Brady & Giglio

Prosecuting Attorneys Coordinating Council

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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.”

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 IN LIGHT OF 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.

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.

**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 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).
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, __ Mich App __, slip op. at 3 (2015). 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.

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.” 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).

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.”).
(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.”)

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).

**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. “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*, __ Mich App __, slip op. at 3 (2015); “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

**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

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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.
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, 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 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 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, 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; __ NNW2d __ (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.”)


**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 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 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).

**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 is 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.


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. 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 US at 84.
- 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)
- 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).

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*”).

**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*
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”).