supreme Court has held that “the defense in a criminal trial is obligated to exercise due diligence in seeking to uncover exculpatory evidence before trial; that is, it cannot merely sit back and do nothing to uncover evidence that would be helpful to the defendant and then after trial and conviction claim, as to evidence that it could have discovered exercising due diligence, that there was wrongful suppression or withholding by the prosecutor”. *State v. Pearson*, 234 Kan. 906, 917, 678 P.2d 605, 615-16 (1984). 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.<sup>1</sup>

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<sup>1</sup> See, e.g., *Parker v. Allen*, 565 F.3d 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 F.3d 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 F.3d 551, 558–59 (CA 5, 1997) (same); *US v. Clark*, 928 F.2d 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 F.3d 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.”).

### ***Evidence outside the prosecution's control***

*Brady* is concerned only with cases in which the government possesses information which the defendant does not. In *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009), the 10<sup>th</sup> Circuit held that: “to establish a *Brady* violation, the defendant must prove that the prosecution suppressed evidence, the evidence was favorable to the defense, and the evidence was material.” See *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993). A *Brady* claim fails if the existence of favorable evidence is merely suspected. That evidence existed must be established by the defendant. *Erickson*, 561 F.3d at 1163. A defendant must also show that the favorable evidence was in the possession or control of the government. *United States v. Gardner*, 2447 F.3d 784, 788 (10th Cir. 2001); There is wide spread support for this notion in federal circuit courts.<sup>2</sup>

### ***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.”)

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<sup>2</sup> See *United States v. Lopez*, 372 F.3d 1207, 1209-11 (10th Cir. 2004) (because defendant failed to establish that the government had promised leniency to prosecution witnesses, there could be no *Brady* violation in government’s failure to turn over documentation of such promises); See also *United States v. Warren*, 454 F.3d 752, 759 (7th Cir. 2006) (defendant failed to establish existence of any document withheld by government, so “his *Brady* claim fails to get off the ground.”); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (“*Brady* obviously does not apply to information that is not wholly within the control of the prosecution.”); *United States v. Maldonado-Rivera*, 489 F.3d 60, 67 (1<sup>st</sup> Cir. 2007) (“For *Brady* to operate, the government not only must know about undisclosed evidence but also must have custody or control of that evidence.”). The prosecutor herself need not have, or even know of, the evidence if one of her agents has it. See *United States v. Velarde*, 485 F.3d 553, 559 (10th Cir. 2007) (defendant can base a *Brady* claim on government investigator’s failure to disclose, even when prosecutor is ignorant of the evidence). Furthermore, a defendant is not denied due process by the government’s nondisclosure of evidence if the defendant knew of the evidence anyway. See *Spears v. Mullin*, 343 F.3d 1215, 1256 (10th Cir. 2003) (“[T]here can be no suppression by the state of evidence already known by and available to the defendant prior to trial.” (brackets and internal quotation marks omitted); *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) (“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.”); *Coe*, 161 F.3d at 344 (no *Brady* violation is possible when defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or when evidence is available to him from another source, such as a witness “to whom he had as much access as the police.”

## MATERIALITY

### *What is it?*

One of the most difficult aspects of applying the *Brady* framework is the materiality requirement. “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.’” *State v. Williams*, 303 Kan. 585, 597, 363 P.3d 1101 (2016) (citing *Bagley*, 473 US 667); see also *Smith*, 132 S. Ct. at 630; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). “In the words of the Supreme Court, ‘[t]he reversal of a conviction is required upon a ‘showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the verdict.’” *State v. Francis*, 282 Kan. 120, 151, 145 P.3d 48, 72 (2006) (quoting *Kyles v. Whitley*, 514 U.S. at 435). 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.” *Smith v. Sec’y of N.M. Dep’t of Corr.*, 50 F.3d 801, 826 (10th Cir. 1995) (citing *Agurs*, 427 U.S. at 107).

Prejudice, or “materiality,” is “an essential element” of a *Brady* claim. *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009). However, prejudice does not require that the “evidence be sufficiently strong to ensure acquittal had it been presented at trial: the question is not whether the defendant would have more likely than not 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.” *Id.* citing *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (quoting *Bagley*, 473 U.S. at 682).

When determining materiality, there is no distinction between exculpatory evidence and impeachment evidence. *Bagley*, 473 U.S. at 676 (“This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [for *Brady* purposes].”) A court examines any appeal regarding the potential impact of undisclosed evidence “in light of the whole record. What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict.” *United States v. Torres*, 569 F.3d 1277, 1282 (10th Cir. 2009) (quoting *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994) (citing *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976))); see also *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

The *Brady* standard is not met if the petitioner shows merely a reasonable *possibility* that the suppressed evidence might have produced a different outcome. *United States v. Torres*, 569

F.3d 1277, 1282 (10th Cir. 2009). *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. Rather, “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 the confidence of the outcome.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (opinion of Blackmun, J.); *Knight v. Mullin*, 293 F.3d 1165, 1172 (10th Cir. 2002).

### ***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 *State v. Dunn*, 243 Kan. 414, 439, 758 P.2d 718, 736–37 (1988) (“The proper standard of materiality must reflect the court’s overriding concern with the justice of a finding of guilt. We permit such a finding only if it is supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omission of the alleged exculpatory evidence creates a reasonable doubt that does not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.”). “[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 U.S. 1, 6, 116 S. Ct. 7, 133 L. Ed. 2d 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 *United States v. Harry*, 816 F.3d 1268, 1283 (10th Cir. 2016), the Tenth Circuit held that when an appellant is challenging the exclusion of evidence, but “failed to make an offer of adequate proof, a lengthy analysis is unnecessary. [Specifically], an offer is inadequate when it lacks the specificity necessary to determine whether the evidence would be admissible or whether exclusion of the evidence prejudiced the appellant.” Thus, the defendant bears the burden of proving that the evidence would be admissible and that its exclusion prejudiced the defendant. *Id.* See *Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1149 (10th Cir. 2009). The Seventh, Fourth and Ninth Circuits agree that *Brady* only applies to information that *will be* admissible. See *United States v. Morales*, 746 F.3d 310, 314 (CA 7, 2014); *Hoke v. Netherland*, 92 F.3d 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 F.3d 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 10th Circuit have held that information may be favorable even if it is not admissible as evidence itself, as long as 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 F.3d 1027, 1034 (CA 9, 2008); *United States v. Brunshtein*, 344 F.3d 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.” *State v. Warrior*, 294 Kan. 484, 507-08, 277 P.3d 1111, 1128 (2012), quoting *United States v. Agurs*, 427 U.S. 97, 103-07, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (emphasis added). In *United States v. Burke*, the 10<sup>th</sup> Circuit court adopted the holding in *Young* that “the belated disclosure of impeachment or exculpatory information favorable to the accused violates due process when ‘an earlier disclosure would have created a reasonable doubt of guilt.’” 45 F.3d at 1408. *See also United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003) (key inquiry is “whether earlier disclosure would have created a reasonable doubt of guilt”.) 571 F.3d 1048, 1054-56 (10th Cir. 2009). Specifically the court held that, “where the district court concludes that the government was dilatory in its compliance with *Brady*, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even a mistrial. The choice of remedy is in the sound discretion of the district court. Fed. R. Crim. P. 16(d)(2) authorizes the district court in cases of non-compliance with discovery obligations to “permit the discovery or inspection,” or grant a continuance,” “prohibit the party from introducing the evidence not disclosed,” or “enter any other order that is just under the circumstances.” *Id* at 1056. *See also United States v. Johnston*, 127 F.3d 380, 391 (5th Cir. 1997) (district court has “real latitude” to fashion appropriate remedy for alleged *Brady* errors following from delayed disclosure); *United States v. Joselyn*, 99 F.3d 1182, 1196 (1st Cir. 1996) (“The district court has broad discretion to redress discovery violations in light of their seriousness and any prejudice occasioned to the defendant”).

### 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 in order to use *Brady* material effectively—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, United States v. Burke*, 571 F.3d 1048, 1055-56 (10th Cir. 2009). The 10th Circuit has been firm in their stance that, while tardy disclosure may not always constitute a violation of *Brady*, any tardy disclosure will be highly scrutinized because “it would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial.” *Id.*

Most circuit courts follow the general rule that, “while the untimely disclosure of *Brady* material does not constitute a constitutional violation in itself, it may violate due process if the defendant can show he was prejudiced by the delay.” See *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008) (“when the claim is untimely disclosure of *Brady* material, we have looked ‘to whether the defendant was prejudiced by the tardy disclosure’”) (quoting *United States v. Williams*, 132 F.3d 1055, 1060 (5th Cir. 1998)); *United States v. Patrick*, 965 F.2d 1390, 1400 (6th Cir. 1992) (“Delay [in disclosure] only violates *Brady* when the delay itself causes prejudice.”); *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003); *Leka v. Portuondo*, 257 F.3d 89, 101-04 (2d Cir. 2001); *United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990) See also *United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir. 2008) (“A mid-trial disclosure violates *Brady* only if it comes too late for the defense to make use of it.”); *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (disclosure of *Brady* material “must be made when it is still of substantial value to the accused”); *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) (“No denial of due process occurs if *Brady* material is disclosed to appellees in time for effective use at trial.”).

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***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***

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## 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 U.S. 39, 60, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

One question that has recently arisen is when exactly the *Brady* obligation begins. The Kansas Court of Appeals has held that although no court has “determine[d] an exact time in which the prosecution is required to disclose *Brady* material [it is] certainly before trial and possibly even before the preliminary hearing or any pretrial hearings that may be scheduled.” *State v. Willis*, 51 Kan. App. 2d 971, 985-88, 358 P.3d 107, 118-20 (2015).

Other jurisdictions have also attempted to answer this question and have found as follows: 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 State 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 P.2d 908, 909 (Okl. Crim. 1983); *Stafford v. District Court of Oklahoma County*, 595 P.2d 797, 799 (Okl. Crim. 1979). Many courts have held under the Due Process Clause that *Brady* disclosures are exclusively a trial right.

### *Plea agreements*

In *United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 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) See also *State v. Szczygiel*, 294 Kan. 642, 647, 279 P.3d 700, 703 (2012) (quoting *Ruiz*). 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. 1735i 118 L. Ed. 2d 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 F.3d 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 F.3d 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 F.3d 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 on 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 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. *Jones 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 U.S. 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 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002) (citing *Weatherford v. Bursey*, 429 U.S. 545, 549, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (“[T]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.”)); See also *United States v. Mayes*, 917 F.2d 457, 461 (10th Cir. 1990) (quoting *Jencks v. United States*, 353 U.S. 657, 667, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio Law Abs. 465 (1957)).

### Kansas's discovery rules

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

#### K.S.A. 22-3212 Discovery and Inspection

- (a) Upon request, the prosecuting attorney shall permit the defense to inspect and copy or photograph the following, if relevant: (1) Written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connections with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (3) recorded testimony of the defendant before a grand jury or at an inquisition; and (4) memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney.
- (b) (1) Except as provided in subsection (1), upon request, the prosecuting attorney shall permit the defense to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution, and which are material to the case and will not place an unreasonable burden upon the prosecution.
- (2) The prosecuting attorney shall also provide a summary or written report of what any expert witness intends to testify to on direct examination, including the witness' qualifications and the witness' opinions, at a reasonable time prior to trial by agreement of the parties or order by the court.

- (3) Except as provided in subsections (a)(2) and (a)(4), and as otherwise provided by law, this section does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses, other than the defendant.
- (4) Except as provided in subsection (g), this section does not require the prosecuting attorney to provide unredacted vehicle identification numbers or personal identifiers of persons mentioned in such books, papers or documents
- (5) As used in this subsection, personal identifiers include, but are not limited to, birthdates, social security numbers, taxpayer identification numbers, drivers license numbers, account numbers of active financial accounts, home addresses and personal telephone numbers of any victims or material witnesses.
- (6) If the prosecuting attorney does provide the defendant's counsel with unredacted vehicle identification numbers or personal identifiers, the defendant's counsel shall not further disclose the unredacted numbers or identifiers to the defendant or any other person, directly or indirectly, except as authorized by order of the court.
- (7) If the prosecuting attorney provides books, papers or documents to the defendant's counsel with vehicle identification numbers or personal identifiers redacted by the prosecuting attorney, the prosecuting attorney shall provide notice to the defendant's counsel that such books, papers, or documents had such numbers or identifiers redacted by the prosecuting attorney
- (8) Any redaction of vehicle identification numbers or personal identifiers by the prosecuting attorney shall be by alteration or truncation of such numbers or identifiers and shall not be by removal.
- (c)** If the defense seeks discovery and inspection under subsection (a)(2) or subsection (b), the defense shall:
- (1) Permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defense intends to produce at any hearing, are material to the case and will not place an unreasonable burden on the defense; and
  - (2) Provide for the attorney for the prosecution a summary or written report of what any expert witness intends to testify, including the witness' qualifications and the witness' opinions, at a reasonable time prior to trial by agreement of the parties or by order of the court.
- (d)** Except as to scientific or medical reports, subsection (c) does not authorize the discovery or inspection of reports, memoranda or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, the defendant's agents or attorneys.
- (e)** All disclosures shall be made at the times and in the sequence directed by the court. IN the absence of other directions from the court or stipulation by the parties, such disclosures shall be made as provided in this section.
- (f)** The prosecuting attorney and the defense shall cooperate in discovery and reach agreement on the time, place and manner of making the discovery and inspection

- permitted, so as to avoid the necessity for court intervention
- (g)** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, enlarged or deferred or make such other order as it appropriate. Upon motion, the court may permit either party to make such showing, in whole or in part, in the form of a written statement to be inspected privately by the court. If the court enters an order granting relief following such a private showing, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.
  - (h)** Discovery under this section must be completed no later than 21 days after arraignment or at such reasonable later time as the court may permit.
  - (i)** If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence that material not disclosed, or it may enter such other order as it deems just under the circumstances.
  - (j)** For crimes committed on or after July 1, 1993, the prosecuting attorney shall provide all prior convictions of the defendant known to the prosecuting attorney that would affect the determination of the defendant's criminal history for purposes of sentencing under a presumptive sentencing guidelines system as provided in K.S.A. 21-4701 et seq., prior to their repeal, or the revised Kansas sentencing guidelines act, article 68 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.
  - (k)** The prosecuting attorney and defense shall be permitted to inspect and copy any juvenile files and records of the defendant for the purpose of discovering and verifying the criminal history of the defendant.
  - (l)** (1) In any criminal proceeding, any property or material that constitutes a visual depictions, as defined in subsection (a)(2) of K.S.A. 2016 Supp. 21-5510, and amendments thereto, shall remain in the case, custody and control of either the prosecution, law enforcement or the court.  
(2) Notwithstanding subsection (b), if the state makes property or material described in this subsection reasonably available to the defense, the court shall deny any request by the defense to copy, photograph, duplicate or otherwise reproduce any such property or material submitted as evidence.  
(3) For purposes of this subsection, property or material described in this subsection shall be deemed to be reasonably available to the defense if the prosecution provides ample and liberal opportunity for inspection, viewing and examination of such property or material at a government facility, whether inside or outside the state of Kansas, by the defendant, the defendant's attorney and any individual the defendant may seek to qualify to furnish expert testimony at trial.

The Kansas Supreme Court has held that K.S.A. 22-3212 is controlling in criminal discovery matters and that it “sets out comprehensive notice and discovery requirements for the parties in criminal trials.” *State v. Edwards*, 299 Kan. 1008, 1016, 327 P.3d 469, 475 (2014).

It is important to note though, that the duty of disclosure is ongoing. In *State v. Carr*, the Kansas Supreme Court held that “after initial compliance with a discovery order, if a party discovers additional material responsive to a previous request, “the party shall promptly notify the other party or the party’s attorney or the court of the existence of the additional material.” K.S.A. 22-3212(g). If a party fails to comply with this obligation the court “may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.” K.S.A. 22-3212(g).” *State v. Carr*, 300 Kan. 1, 218-19, 331 P.3d 544, 686 (2014).

## **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 F.3d 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 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)).

### ***Confidential informants***

Generally, the people are not required to disclose the identity of confidential informants. *State v. Clovis*, 248 Kan. 313, 324-25, 807 P.2d 127, 135 (1991). However, a defendant may attempt to show that the identity of the informant is material to his defense. *State v. Braun*, 209 Kan. 181, 185, 495 P.2d 1000, *cert. denied*, 409 U.S. 991 (1972). The Supreme Court of Kansas has held that “if a trial court is unsure about the materiality of a confidential informant’s identity, an in camera review may be appropriate. Speculation and suspicion alone are not adequate grounds for requiring exposure. A trial court must find a reasonable probability that the informant could give needed testimony regarding guilt or innocence before disclosing the identity of the informant.” *State v. Pink*, 236 Kan. 715, 717, 696 P.2d 358 (1985). Once a court has ordered the disclosure of the identity of a confidential informant, “failure of the prosecution to comply with [the order] can result in dismissal of the case.” *State v. Clovis*, 248 Kan. 313, 330, 807 P.2d 127, 135 (1991) (citing *State v. Shilling*, 238 Kan. at 601).

### ***Privileged information***

When privileged information is at issue, the Kansas Court of Appeals has thus far followed the ruling in *Ritchie* that “a criminal defendant is entitled under due process to an in camera review of potential privileged records held by a state agency which the defendant alleged might disclose exculpatory evidence.” *State v. Willis*, 51 Kan. App. 2d 971, 985-88, 358 P.3d 107, 118-20 (2015) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15; 107 S. Ct. 989; 94 L. Ed. 2d 40 (1987)). See also *State v. Shoptaw*, 30 Kan. App. 2d 1059, 1063-66, 56 P.3d 303, *rev. denied*, 275 Kan. 968 (2002) (holding that “it is impossible to say whether any of the information contained in [the alleged victim’s] record would have been material to Shoptaw’s defense because no one involved in the case looked at the subpoenaed records, and therefore in order to adequately protect Shoptaw’s constitutional rights, as well as [the alleged victim’s] interest in her privileged communications with the treatment facility” this court ordered the district court to conduct an in camera review of the record “to determine if there is any evidence that probably would have changed the outcome of the trial” 30 Kan. App. 2d at 1066; *State v. Griswold*, No. 94, 835, 2006 Kan. App. Unpub. LEXIS 1037, 2006 WL 2440009, \*1-4 (Kan. App. 2006) (unpublished opinion) (holding that in camera review of privileged information can be necessary when a defendant is unable to determine the materiality of the information because she does not have access to them outside of the court’s presence).

## 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 F.2d 626, 630 (CA 5, 1978) (emphasis added).

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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. Taking into account 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 U.S. at 84.
- Affirmative defense, necessity; *Finley v. Johnson*, 243 F.3d 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 F.3d 1101, 1106 (CA 1, 1993).
- Psychiatric evaluation done during pretrial detention could have strengthened insanity defense; *US v. Spagnoulo*, 960 F.2d 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 U.S. 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 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.2d 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 U.S. 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 U.S. 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***

- Impeachment evidence not material where witness had been impeached at trial with his prior inconsistent statements and with alleged “concessions” made to his son; *State v. Armstrong*, 240 Kan. 446, 452, 731 P.2d 249, cert. denied 482 U.S. 929, 107 S. Ct. 3215, 96 L. Ed. 2d 702 (1987)
- 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 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)
- Undisclosed witness statements inconsistent with trial testimony; *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490, 441–46 (1995).
- Note written by two victim witnesses that contradicted testimony; *Youngblood v. West Virginia*, 547 U.S. 867, 869–70, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006).

### ***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*, 416 F.3d 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 F.3d 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 F.3d 1156, 1166–67 (CA 10, 2009).
- Key witness had several pending charges against him dropped during prosecution of defendant; *Singh v. Prunty*, 142 F.3d 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 F.3d 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 F.2d 510, 513–14 (CA 5, 1977).

❖ ***Immunity or offers of immunity***

- Alleged promise of immunity to key witness; *Horton v. Mayle*, 408 F.3d 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 F.3d 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 F.3d 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 F.3d 223, 233 (CA 6, 2008).

- Key witness expected, and later received, “an extremely favorable plea agreement” on unrelated state charges; *US v. Risha*, 445 F.3d 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 F.3d 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 F.2d 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 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.2d 550, 553 (CA 8, 1975); *Cf. Wilson v. Beard*, 589 F.3d 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 U.S. 150, 152–55 (1972).
- Prosecution promised not to prosecute key witness—a convicted felon—for possession of a firearm; *Monroe v. Angelone*, 323 F.3d 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 F.2d 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 F.3d 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 F.2d 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 F.3d 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 F.3d 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 F.3d 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*”).

❖ **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 F.3d 728, 735–36; denial of reh’g en banc, 647 F.3d 1175 (2011)

- Key witness was promised his girlfriend would be released from custody if he incriminated defendant; *Harris v. Lafler*, 553 F.3d 1028, 1033–35 (CA 6, 2009); *Cf. Graves v. Dretke*, 442 F.3d 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 F.2d 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 F.2d 1, 10–11 (CA 1, 1991).
- Codefendant granted immunity for testimony had prior criminal record; *US v. Auten*, 632 F.2d 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 F.3d 898, 909–11 (CA 9, 2011).
- Key witness faced charges of sexual misconduct with minor; *US v. Kohring*, 637 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.3d 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 F.3d 651, 660–62 (CA 3, 2009).
- Evidence that key witness was using drugs during trial; *Benn v. Lambert*, 283 F.3d 1040, 1056 (CA 9, 2002).
- Evidence that a key witness said he suffered from a disorder (PTSD) that affected his ability to distinguish events of his son’s murder from the facts pertaining to the instant case might have affected his credibility had he been questioned about it on cross-examination, but was not material in the instant case due to the level of recall the witness showed during trial. *State v. Francis*, 282 Kan. 120, 151, 145 P.3d 48, 71 (2006)

### ***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 F.3d 1, 19–21 (CA 1, 2008).
- Evidence not revealed until presentence report that key witness “personally disliked” defendant *US v. Sipe*, 388 F.3d 471, 477 (CA 9, 2004), *Cf. Schledwitz v. US*, 169 F.3d 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 F.3d 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 F.3d 730, 737 (CA 6, 2010).

- Two prior undisclosed contracts between confidential informant witness and DEA; *US v. Torres*, 569 F.3d 1277, 1282–83 (CA 10, 2009).
- Key witness was informant for government in earlier, different drug investigation; *US v. Shaffer*, 789 F.2d 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 F.3d 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 F.3d 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 F.3d 1315, 1318–19 (CA 9, 1993), *Cf. Douglas v. Workman*, 560 F.3d 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 F.3d 149, 162–63 (CA 2, 2008) (quoting *US v. Gil*, 297 F.3d 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 F.3d 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 F.3d 1, 5 (CA 1, 2003).
- “Inadmissible evidence may be material under Brady” *Spence v. Johnson*, 80 F.3d989, 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 F.3d 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 F.3d 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 F.3d 602, 604 (CA 8, 1998) (citing *Wood*, But *cf. Hoke v. Netherland*, 92 F.3d 1350, 1356 at n3 (CA 4, 1996) (reading *Wood* to hold that inadmissible evidence is, “as a matter of law, ‘immaterial’ for Brady purposes”).