THE
MICHAEL MORTON ACT:
PRACTICING UNDER THE NEW DISCOVERY RULES

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MATERIALS INCLUDED

Asking for a discovery and *Brady* log at the time of the plea or trial is simply too late.

While this information must be exchanged *no later than* these events, we must be documenting what we have received much earlier in the case. Further, prosecutors and defense attorneys must request that law enforcement search for *Brady* information well before the case is set for trial. Otherwise, the problems that resulted in Michael Morton's case will only be replicated.

The following resources are for use in drafting specific discovery and *Brady* requests:

REFERENCE MATERIALS

ITEM	PURPOSE
Full Text of Michael Morton Act	To illustrate the specific changes in the statute to support defense discovery requests in a contested hearing
Bill Analysis – Michael Morton Act	To illustrate the legislative intent behind the new discovery rules
Full Text of CCP 39.14(a) with comments	For reference; for understanding the importance of specific phrases in the new discovery rules
Brady v. Maryland Outline prepared by the Special Litigation Division of the Public Defender Service for the District of Columbia	An outstanding resource for what is *Brady* evidence, where the prosecutor must look for *Brady* evidence, how prosecutors must assess materiality, and a compendium of all significant *Brady* cases
Sample – Travis County Discovery Log with comments	This is a sample of a form prosecutor's request that defense attorney's sign at the time of plea or trial. Remember: you do not have to sign any form; you can draft your own discovery log or simply just put it on the record. The comments are from attorney Carlos Garcia who was part of the Travis County workgroup on resolving Morton compliance.

FORMS

ITEM	PURPOSE
Template – Inspect Discovery Only (General)	Most jurisdictions have a special docket for clients who are arrested for misdemeanors or low-level felonies and can be released from jail after a short sentence. In these situations, prosecutors may use the Michael Morton Act to purposefully keep people in jail longer under the false pretenses of wanting to comply with the discovery provisions. This template is for use to gain access – but not copies – of simply the police report or another item in possession of the State's file – without triggering the entire scope of a 39.14 discovery request.
Template – Inspect Discovery Only (Checklist)	A more specific form that can be brought to a jail reduction docket where specific items can be requested for inspection without triggering the entire scope of a 39.14 discovery request for production.
Template – Discovery Only (General)	This is a template for a generic discovery request for production.
Template – Discovery Only (Checklist)	This is a template for a specific discovery requests for production.
Template – Discovery & Notice (Checklist)	This is a template for specific discovery requests for production and includes requests for notice that would be provided under the Texas Rules of Evidence and Code of Criminal Procedure
Template – Discovery & Brady (Checklist)	This is a template for specific discovery requests that can be used in court and includes *Brady, Giglio, and Bagley* requests.
Template – Discovery & Brady (Detailed)	This is a template for general and specific discovery requests and includes *Brady, Giglio, and Bagley* requests. This is the most thorough of all templates and includes the State's Privilege Log as an exhibit.
Template – Brady Request (Letter format)	This is a letter for *Brady, Giglio, and Bagley* requests that can be submitted separately from discovery. The substance of this letter originates from the Public

	Defender Service's special litigation project on Brady.
Template – Motion for Exculpatory Information	This is a motion for *Brady, Giglio, and Bagley* requests that can be filed separately from a discovery request.
Template - Privilege Log	This is a template for sending to a prosecutor so they can log any items that were withheld or redacted.
Template – Discovery Log	This is a template for documenting the discovery you have received. In a case of contested litigation, you should file a discovery log in advance of any pretrial hearing.
Mail Merge Table	Microsoft Word Mail Merge allows you to set up a mail merge document, or alternatively, you can use the "find and replace" command. This table includes all the fields for the templates so you can use them in your practice.

Full Text of SB 1611

The Michael Morton Act

S.B. No. 1611

AN ACT

relating to discovery in a criminal case.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Michael Morton Act.

SECTION 2. Article 39.14, Code of Criminal Procedure, is amended by amending Subsection (a) and adding Subsections (c) through (n) to read as follows:

(a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall [~~Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to~~] produce and permit the inspection and the electronic duplication, copying, and [~~or~~] photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements [~~statement~~] of the defendant or a witness, including witness statements of law enforcement officers but not including[~~, (except written statements of witnesses and except~~] the work product of counsel for the state in the case and their investigators and their notes or report[~~)~~], or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that[~~, which~~] constitute or contain evidence material to any matter involved in the action and that [~~which~~] are in the possession, custody, or control of the state or any person under contract with the state [~~State or any of its agencies~~]. The state may provide to the defendant electronic duplicates of any documents or other information

described by this article. The [~~order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the~~] rights granted to the defendant under this article do [~~herein granted shall~~] not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize [~~State or any of its agents or representatives or employees. Nothing in this Act shall authorize~~] the removal of the documents, items, or information [~~such evidence~~] from the possession of the state [~~State~~], and any inspection shall be in the presence of a representative of the state [~~State~~].

(c) If only a portion of the applicable document, item, or information is subject to discovery under this article, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion. The state shall inform the defendant that a portion of the document, item, or information has been withheld or redacted. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.

(d) In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).

(e) Except as provided by Subsection (f), the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant may not disclose to a third party any documents, evidence, materials, or witness statements received from the state under this article unless:

(1) a court orders the disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or

(2) the documents, evidence, materials, or witness statements have already been publicly disclosed.

(f) The attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, may allow a defendant, witness, or prospective witness to view the information provided under this article, but may not allow that person to have copies of the information provided, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another under this subsection, the person possessing the information shall redact the address, telephone number, driver's license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement. For purposes of this section, the defendant may not be the agent for the attorney representing the defendant.

(g) Nothing in this section shall be interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, except as provided in Subsections (e) and (f), address, telephone number, driver's license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness. Nothing in this subsection shall prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency for the purposes of making a good faith complaint.

(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession,

custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

(i) The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.

(j) Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.

(k) If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.

(l) A court may order the defendant to pay costs related to discovery under this article, provided that costs may not exceed the charges prescribed by Subchapter F, Chapter 552, Government Code.

(m) To the extent of any conflict, this article prevails over Chapter 552, Government Code.

(n) This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article.

SECTION 3. The change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 4. This Act takes effect January 1, 2014.

Bill Analysis of SB 1611

Legislative Intent

BILL ANALYSIS

Senate Research Center

S.B. 1611
By: Ellis et al.
Criminal Justice
7/26/2013
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Criminal discovery—the exchange of relevant information between prosecutors and the defense prior to trial—is both necessary for a fair and just criminal justice system, and also required as part of a defendant's constitutional right to a full defense.

Brady v. Maryland requires prosecutors to turn over to the defense any evidence that is relevant to the defendant's case. However, *Brady* is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. That is why a uniform discovery statute is needed. S.B. 1611 will save attorney resources as well as taxpayer dollars by limiting discovery disputes and increasing efficient resolution of cases, all while reducing the likelihood of costly appeals and wrongful convictions.

S.B. 1611 requires prosecutors to turn over to the defense any relevant evidence that may help the defendant, including witness lists. The defense also has a reciprocal obligation to turn over certain information to the prosecution. S.B. 1611 also clearly defines what is considered to be privileged work product so that there is no question as to what is considered confidential.

Open file discovery is important for several reasons. First, it promotes efficiency in the criminal justice system. A defendant who understands the extent of the evidence against him can make an informed decision to plead. It also allows for a full defense, lessening the likelihood of an overturned verdict on appeal. The state saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions.

Open file discovery also ensures that each defendant is guaranteed his constitutional right to a defense, regardless of where he is charged. A defendant's chances to a fair trial often vary according to jurisdiction, because of the lack of a uniform discovery law. A statewide criminal discovery policy ensures that no matter where a defendant is on trial, he is guaranteed to all the protections afforded to him by the Constitution.

Most importantly, S.B. 1611 helps prevent wrongful convictions. Recent high profile cases in Texas show that with open file discovery, the likelihood that evidence relevant to the defendant's innocence

would have been revealed is increased. Every defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it. The state also saves billions of dollars in ensuring that the defendants sent to prison are actually guilty. Finally, public safety is threatened if an innocent person is in prison while the guilty party goes free.

S.B. 1611 will uphold a defendant's constitutional right to a defense, minimize the likelihood of wrongful convictions, save thousands in taxpayer dollars, promote an efficient justice system, and improve public safety, all while increasing the public's confidence in the criminal justice system.

S.B. 1611 amends current law relating to discovery in a criminal case.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Requires that this Act be known as the Michael Morton Act.

SECTION 2. Amends Article 39.14, Code of Criminal Procedure, by amending Subsection (a) and adding Subsections (c) through (n), as follows:

> (a) Requires the state, subject to the restrictions provided by Section 264.408 (Use of Information and Records; Confidentiality and Ownership), Family Code, and Article 39.15 (Discovery of Evidence Depicting or Describing Abuse or Sexual Conduct by Child or Minor), as soon as practicable after receiving a timely request from the defendant, to produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. Authorizes the state to provide to the defendant electronic duplicates of any documents or other information described by this article. Provides that the rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. Provides that this article does not authorize the removal of the documents, items, or information from the possession of the state, and requires that any inspection be in the presence of a representative of the state.
>
> Deletes existing text requiring the court in which an action is pending, upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, to order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of

the defendant of any designated documents, papers, written statement of the defendant (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. Deletes existing text requiring that the order specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence, provided, however, that the rights herein granted are required to not extend to written communications between the State or any of its agents or representatives or employees. Deletes existing text requiring that nothing in this act authorize the removal of such evidence from the possession of the State, and that any inspection be in the presence of a representative of the State.

(c) Provides that if only a portion of the applicable document, item, or information is subject to discovery under this article, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and is authorized to withhold or redact that portion. Requires the state to inform the defendant that a portion of the document, item, or information has been withheld or redacted. Requires the court, on request of the defendant, to conduct a hearing to determine whether withholding or redaction is justified under this article or other law.

(d) Requires the state, in the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, to permit the pro se defendant to inspect and review the document, item, or information but provides that the state is not required to allow electronic duplication of the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).

(e) Prohibits the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant, except as provided by Subsection (f), from disclosing to a third party any documents, evidence, materials, or witness statements received from the state under this article unless:

(1) a court orders the disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or

(2) the documents, evidence, materials, or witness statements have already been publicly disclosed.

(f) Authorizes the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, to allow a defendant, witness, or prospective witness to view the information provided under this article, but is prohibited from allowing that person to have copies of the information provided, other than a copy of the witness's own statement. Requires the person possessing the information to redact the address, telephone number, driver's license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement before allowing that person to view a document or the witness statement of another

under this subsection. Prohibits the defendant from being the agent for the attorney representing the defendant for purposes of this section.

(g) Provides that nothing in this section shall be interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, except as provided in Subsections (e) and (f), address, telephone number, driver's license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness. Provides that nothing in this subsection shall prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency for the purposes of making a good faith complaint.

(h) Requires the state, notwithstanding any provision of this article, to disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

(i) Requires the state to electronically record or otherwise document any document, item, or other information provided to the defendant under this article.

(j) Requires each party, before accepting a plea of guilty or nolo contendere, or before trial, to acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.

(k) Requires the state, if at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), to promptly disclose the existence of the document, item, or information to the defendant or the court.

(l) Authorizes a court to order the defendant to pay costs related to discovery under this article, provided that costs are prohibited from exceeding the charges prescribed by Subchapter F (Charges for Providing Copies of Public Information), Chapter 552 (Public Information), Government Code.

(m) Provides that to the extent of any conflict, this article prevails over Chapter 552, Government Code.

(n) Provides that this article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article.

SECTION 3. Provides that the change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. Provides that the prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. Provides that for purposes of

this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 4. Effective date: January 1, 2014.

Text of Art. 39.14

Interpretation and commentary

NO. D1DC_____

THE STATE OF TEXAS

V.

_____

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

DISCOVERY COMPLIANCE STATEMENT PURSUANT TO ARTICLE 39.14(J) TEXAS CODE OF CRIMINAL PROCEDURE

COMES NOW, the State of Texas, by and through the District Attorney of Travis County, Texas, and pursuant to Article 39.14(j) of the Texas Code of Criminal Procedure would respectfully show the Court the disclosure, receipt, and list of the following documents, items, and information provided to the defense in the above styled and numbered cause:

[ ] OFFENSE REPORT(S) _____

[ ] 911 RECORDING(S) [ ] CAD

[ ] WITNESS STATEMENTS _____

_____

[ ] STATEMENTS OF DEFENDANT_____

[ ] SCIENTIFIC REPORTS

[ ] DRUG_____ [ ] BALLISTIC_____

[ ] PRINTS_____ [ ] DNA_____

[ ] BLOOD/BREATH_____ [ ] OTHER_____

[ ] AUTOPSY REPORT(S)_____ [ ] AUTOPSY PHOTO

[ ] CSU REPORTS_____

[ ] CRIME SCENE PHOTOS/VIDEO_____

[ ] CRIME SCENE DIAGRAM

[ ] PATROL CAR VIDEO(S)_____

[ ] OTHER VIDEO(S)/PHOTOS_____

Each of these items needs to list the date generated (since oftentimes items such as offense reports are updated). This is probably more important in serious felony cases. I suggest that a more comprehensive list, an attachment, (or even an attached electronic cd copy_ should be utilized in discovery-heavy cases, especially child abuse, sex assaults, and homicides. I would be wary of any list that does not list witness statements, the date taken and by whom or of any attempt by the prosecution to be less specific in their documentation. The intent of the act is to ensure full disclosure and accountability; I would be suspicious of any attempts at watering down the requirements. The Act means more work for prosecutors and more vigilance for us.

[ ] SEARCH WARRANT(S)_____

[ ] MEDICAL RECORDS _____

[ ] BUSINESS RECORDS_____

[ ] EXPERT REPORTS _____

[ ] OTHER OFFENSE REPORTS_____

[ ] CRIMINAL HISTORY(S)___Defendant_____ (view only)

_____ (view only)

[ ] GRAND JURY TESTIMONY_____ (court order required)

[ ] OTHER_____

[ ] OTHER_____

I suggest adding this in. It follows the law verbatim. There is no reason why any prosecutor should oppose it.

The above documents, items, and information have been provided to the defense in the above styled and numbered cause.

The state acknowledges the disclosure of all exculpatory, impeachment, or mitigating documents, items or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or that tends to reduce the punishment for the offense charged. The state further acknowledges its continuing duty to disclose the existence of any document, item, or information required to be disclosed by TCCP 39.14(h).

The above documents, items and information have been provided to me in the above styled and numbered cause. As counsel for the defense, I am aware of the obligations and restrictions contained in Article 39.14 concerning the use, redaction, and dissemination of these materials.

~~After consultation with my client, we are satisfied with the discovery set forth above and wish to proceed with, and derive the benefits of, a plea of guilty. Accordingly, we withdraw our request for any other documents, items, or information which may have been previously designated for production, and waive our right to view any criminal history not listed above.~~

_____ _____

~~Defendant~~ ~~Counsel for Defendant~~

This section violates (n) because it makes the D agree to requirements less than required by law. It is also unnecessary. 39.14 (n) reads: "This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required by law." Our clients should simply acknowledge receipt of the materials tendered, not be required to waive or withdraw previous requests. The plea should not be contingent on the D waiving or withdrawing lawful requests.

It is the State's burden to ensure they have complied with both open file discovery and Brady. The law intends for the state to document its good faith discovery effort, not for the D to waive anything so that they their plea bargain can be accepted.

UNDER NO CIRCUMSTANCES WOULD I AGREE TO THIS PROVISION. 39.14(j) requires acknowledgment only, not proactive waivers, agreements, or statements of satisfaction with the product.

Brady v. Maryland Outline

Prepared by the Special Litigation Division,
Revised March 2013

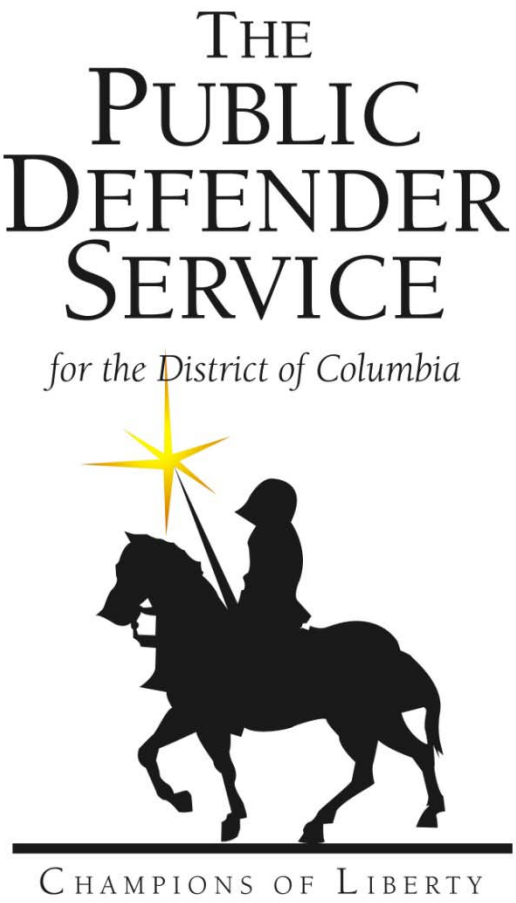

Table of Contents

Introduction

This outline discusses in some detail what the prosecution's obligations are under *Brady v. Maryland*, 373 U.S. 83 (1963), and how a trial attorney litigating in Superior Court for the District of Columbia may advocate to hold the government to those obligations.

The outline is meant to serve both as a quick reference guide when trial lawyers are confronted with *Brady* issues in court and as the starting point for any correspondence or pleading addressing the government's *Brady* obligations. However, since *Brady* issues can be so fact-specific (and there is seemingly no shortage of *Brady* opinions, old and new), **doing case-specific research is always important**.

The outline relies on a variety of authorities:

- Binding authority from the Supreme Court and the D.C. Court of Appeals;
- Persuasive authority from federal courts around the country;
- The government's own policy documents, specifically:
  - The "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the United States Attorney's Manual (hereinafter "USAM") available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001), and
  - The 2010 memo "Guidance for Prosecutors Regarding Criminal Discovery" issued by then Deputy Attorney General David Ogden in the wake of the Ted Steven's scandal (hereinafter "DAG Guidance Memo"), now codified at Section 165 of the United States Attorney's Criminal Resource Manual and available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

  (**NOTE:** PDS is unaware of any similar policy documents from the District of Columbia Office of the Attorney General).
- Local rules/standing orders from other federal courts around the country, in particular Massachusetts (borne of its long-standing troubles with *Brady* violations).

The first category of authority will obviously be the most persuasive to a Superior Court judge, and should always be the starting point of any argument.

Persuasive authority is valuable too, if only to remind D.C. judges that prosecutors from other jurisdictions – in particular Assistant United States Attorneys – are held to more stringent standards elsewhere and, as a consequence, behave differently vis-à-vis *Brady*.

Lastly, although the AUSAs will not hesitate to inform judges that their internal *Brady* policies create no enforceable rights for defendants, these policies are important because they contain a "constructive and objective description of a prosecutor's responsibilities pursuant to *Brady*" that memorializes "the government's own stated sense of fairness vis-a-vis criminal

defendants." *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011). Defense counsel should be prepared to (1) remind government counsel about their obligations under these policies, (2) call on the government to explain why it cannot or will not comply with its own policies – policies which were drafted to reassure the courts and the public that the government takes its *Brady* obligations seriously, and (3) urge trial courts that any display of ignorance of or disregard for these policies by government counsel simply reinforces the need for courts to act to regulate the government's *Brady* disclosures.

I. THE BASIC RULE

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused … 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."

Today, *Brady* and its progeny impose on the prosecution a "duty to learn of"[1] and disclose to the defense all "favorable,"[2] "material"[3] information[4] "known to the others acting on the government's behalf in the case, including the police,"[5] a group commonly referred to as "the prosecution team."[6] The prosecution must disclose this information "at such a time" and in such a manner "as to allow the defense to use the favorable material effectively"[7] – which, as a practical matter, means well before trial if not at the outset of the case, because "the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense."[8]

Each of these requirements – what is favorable information, where the prosecution must look for it, how materiality must be assessed, when it must be disclosed, and in what format – has been analyzed by courts and is discussed in further detail below. But in litigating *Brady* claims, the defense should never lose sight of the fact that *Brady* is the furthest thing from a technicality. It is a "rule of fairness."[9] The motivating force behind the Court's decision in *Brady* was the belief that "[s]ociety 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."[10] The Court affirmed that a prosecutor should not be the "architect of a proceeding that does not comport with standards of justice."[11]

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[1] *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), *see also* III *infra*.

[2] *Brady*, 373 U.S. at 87; *see also* II *infra.*

[3] *Brady*, 373 U.S. at 87; *see also* IV *infra*.

[4] *See* II.D & III.B.3 *infra* (explaining that the prosecution has an obligation to disclose favorable information whether or not it has been documented and whether or not it is itself admissible if it may lead to admissible evidence).

[5] *Kyles,* 514 U.S. at 437; *see also* III.B.2 *infra*.

[6] *See, e.g.,* DAG Guidance Memo, Step 1.A.

[7] *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) (internal quotation and citation omitted).

[8] *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009).

[9] *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (internal quotations and citations omitted).

[10] *Brady*, 373 U.S. at 87.

[11] *Id*. at 88.

"By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model."[12] This is because "the prosecutor's role transcends that of an adversary: the prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[13] When litigating *Brady* claims, the defense should examine whether the prosecution is acting consistently with its obligation "to assist the defense in making its case" or whether it is acting strategically – *e.g.,* to limit the scope of disclosure or to delay the timing – which is antithetical to its duty to "transcend" its role as "an adversary."[14]

II. WHAT CONSTITUTES FAVORABLE INFORMATION?

A. Favorable information is any information that the defense can use to assist its defense either offensively or defensively:

1. Favorable information is any information that might help the defense attack the government's case or mount an affirmative defense. In determining what must be disclosed under *Brady* "the [prosecution's] guiding principle must be that *the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel*, who has a different perspective and interest from that of the police or prosecutor." *Miller,* 14 A.3d 1094, 1110 (D.C. 2011) (quoting *Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010) (emphasis added).

2. Certain categories of information are listed below, *see* II.E. *infra*, but ultimately what is favorable to the defense in a case will be fact-specific.

3. Thus, defense counsel should be prepared to explain (*ex parte* when appropriate) why certain types of information might be favorable in light of the government's apparent theory and the defendant's defense.

B. Favorable information encompasses "Exculpatory" and "Impeaching" Information:

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[12] *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

[13] *Id.* (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)); *Miller*, 14 A.3d at 1107 ("the constitutional command of *Brady* unambiguously prescribes the prosecutor's priorities: The prosecutor's obligation is to seek justice before victory") (internal quotation and citation omitted).

[14] *Bagley*, 473 U.S. at 675 n.6; *see also Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011) (expressing dismay that "prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense").

1. The Court in *Brady* simply spoke of the duty to disclose information "favorable" to the defense. 373 U.S. at 87.

2. Subsequent decisions have referred to the duty to disclose exculpatory and impeaching information. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Perez v. United States*, 968 A.2d 39, 65 (D.C. 2009) (citing *Strickler*).

   a. "**Exculpatory" information is information "of a[ny] kind that would suggest to any prosecutor that the defense would want to know about it."** *Miller*, 14 A.3d at 1110 (internal quotation and citation omitted) (endorsing this "eminently sensible standard"). It typically refers to information that, in itself, tends to reduce the likelihood of guilt or bears favorably on culpability or some other component of punishment. Under *Brady*, the defense is entitled, for example, to any mitigating information. Indeed, *Brady* itself addressed the failure to disclose to the defense the co-defendant's confession that he actually strangled the victim (although he said it was Brady's idea). Brief of Respondent, 1963 WL 105617 *4.

   b. **"Impeachment" information typically refers to information that tends negatively to impact the credibility or reliability of a Government witness.** Impeaching information may be case-related (*e.g.,* inconsistent statements about the same incident – which also may be exculpatory) or witness specific (*e.g.,* evidence of past dishonesty).

3. Exculpatory and Impeaching information are *not* strictly distinct categories. *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979) (accepting "the premise that 'impeaching evidence' is exculpatory.")

   a. Indeed there is often little conceptual distinction between the two: evidence that casts a doubt on the reliability of evidence against a defendant is exculpatory in that it undermines the prosecution's case. In other words, impeaching information may be a substantive reason to doubt whether the Government has sufficiently proven defendant's guilt. *See Bagley*, 473 U.S. at 676 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.") (internal quotation and citation omitted); *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) (same). **Because showing weaknesses in allegedly inculpatory evidence makes a person's guilt less likely, any attempt to treat "impeachment" information as something other than "exculpatory" information is untenable as a matter of logic and fairness.**

   b. Ultimately the distinction is immaterial: **A prosecutor's duty to disclose impeaching information is the same as his/her duty to disclose exculpatory information.**

   c. Nevertheless, the DC USAO has a history of trying to distinguish between the two, particularly vis-à-vis timing of disclosure, and the defense must be prepared to

combat the impression that impeaching information is somehow constitutionally less important (*e.g.,* "*Brady* with a little b").

1) Supreme Court case law is clear that the full force of a prosecution's disclosure obligations under *Brady* applies to both types of information. *Strickler*, 527 U.S. at 281-82. Indeed, the Supreme Court has generally "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes."[15] *Kyles*, 514 U.S. at 433. (In *Bagley,* the Court rejected an argument that the failure to disclose impeaching information was *more* egregious because it impinged both on a defendant's right to due process and his right to confrontation, and held that the same standard of review applied to the failure to disclose exculpatory and impeaching information. 473 U.S. at 676-78.)

2) For its part, the Court of Appeals has not only reaffirmed that "[t]here is, of course, no difference between exculpatory and impeachment evidence when it comes to the prosecutor's duty to disclose evidence favorable to the accused," *Moore v. United States*, 846 A.2d 302, 305 n. 4 (D.C. 2004) (internal quotations and citations omitted), it specifically held in *Sykes v. United States* that the government could not justify delaying disclosure of information that was both exculpatory and impeaching simply by characterizing it as the latter: "[U]nder our precedents, . . . the [withheld] grand jury testimony . . . should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence." 897 A.2d 769, 778 (D.C. 2006).

3) Although impeachment evidence is sometimes referred to as *Giglio* evidence in the Superior Court, advocates should remember that *Giglio* information, as the term is used in this manner, is merely one subset of important *Brady* information. Delay in disclosure cannot be justified by calling *Brady* information by another name.

C. **Favorable information can relate to pretrial litigation of suppression of the government's evidence or the admission of defense evidence:**

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[15] The only exception is *United States v. Ruiz*, 536 U.S. 622 (2002)**,** in which the Court held that the government could legitimately require a defendant to waive her right to impeaching information or information supporting an affirmative defense prior to entering into a pre-indictment, fast-track plea agreement. The foundation for the Court's ruling was its determination that *Brady* is "part of [the Constitution's] basic 'fair trial' guarantee." *Id.* at 628. *Ruiz* should be interpreted to have limited import, bounded by its facts. Where a case has progressed beyond the very preliminary stages and there is every indication that a case *is* going to trial – *i.e.,* defendant has been indicted and defense counsel has made *Brady* requests – *Ruiz* should have no application. For further discussion of *Ruiz*, see VIII.B. *infra*.

1. *Brady* encompasses information relevant to the admissibility of evidence, including any information relevant to evidentiary questions or important pretrial constitutional motions, such as motions to suppress.

    a. *Gaither v. United States,* 759 A.2d 662 (D.C. 2000), *mandate recalled and opinion amended by*, 816 A.2d 791 (D.C. 2003) (remanding for an evidentiary hearing, *inter alia*, to determine if *Brady* information had been withheld regarding suggestive procedures used in the identification process); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (witness statement should have been disclosed under *Brady* because it called into question whether prosecution's evidence could be admitted as a "spontaneous utterance"); *James v. United States*, 580 A.2d 636 (D.C. 1990) (same);

    b. *See also United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated in pretrial context by suppression of report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred—and thus, crucial to the admissibility of the confession); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (nondisclosure of *Brady* information may have affected fact finder's findings at the suppression hearing).

2. The government's policy acknowledges this. USAM § 9-5.001.C.2 (requiring disclosure of information that "might have a significant bearing on the admissibility of prosecution evidence").

D. *Brady* encompasses ALL favorable information whether or not it is admissible at trial or even previously documented:

1. Although *Brady* itself uses the term "evidence," the *Brady* doctrine encompasses *any* information, directly admissible or not, that would be favorable to the accused in preparing her defense, including information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. *See Wood v. Bartholomew*, 516 U.S. 1 (1995) (polygraph results showing possible deception not *Brady* because they were inadmissible and because they would not have affected defense counsel's strategy or preparation).

    a. This is implicit in D.C. case law holding that *Brady* information is to be used in the defense investigation or preparation of its case – at a time when admissibility is not the immediate or primary concern: *Miller*, 14 A.3d at 1108 ("An important purpose of the prosecutor's obligations under *Brady* is to 'allow[ ] defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.'") (citation omitted); *Sykes*, 897 A.2d at 777, 781 (noting the importance of using the information in preparation of a case and highlighting that earlier disclosure would have enabled defendant to conduct additional pretrial investigation); *see also Leka v. Portuondo*, 257 F.3d 89, 101-02 (2d. Cir. 2001) (discussing the need to use favorable information for "full exploration

and exploitation" and that *Brady* must consider the impact of new information on "existing strategies and preparation").

b. Federal cases explicitly acknowledge that *Brady* information need not be admissible to trigger the prosecution's disclosure obligation. *See, e.g.*, *Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003) (prosecution withheld double-hearsay note that complainant had made false allegations in the past and, even though inadmissible, it might have led to admissible evidence); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (*Brady* information includes competent evidence, material that could lead to competent evidence, or any information that "would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise."); *United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999) ("[T]o refute Bowie's contention that the undisclosed information was 'material' in the *Brady* sense, it is not enough to show that the [suppressed information] would be inadmissible."); *see also Coleman v. Calderon*, 150 F.3d 1105, 1116-17 (9th Cir. 1998); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999); *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012); *Johnson v. Folino*, 2013 U.S. App. LEXIS 1072 (3d Cir. Jan. 16, 2013).

c. The government's own policy requires prosecutors to disclose favorable, material information regardless of admissibility, although the government takes the position that this policy obligation exceeds the constitutional disclosure obligations imposed by *Brady*. USAM § 9-5.001.C.

2. Relatedly, the mandate of *Brady* is not limited to requiring the production of certain pre-existing documents (like Rule 16), *but see* VI *infra* (discussing the form in which *Brady* disclosures should be made in order to be effectively used by the defense).

a. *Brady* "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. . . . [that] is necessary to ensure the effective administration of the criminal justice system." *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (internal quotations and citations omitted).

b. Thus, *Brady* requires the prosecution to disclose certain favorable information, even if that information has not previously been recorded and has only been communicated orally to a member of the prosecution team. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007); *See* DAG Guidance Memo Step 1.B.5 (acknowledging that "the format of the information does not determine whether it is discoverable"; the government must search for favorable information in "factual reports" "factual discussions" or "factual information obtained during interviews"; and "information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.")

E. **Examples of favorable information – what the defense should ask for and what it is entitled to receive:**

NOTE: The law is now clear that the prosecution has a nondelegable duty to disclose *Brady* information in the possession of the prosecution team, and the defense has no obligation to make specific *Brady* requests. *See Strickler*, 527 U.S. at 281-82 (setting forth the elements of a *Brady* claim – no requirement that the defense make a request); *Bagley,* 473 U.S. at 668 (rejecting a different standard of review for *Brady* claims based on whether defendant made a specific *Brady* request); *see also Miller,* 14 A.3d at 1107 (*Brady* is a "rule of fairness and minimum *prosecutorial* obligation") (quoting *Curry*, 658 A.2d at 197; emphasis added).

Nevertheless, in order to ensure a defendant obtains the *Brady* information that he is due, or at the very least, to preserve and substantiate a *Brady* claim on appeal, defense counsel will always want to make written *Brady* requests tailored to the specific facts of the defendant's case.

- Such requests focus the prosecution on the categories of favorable information the defense is seeking and thereby reduce the possibility that the prosecution will overlook this information,

- In addition, making such requests will only benefit the defense in pretrial materiality assessments – the fact that the defense asked for a specific type of information demonstrates that the defense considers such information important – and may hasten the timing of disclosure. *See* IV *infra*.

- Finally, the fact that the defense has made a specific request and received nothing from the government can assist in demonstrating prejudice. Nondisclosure in the face of explicit requests strikes courts as unfair. As the Supreme Court explained in *Bagley*:

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

473 U.S. at 682-83.

The following is a non-exhaustive list of sometimes overlapping categories of favorable information the defense may want to ask for:

1. **Any information that tends to cast doubt on the defendant's guilt with respect to any essential element in any charged count.** *Brady*, 373 U.S. at 87; USAM § 9-5.001.C.1 (requiring disclosure of "information that is inconsistent with any element of any crime charged"); *see also* D. Mass. L. R. 116.2(A)(1).

2. **Any physical evidence, testing, or reports tending to make guilt less likely.** *See, e.g.*, *Benn v. Lambert*, 283 F.3d 1040, 1060 (9th Cir. 2002) (failure to disclose investigative report that fire was *not* caused by an arson); *Sawyer v. Hofbauer*, 299 F.3d 605 (6th Cir.

2002) (testing withheld by prosecution demonstrated that semen stain in forced fellatio case belonged to a person different than the defendant); *Mitchell v. Gibson*, 262 F.3d 1036, 1063-64 (10th Cir. 2001) (State actively withheld and misled about DNA testing by different lab that completely contradicted forensic testimony of police examiner at trial); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (withheld ballistics results showing that alleged firearm was inoperable); *Johnson v. State*, 38 S.W.3d 52, 56-58 (Tenn. 2001) (withheld police report concluding that bullet came from different direction than where defendant was standing); *State v. Larimore*, 17 S.W.3d 87 (Ark. 2000) (withheld original medical examiner opinion on time of death).

3. **Any information regarding the failure of any percipient witness to make a positive identification of a defendant:**

   a. **If the perpetrator is known to the witness, in any statement regarding the crime.** *Shelton v. United States*, 26 A.3d 216, 222 (D.C. 2011) (government violated *Brady* when it failed to disclose that complainant, who knew defendant, initially stated he was unable to identify the perpetrator); *see also, e.g., Slutzker v. Johnson,* 393 F.3d 373, 387 (3d Cir. 2004) (witness statement that man she saw talking to decedent before the murder was not defendant was *Brady* information).

   b. **If a stranger identification, in any identification procedure.** *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011) (witness's failure to identify defendant in a photo array coupled with statement that the shooter "sort of look[ed] like" the photographs of two other people in the photo array was exculpatory); *Jackson v. United States*, 650 A.2d 659, 661 n.4 (D.C. 1994) (government "wisely conceded" that failure to disclose witness's inability to identify defendant coupled with the witnesses description of the perpetrator that was inconsistent with defendant "violated both the letter and spirit of *Brady*"); *see also Boyette v. Lefevre*, 246 F.3d 76, 85 (2d Cir. 2001) (the fact that complainant's "description of her attacker did not fit [defendant] and that she had not been able to identify [defendant] from photos" constituted *Brady* information).

   NOTE: At present, in tension with other jurisdictions, the law in D.C. appears to be that a simple failure to identify – *i.e.,* a witness looks at photographs and does not choose defendant, without any other helpful facts – is not exculpatory. *Mackabee,* 2011 WL 4975109 *7; *Johnson v. United States*, 544 A.2d 270, 275 (D.C. 1988); *but see United States v. Jernigan*, 492 F.3d 1050, 1056 (9th Cir. 2007) (noting fact that "victim teller in the October 11, 2000 robbery could not identify the woman who robbed her from the photo spread containing Jernigan" was exculpatory); *United States v. Waagner*, 104 Fed. Appx. 521, 525 (6th Cir. 2004) ("The outcome of the unsuccessful pretrial identification constituted *Brady* material"); *United States v. Collazo-Aponte*, 216 F.3d 163, 189 (1st Cir. 2000) (witness's failure to identify defendant in a photo array was *Brady* information that should have been disclosed pretrial), *judgment vacated on other grounds, Collazo-Aponte v. United States*, 532 U.S. 1036 (2001); D. Mass L. R. 116.2(B)(1)(f) (requiring pre-trial disclosure of "[a] written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue"). Thus,

counsel should be prepared to argue why a non-identification is significant based on the facts of defendant's case. Assuming that a witness had an adequate opportunity to view the perpetrator (a fair assumption if the police chose to expend the effort to conduct an id procedure with the witness), the defense should argue that a non-id of a defendant in an array is the equivalent to saying "that doesn't look like the perpetrator," which surely would be *Brady* if the witness said this out loud. See II.E.4 *infra*. Counsel should still request this information, however, because the Court of Appeals' statement on the issue is contradicted by the great weight of authority and itself lacked any explanation or analysis. It is likely that, when pressed, the Court of Appeals would come to a different conclusion in a properly preserved case because such evidence is clearly favorable to the defense.

4. **Any eyewitness's description of the perpetrator which differs from the defendant's appearance.** *Kyles*, 514 U.S. at 441-44 (*Brady* violated when prosecution failed to disclose eyewitness descriptions of perpetrator that were not consistent with defendant); *Mackabee*, 2011 WL 4975109 at *3 & n.11 (observing that Court was "at a loss to understand th[e] reasoning" of the prosecution that videotaped statement of witness who gave police "a physical description [of the shooter] that could not match Mr. Mackabee" "was not the kind of exculpatory information that we would immediately go around and turn over"); *id*. at *5 (acknowledging inconsistent description "was exculpatory"); *Miller*, 14 A.3d at 1109 ("There can be no doubt – and all members of the court agree – that the government had an obligation under *Brady* to disclose" information that shooter was left handed); *Curry*, 658 A.2d at 195, 197 (government conceded error when it failed to disclose until two days prior to trial statements of eyewitness whose description of the perpetrator was inconsistent with defendant); *see also White v. Helling*, 194 F.3d 937 (8th Cir. 1999) (*Brady* violation when prosecutor failed to disclose that witness had initially identified another person as performing key actions during the robbery); *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988) (*Brady* violated by failure to disclose that initial witness statement had indicated perpetrator was a different race than defendant).

5. **An eyewitness' initial inability to provide a description of the perpetrator.** *Smith v. Cain*, No. 10-8145, 2012 U.S. LEXIS 576 (evidence "plainly material" when only eyewitness, who had testified at the murder trial that he was sure of his identification, had told police the night of the murder and a few days later that he could not make an identification"); *Shelton*, 26 A.3d at 222-23 (government had an obligation to disclose pretrial that complainant, who positively identified defendant as the shooter at trial, initially told police "I don't know or I didn't see or all's I saw was a dark colored, someone shoot at me from a dark-colored car"); *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) (forceful condemnation of prosecutor's conduct, which was "beyond reprehension" for failing to disclose police report taken "eight days after the murder that [witness] did not see the assailant's face, that he saw only his silhouette, and that because of this circumstance viewing photographs would be useless," where witness testified at trial that "he did see Lindsey's face" and that he was sure on the night of the murder that he could identify the shooter).

6. **Any information that links someone other than the defendant to the crime.** *Miller*, 14 A.3d at 1109, 1112 ("There can be no doubt – and all members of the court agree –

that the government had an obligation under *Brady* to disclose" information that shooter was left handed in case where defense sought to show that government witness, who was left handed, was the actual perpetrator); *Jernigan*, 492 F.3d at 1053 (*Brady* violation where prosecution failed to "disclos[e] the existence of a phenotypically similar bank robber who had been robbing banks in the same area after Jernigan's incarceration"); *Trammell v. McKune*, 485 F.3d 546, 551-52 (10th Cir. 2007) (*Brady* violation where prosecution failed to disclose gas station receipts that supported defendant's trial theory linking another person to the crime); *Jamison v. Collins*, 291 F.3d 380, 389 (6th Cir. 2002) (*Brady* violated because prosecution failed to disclose "positive identification of different suspects by an eyewitness to the crime"); *DiLosa v. Cain*, 279 F.3d 259, 265 (5th Cir. 2002) (prosecution withheld foreign hair samples and evidence of another neighborhood break-in that supported defendant's assertion that two men robbed his house and killed his wife; this was particularly "unsettling" because the state had argued that the prosecution theory had to be credited in the absence of any evidence of a break-in – evidence it knew existed); *Mendez v. Artuz*, 303 F.3d 411, 412-13 (2d Cir. 2002) (prosecutors withheld evidence that contradicted their motive theory of the case and established that someone else had a motive); *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002) (state withheld evidence that another person had confessed to the crime); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997) (state withheld internal prison communication stating that another inmate had observed a different person commit the stabbing); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995) (state failed to disclose the evidence that suggested that two people previously arrested for the same murder had committed the crime); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801 (10th Cir. 1995) (Failure to disclose information indicating that uncharged third party had committed the offense); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (state withheld significant evidence of investigation into the guilt of another, which warranted reversal even though petitioner had chosen, without that exculpatory information, to plead not guilty by reason of insanity); *Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. Okla. 1986) (granting habeas relief because withheld evidence of a different suspect created a "reasonable doubt" and "in the hands of the defense, it could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders"); *cf. Winfield v. United States*, 676 A.2d 1, 4 (D.C. 1996) (evidence showing reasonable possibility of a third party perpetrator is relevant and admissible at trial).

7. **Any information that tends to support an affirmative defense**. *Mahler v. Kaylo*, 537 F.3d 494, 500-01 (5th Cir. 2008) (*Brady* violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (government withheld psychiatric report demonstrating that defendant may have a disorder, which could have made an insanity defense viable and otherwise changed defense strategy); *Finley v. Johnson*, 243 F.3d 215 (5th Cir. 2001) (prosecution withheld fact that there had been a restraining order placed against victim to protect his wife and child, which would have supported defendant's affirmative defense that he kidnapped victim in order to protect the victim's wife and child); *United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) (government withheld information that person defendant claimed coerced her was a known, prominent drug-trafficker and government target); USAM § 9-5.001.C.1 (requiring disclosure of information "that establishes a recognized affirmative defense").

8. **Any information that tends to cast doubt on the admissibility of the government's evidence.** *Gaither v. United States*, 759 A.2d 655, 663 (D.C. 2003) (remanding because motions court "ignored the *Brady* consequences" of allegations of use of suggestive identification procedures by the police); *mandate recalled and amended by* 816 A.2d 791 (D.C. 2003) (again directing remand); *Smith*, 666 A.2d at 1224-25 (information that could have undermined admission of statement as excited utterance "require[d] disclosure under *Brady*"); *James v. United States*, 580 A.2d 636 (D.C. 1990) (same); USAM § 9-5.001.C.2 (requiring disclosure of information that "might have a significant bearing on the admissibility of prosecution evidence"); *see also* D. MASS. L. R. 116.2(A)(2) (requiring disclosure of any information that "tends to . . . [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief").

9. **Any information that tends to support the defendant's pretrial constitutional motions or tends to show that defendant's constitutional rights were violated**. *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated where prosecution suppressed report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred—and thus, crucial to the admissibility of the confession).

10. **Any information that tends to diminish culpability and/or support lesser punishment**. *Cone v. Bell*, 129 S. Ct. 1769, 1783-86 (2009) (evidence that defendant "was impaired by his use of drugs around the time his crimes were committed" constituted *Brady* information; remand to assess its materiality as mitigation evidence in sentencing); *Brady*, 373 U.S. at 87 (requiring disclosure of information that is "favorable . . . and material . . . to . . . punishment"); *United States v. Quinn*, 537 F.Supp.2d 99 (D.D.C. 2008) (prosecution's plea deal with another target was *Brady* information where it showed sentencing disparity); *see also* D. MASS. L. R. 116.2(A)(4) (requiring disclosure of any information that "tends to . . . [d]iminish the degree of the defendant's culpability").

11. **Inconsistent statements by government witnesses regarding the facts of the crime or the alleged conduct of the defendant**. *Kyles*, 514 U.S. at 445 (*Brady* violated when prosecution failed to disclose multiple inconsistent statements by key witness); *see also id.* at 444 ("[T]he evolution over time of a given eyewitness's description can be fatal to his reliability"); *United States v. Kohring*, 637 F.3d 895, 906 (9th Cir. 2010) (reversing conviction for extortion and bribery where prosecution suppressed, *inter alia*, notes "that tend to show [prosecution witness] had difficulty remembering the details of key events," for example, the amounts of cash payments, or whether any payment was made at all on certain occasions.); *United States v. Quinn,* 537 F.Supp.2d 99, 109 (D.D.C. 2008) ("the government itself concedes that when it has information about a witness who it is planning to call in its case in chief that indicates the witness has lied to the government about material matters during the course of the investigation, that information is *Brady* material."); *Black v. United States*, 755 A.2d 1005 (D.C. 2000) (deceptive statements about the offense made by key witness made during a voice stress analyzer lie detector

test constituted favorable *Brady* information; remand to determine if suppressed statements were material); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (*Brady* violated when government suppressed inconsistent statement by key witness: his admission that his initial claim that robber had stuck a gun in his face was false); DAG Guidance Memo Step 1.B.7 (requiring review for potential disclosure of "[p]rior inconsistent statements" and "[s]tatements or reports reflecting witness statement variations"); *id*. at Step 1.B.8 (clarifying that "witness interviews should be memorialized," and that "agent and prosecutor notes" should be reviewed); *see also* D. Mass L. R. 116.2(B)(2)(b) (requiring disclosure of "[a]ny inconsistent statement . . . made orally or in writing by any witness whom the government anticipates calling in its case-in-chief").

12. **Statements by others that are inconsistent with statements of government witnesses regarding the facts of the crime or the alleged conduct of the defendant**. *Boyd v. United States*, 908 A.2d 39, 54-56 (D.C. 2006) (statements of witnesses who saw three rather than four persons present at the time of the abduction, contradicting government witness's account, constituted *Brady* information that should have been disclosed to the defense); *Sykes v. United States*, 897 A.2d 769, 778-79 (D.C. 2006) (grand jury testimony of two witnesses contradicting government informant's account of defendant's alleged confession constituted *Brady* information that should have been disclosed to the defense); *see also Norton v. Spencer*, 351 F.3d 1 (1st Cir. 2003) (*Brady* violated when prosecutor failed to disclose that a witness, who ultimately did not testify, claimed that he and the other witness had made up their stories of molestation at the suggestion of the other witness); *United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997) (*Brady* violation where government failed to disclose interview with individual who was not called as a witness at trial that undermined credibility of witness whose testimony was key to one of the counts of conviction); D. Mass L. R. 116.2(B)(2)(c) (requiring disclosure of "[a]ny statement . . . made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief").

13. **Any information that relates to the potential mental or physical impairment of any witness**. *Perez*, 968 A.2d at 65 (government should have disclosed pretrial key witness's statements to the grand jury that he was drunk at the time of the incident and had no memory of it); DAG Guidance Memo Step 1.B.7 (requiring review for disclosure of "[k]nown substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events."); *see also Silva v. Brown*, 416 F.3d 980, 984 (9th Cir. 2005) (failure to disclose deal that prosecution agreed with witness to prevent the witness from undergoing a psychiatric examination prior to testifying); *East v. Johnson*, 123 F.3d 235, 239-40 (5th Cir. 1997) (failure to disclose complete criminal record that would have led to information concerning serious mental health problems of key witness); *United States v. Smith*, 77 F.3d 511, 513-17 (D.C. Cir. 1996) (failure to disclose dismissal of state charges in exchange for federal testimony and mental health history of witness concerning depression); D. MASS. L. R. 116.2(B)(2)(a) &(g) (any information that "tends to. . . [c]ast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-

chief," including but not limited to "[i]nformation known to the government of any mental or physical impairment [or substance abuse] of any witness").

14. **Any information relating to potential witness bias, including:**

a. **Benefits received by a witness**. *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004) (*Brady* violation when government failed to disclose witness status as paid informant); *Giglio v. United States*, 405 U.S. 150 (1972) (*Brady* violation where government failed to disclose nonprosecution agreement with cooperating witness); DAG Guidance Memo, Step 1.B.7 (requiring disclosure of benefits to any testifying witness including but not limited to: "[d]ropped or reduced charges, [i]mmunity, [e]xpectations of . . . reduce[d] . . . sentence[s], [a]ssistance in. . . [other] criminal proceeding[s], [c]onsiderations regarding forfeiture of assets, [s]tays of deportation or other immigration status considerations, S-Visas, [m]onetary benefits, [n]on-prosecution agreements, [l]etters to other law enforcement officials (. . . [including] parole boards), setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf, [r]elocation assistance, [c]onsideration or benefits to. . . third parties"); *Lindsey v. United States*, 911 A.2d 824, 839 (D.C. 2006) (government made "substantially incomplete" *Brady* disclosures pretrial; "[e]ach of the eyewitnesses had been treated favorably by the government in exchange for their testimony by garnering plea agreements on other charges or being paid with federal witness vouchers, but impeachment evidence on three of the four eyewitnesses was not disclosed before trial and had to be supplemented by the government as the trial progressed"); *see also Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010) (Brady violation where prosecution failed to disclose details of informant's plea bargaining process – specifically, the fact that he independently negotiated a separate deal with the prosecution that was more favorable than the deal negotiated by his lawyer; information contradicted his representations of naiveté and indicated he was a sophisticated jailhouse informant); *Robinson v. Mills,* 592 F.3d 730, 738 (6th Cir. 2010) (*Brady* violation where prosecution suppressed evidence of "State's star witness" status as a confidential informant); *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (*Brady* violation where prosecution failed to disclose understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes; rejecting argument that there was no *Brady* violation in the absence of an express promise); D. MASS. L. R. 116.2(B)(1)(c) (requiring disclosure of information regarding "any promise, reward, or inducement . . . given to any witness whom the government anticipates calling in its case-in-chief").

b. **"Other known conditions that could affect the witness's bias such as: [a]nimosity toward defendant[,] [a]nimosity toward a group of which the defendant is a member or with which defendant is affiliated[,] [r]elationship with [the] victim[,] [k]nown but uncharged criminal conduct.**" DAG Guidance Memo, Step 1.B.7; *see also* D. Mass R. 116(B)(2)(d) (requiring disclosure of "[i]nformation reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief"); D. Mass. L. R. 116.2(B)(2)(e) (requiring disclosure of "[a] written description of any prosecutable...offense known by the government to

have been committed by any witness whom the government anticipates calling in its case-in-chief").

c. **Information that calls into question efforts to present the witness as neutral and disinterested**. *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (reversing conviction where prosecution failed to disclose that key witness to alleged extortion and bribery scheme was under investigation for sexual exploitation of minors which shed light on his incentive to cooperate with law enforcement); *Schledwitz v. United States*, 169 F.3d 1003, 1015-16 (6th Cir. 1999) (*Brady* violation when government presented witness as disinterested expert but witness had been actively involved in the criminal investigation).

d. **Impeachment information that officers or others had "fed" parts of a witness's story to the witness during questioning.** *See, e.g.*, *Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012) (reversing conviction and death sentence and emphasizing "momentous" nature of *Brady* violation when officers not only told the witness that he could avoid the death penalty by implicating the person who allegedly hired him, but also mentioned to the witness that officers thought Justin Wolfe was involved, thereby potentially feeding the witness the person the witness was supposed to inculpate). **This phenomenon is common, and often subtle, and it should lead to specific questions by defense counsel about the ways in which witnesses were questioned to determine whether and when specific facts were introduced by officers into the conversation.**

15. **Any information related to a witness' dishonesty and/or criminality.**

a. **Acts of a witness that are probative of untruthfulness**. *United States v. Cuffie*, 80 F.3d 514, 515 (D.C. Cir. 1996) (prosecution violated its Brady obligations where it failed to disclose fact of key witness's perjury in a Superior Court proceeding to expunge the arrest record of his cousin); *United States v. Quinn,* 537 F.Supp.2d 99, 109 (D.D.C. 2008) (government conceded and court held that when the prosecution "has information about a witness who it is planning to call in its case in chief that indicates the witness has lied to the government about material matters during the course of the investigation, that information is *Brady* material")[16]; *Bennett v. United States*, 797 A.2d 1251, 1255-58 (D.C. 2002) (*Brady* violation because government suppressed information that key witness had lied to the police or the grand jury about an unrelated murder); DAG Guidance Memo, Step 1.B.7 (requiring review for

[16] In *Quinn*, the court rejected the government's argument that **"**nothing was suppressed at Quinn's trial or sentencing because it did not know with absolute certainty at that time that Tatum had lied." *Quinn*, 537 F.Supp.2d at 109. The court observed that "[t]he government's strained dichotomy between 'knowing' and being 'highly suspicious' constitutes no excuse here since the failure to pinpoint a precise statement that would support a false statement charge was due to the lack of timely investigation by the government—an action that 'constituted a breach of the government's duty to search for *Brady* information.'" *Id.* at 110.

potential disclosure "[p]rior acts under Fed. R. Evid. 608"); *see also Benn v. Lambert*, 283 F.3d 1040, 1055 (9th Cir. 2002) (*Brady* violation for failing to disclose prior acts of theft and lying by government witness and citing cases noting that such failures are material even if separate impeachment evidence concerning such a witness is disclosed).

b. **A copy of any criminal record of any witness, including witness's prison records and probation records, as well as a written description of any criminal cases pending against any witness.** *Lewis v. United States*, 408 A.2d 303 (D.C. 1978) (setting up prophylactic rule concerning disclosure of criminal histories of prosecution witnesses); DAG Guidance Memo, Step 1.B.7 (requiring review for potential disclosure of "[p]rior convictions under Fed. R. Evid. 609"); *see also* D. Mass. L. R. 116(B)(1)(d); D. Mass. L. R. 116(B)(1)(e)

c. **Any information concerning a law enforcement officer's misconduct and/or abuse of authority:** *Cf. Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (complaint regarding police officer to Civilian Complaint Review Board could be *Brady* information, observing complaint procedures require officer to be notified of complaint against him and his actual knowledge could be imputed to prosecution team, and remanding to determine if suppression of complaint in this case violated *Brady*); *Bullock v. United States*, 709 A.2d 87, 93 (D.C. 1998) (inviting defendant to file §23-110 to litigate whether suppression of pending internal investigation of law enforcement officer violated *Brady*); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (prosecutor must search internal police files for possible impeachment information about officers important to the case); *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) (*Brady* violation when prosecutor withheld investigation into officer's sleeping on the job, role in thefts from police, and other nefarious firearms transactions because his credibility was key to suppression hearing on *Miranda*); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (requiring review of Postal Officer's personnel file for impeachment evidence when he was prosecution's key witness); International Association of Chiefs of Police ("IACP") Model *Brady* Policy IV.B.1.l (recommending disclosure of "[a]n officer's excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer.").[17]

III. WHERE MUST THE GOVERNMENT LOOK FOR FAVORABLE INFORMATION?

A. It is the trial prosecutor's duty to learn of *Brady* information: A prosecutor's *Brady* disclosure obligation is not limited to information of which a prosecutor has actual knowledge; rather, a prosecutor has a nondelegable "duty to learn of" *Brady* information in the case. *Kyles*, 514 U.S. at 437.

1. The argument that a trial prosecutor's duty of disclosure to favorable information is limited to that which he/she has actual knowledge of has been rejected because

[17] Metropolitan Police Department Chief Cathy Lanier is a member of the IACP. http://www.dcwatch.com/mayor/061120.htm.

a. It would not serve the fairness goals of the *Brady* mandate, *see Brooks*, 966 F.2d at 1503 ("an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure"); *Barbee v. Maryland*, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's attorney, were guilty of the nondisclosure" and "[f]ailure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld.").

b. It would create a perverse incentive for a prosecutor to shield him/herself from *Brady* information in the case. *Brooks*, 966 F.2d at 1502.

2. It is illegitimate for a prosecutor to assert pretrial that it may withhold *Brady* information because the defense should be able to learn of this favorable information through other means.

a. In *Strickler*, 527 U.S. at 283 n.23, 284, the Supreme Court rejected the argument that defense counsel should have uncovered *Brady* information, stating that counsel was entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor's constitutional duty of disclosure. Likewise, in *Banks*, 540 U.S. at 695-698, the Court declared that "[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

b. In *In Re Sealed Case (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999), the D.C. Circuit rejected the government's argument that *Brady* was not violated because defense counsel could have learned of details of cooperation agreements with witness through "reasonable pre-trial preparation." That the witness had been called to testify for the defense was "irrelevant." Defense was entitled to obtain information about deals directly from the government and defense counsel "was no more required to subpoena the [police] officers to learn of their agreements [with the witness] than she was to subpoena the prosecutor to learn of her [agreements with the witness]. The appropriate way for counsel to obtain such information was to make a *Brady* request of the prosecutor, just as she did." Other federal courts around the country have likewise held that the government's disclosure obligations are independent of what the defendant or even a defendant's witness may know or remember. *See, e.g., Gantt v. Roe*, 389 F.3d 908, 913 (9th Cir. 2004); *Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995); *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001).

B. It is the prosecutor's duty to learn of *Brady* information in the possession of the entire "Prosecution Team":

1. **A prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in a case," *Kyles*, 514 U.S. at 437,** aka "the prosecution team." DAG Guidance Memo, Step 1.A; *Brooks*, 966 F.2d at 1503 (duty

to search for *Brady* extends to "branches of government closely aligned with the prosecution") (internal quotations and citation omitted); *United States v. Bryant,* 439 F.2d 642, 650 (1971) ("The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies."); *see also Cook v. United States,* 828 A.2d 194, 202 (D.C. 2003) (quoting *Bryant*); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) ("If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do."); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (imputing knowledge of FDA to federal prosecutors because FDA was agency that administered the statute and had consulted with the prosecutor at times during prosecution); *United States v. Kattar*, 840 F.2d 118,127 (1st Cir. 1988) ("The Justice Department's various offices ordinarily should be treated as an entity, the left hand of which is presumed to know what the right hand is doing."); *United States v. Barkett*, 530 F.2d 189 (8th Cir. 1976) ("[O]ne office within a single federal agency must know what another office of the same agency is doing. This is no more than to hold the Government to the same standard of conduct as governs private individuals in transmitting notice from agent to principal."); *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (imputing knowledge of witness protection team and of the attorney general's department to the prosecutor).

2. **The prosecution team:**

   a. **Necessarily encompasses the MPD**, "[g]iven the close working relationship between the Washington Metropolitan Police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts)." *Brooks*, 966 F.2d at 1503; *see also Kyles*, 514 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police"); *In re Sealed Case* (*Brady* Obligations), 185 F.3d 887, 892, (D.C. Cir. 1999) (quoting *Kyles*); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) ("pursuant to *Kyles,* the government is responsible for knowing what the police know").

   b. **May extend beyond police officers working directly on the defendant's case**. *Brooks*, 966 F.2d at 1503 (in drug case where prosecution's chief witness (a police officer) was subsequently shot and there was "some link between the death and her work, and thus (by extension) to some trouble connected with her work," duty to search extended to homicide and Internal Affairs Division files); *see also Robinson v. United States*, 825 A.2d 318, 314 (D.C. 2003) (citing *Brooks* and acknowledging "the *Brady* doctrine requiring disclosure of exculpatory information has been extended to situations where a division of the police department not involved in a case has information that could easily be found by the prosecutors if they sought it out") (internal quotations and citation omitted).

   c. **Includes other prosecutors and their agents**. *In re Sealed Case (Brady Violations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (imputing knowledge to prosecutors in Superior Court and federal court, as well as to MPD, FBI, DEA, or any other agency operating

on behalf of the same government); *Smith v. Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) (*Brady* "encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture") (internal citation omitted).

d. **May extend across state-federal jurisdictional boundaries**. *United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (imputing knowledge in state hands to federal prosecutors because of degree of cooperation and interaction among the various authorities during the general course of the investigation); *United States v. Naegele*, 468 F.Supp.2d 150, 154 (D.D.C. 2007) (in case where defendant was charged with making false statements in a bankruptcy proceeding, government had an obligation under *Brady* to search the files of the main office of the Region 4 [U.S.] Trustee in Columbia, South Carolina). A general test is set forth in *United States v. Risha*, 445 F.3d 298, 303-06 (3d Cir. 2006): "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence.

3. The prosecutor's "duty to learn" of favorable information in possession of the prosecution team extends to information that has not been memorialized.

a. *Brady* is not a rule of discovery, see II.D.2. *supra,* and thus is not limited to a review and production of pre-existing documents. As the government's own policy states, "material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email." DAG Guidance Memo, Step I.B.5; *see also id.* at Step 1.B.8.b (noting that prosecutor's "[t]rial preparation meetings with witnesses generally need not be memorialized" but that prosecutors " should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session" and that such information may be subject to disclosure).

b. Thus, as the government's own policy acknowledges, the "duty to learn" encompasses the duty to speak to members of the prosecution team to become aware of previously undocumented favorable information. DAG Guidance Memo, Step 1.B.6 ("Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues. . . ."); *see also id.* (requiring prosecutors to review "case-related communications" which "*may be* memorialized in emails, memoranda, or notes") (emphasis added); *Cf. Benton v. United States*, 815 A.2d 371 (D.C. 2003) (declining to endorse government argument that police officer's perjury was not disclosable under *Brady* because it was known only to the officer himself).

NOTE: The government's policy is that all witness interviews *should be* memorialized:

> Witness interviews should be memorialized by the agent. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement.

DAG Guidance Memo, Step 1.B.8.

4. **The prosecutor's constitutional "duty to learn" of favorable information extends to documents that are otherwise privileged or protected from disclosure by statute or court rules.**[18]

   a. **The prosecution has a duty to review documents that are otherwise privileged or protected from disclosure by statute or court rule.** *United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2010 ("prosecution ha[d] a duty to disclose the non-cumulative underlying exculpatory facts in the [prosecutor's] email") (internal quotations and citation omitted); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995) (*Brady* violation when government failed to disclose IRS filing information for people, even though protected by statute, because those people's prior false returns could have helped defendant show that the new falsities were not his doing, but rather, a continuation of their prior improper conduct); *Hammon v. United States*, 695 A.2d 97, 105 (D.C. 1997) (acknowledging that "under certain circumstances, records in confidential juvenile case files are subject to *Brady* disclosure" & citing cases); *Cf. Pennsylvania v. Ritchie,* 480 U.S. 39 (1987) (relying on *Brady* cases, Court holds defendant's due process entitlement to favorable material documents potentially extended to documents in statutorily-protected Children and Youth Services file and affirming remand for in camera review); *United States v. Williams Companies, Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (acknowledging that *Brady* "contemplates a role" for the trial court vis-à-vis disclosures of privileged information, and directing that "[u]pon remand the district court can flesh out the details as to which documents must be disclosed . . . and determine whether a protective order should be issued with respect to any of those documents").

   b. **This includes factual information in the prosecutor's notes.** *Kohring*, 637 F.3d at 908; *United States v. NYNEX Corp.,* 781 F. Supp. 19, 25 (D.D.C. 1991) (noting that case law "suggest[s] that internal materials possibly constituting work product may not automatically be exempt from *Brady* requirements"); *see also* DAG Guidance Memo, Step 1.B.1 (requiring review of an investigative agency's files and noting that if favorable "information is contained in a document that the agency deems to be an 'internal' document . . . it may not be necessary to produce the internal document,

[18] Similarly, privilege or statutory restrictions on disclosure are not a legitimate basis for withholding *Brady* information from the defense. See V.D. *infra*.

but it will be necessary to produce all of the discoverable information contained in it"); DAG Guidance Memo, Step 1.B.5 (requiring review of "[s]ubstantive communications" between prosecutors and agents, including "factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility").

c. **Privilege or statutory restrictions on disclosure are not a legitimate basis for disregarding *Brady* disclosure obligations**. Rather, where *Brady* compels disclosure, a prosecutor may seek court permission and/or a protective order from the court to limit disclosure of this information. *United States v. Williams Companies, Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (acknowledging that *Brady* "contemplates a role" for the trial court vis-à-vis disclosures of privileged information, and directing that "[u]pon remand the district court can flesh out the details as to which documents must be disclosed . . . and determine whether a protective order should be issued with respect to any of those documents"); *see also Boyd*, 908 A.2d at 61 (generally affirming trial courts' oversight power over *Brady* disclosures); DAG Guidance Memo Step 3.A. (noting that when "considerations [militating against disclosure] conflict with the[ir] discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures").

C. Pursuant to the government's *own policy*, specific documents federal prosecutors should examine include:

1. "[T]he investigative agency's files," including any emails/electronic documents. DAG Guidance Memo, Step 1.B.1.

2. All files relating to a "confidential informant," "not just the portion relating to the current case," "including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information." *Id.* at Step 1.B.2.

3. All "[e]vidence and [i]nformation [g]athered [d]uring the [i]nvestigation," including but not limited to anything obtained during searches or via subpoenas. *Id*. at Step 1.B.3

4. All "[s]ubstantive [c]ase-[r]elated [c]ommunications" including communications "1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims." *Id.* at Step 1.B.5.

   NOTE: In April 2011 the USAO acknowledged that it had failed to disclose recordings of radio communications in a number of cases because it thought the radio channels used (which it described as "tactical radio communications") were not recorded. Be advised that it is PDS's understanding that the Office of Unified Communications currently records ALL radio communications.

5. Any "[p]otential *Giglio* [i]nformation [r]elating to [l]aw [e]nforcement [w]itnesses." Step 1.B.6; *see also* USAM § 9-5.100.1 (requiring "[e]ach investigative agency employee

. . . to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case" but noting that "in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency"). This includes:

> "(a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;" USAM § 9-5.100.5
>
> "(b) any past or pending criminal charge brought against the employee; and," *id.*
>
> "(c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation." *Id*.

6. Any "[p]otential *Giglio* [i]nformation [r]elating to [n]on-[l]aw [e]nforcement [w]itnesses" or declarants of hearsay admitted into evidence, including "[p]rior inconsistent statements," "[s]tatement variations," "benefits provided to witnesses," "[o]ther known conditions that could affect the witness's bias," prior bad acts, prior convictions, and "[k]nown substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events." Step 1.B.7

7. Any "[i]nformation [o]btained in [w]itness [i]nterviews," or "[t]rial [p]reparation [m]eetings" with witnesses. DAG Guidance Memo, Step 1.B. 8. "Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed." *Id.* "Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview." *Id.; see also United States v. Triumph Capital Group, Inc*., 544 F.3d 149, 165 (2d Cir. 2008) (reversing conviction where prosecution failed to disclose agent's notes from cooperating witness's proffer session containing information favorable to defendant).

IV. HOW MUST PROSECUTORS ASSESS MATERIALITY PRE-TRIAL?

A. Distinguishing pre-trial from appellate/post-conviction assessments of materiality

1. To prevail on a *Brady* claim on appeal or in post-conviction proceedings, a defendant must establish that (a) the prosecution was in possession (actual or constructive) of favorable information, (b) the prosecution failed to disclose this information to the defense in a timely fashion or at all, and (c) the withheld favorable information was material to the outcome of the trial. *Strickler*, 527 U.S. at 281-82. The notion of "materiality" is the attempt by courts to quantify the importance of withheld information or, put another way, the prejudice to the defense at trial from the suppression or delayed disclosure of this information. *Bagley*, 473 U.S. at 682 (*Brady* information is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different."). This means, therefore, whether there is a reasonable chance that one juror might have had a reasonable doubt. United States v. Agurs, 427 U.S. 97, 112 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.").

2. The pretrial materiality calculus presents distinct challenges and considerations.

   a. Pretrial, it is difficult if not impossible to say what the importance of any one piece of withheld favorable information is to the outcome of a trial—because the trial has yet to occur.

   b. Pretrial, the prosecution's focus should be to ensure that the due process guarantee is fulfilled—not to conduct speculative, ex ante assessments of prejudice if certain information is strategically withheld.

3. Accordingly, the Supreme Court and the D.C. Court of Appeals have recognized that the pre-trial materiality assessment differs from—and encompasses more information than[19] – the materiality assessment made on appellate review or in post-conviction proceedings. *See* IV.B *infra*.

B. The Pretrial Materiality Standard in D.C.: Prosecutors must disclose all "arguably material" favorable information.

1. **The pretrial materiality analysis is more inclusive**: Both the Supreme Court and the Court of Appeals have recognized that the prosecution's "duty of disclosure" pretrial under *Brady* is "broad," *Strickler*, 527 U.S. at 281, and "exists even when the items disclosed later prove not to be material" on appeal. *Boyd*, 908 A.2d at 60. In *Boyd*, the Court of Appeals explained:

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[19] Even if a trial court erroneously determines that it should apply the post-conviction materiality standard pretrial, counsel should be prepared to educate the court that this standard is itself not a high one. It merely requires the defense to show that, had the *Brady* information been timely disclosed, there is a "reasonable probability" that the jury would have reached a different result – *i.e.,* a reasonable probability that the jury would have had reasonable doubt as to defendant's guilt. A reasonable probability *does not* mean more likely than not. *Kyles,* 514 U.S. at 434. As the Supreme Court explained in *Kyles*:

> *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting *Bagley,* 473 U.S. at 678); *id.* at 543 (the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same).

> the Supreme Court in *Strickler* contemplated the existence of a broad "duty of disclosure," but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. The Court thus recognized that *a duty of disclosure exists even when the items disclosed later prove not to be material.*

Id. (emphasis added); *accord Miller*, 14 A.3d at 1109 ("[A]s we explained in *Boyd,* [and as] the Supreme Court recognized in *Strickler,* . . . there is a duty of disclosure even when the items disclosed subsequently prove not to be material. . . . We further stated in *Boyd* that the language in *Strickler* "can fairly be read only as recognizing that a duty of disclosure exists even if it later appears that reversal is not required.")[20]

2. **The broader interpretation of materiality pretrial requires prosecutors:**

   a. To "make the materiality determination . . . with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense" and

   b. "[I]n arguable cases, . . . to provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for in camera inspection."

Boyd, 908 A.2d at 61; *see also Cone v. Bell*, 129 S. Ct. 1769, 1783 at n.15 (2009) (prosecutors must "resolv[e] doubtful questions in favor of disclosure"); *Kyles*, 514 U.S. at 439-40 (same).

This broad interpretation of materiality takes into account the reality, acknowledged by the Court of Appeals over thirty years ago in *Lewis v. United States,* 408 A.2d 303, (D.C. 1979), that

> a defendant's actual use of [*Brady* information] at trial before the jury decides is a better test of materiality than a retrospective inquiry by an appellate court. . . . It follows, in the words of [*United States v. Agurs*, 427 U.S. 97, 106 (1976)] that a defendant is entitled to disclosure because "a substantial basis for claiming materiality exists…." In short, the defendant, not the post-trial reviewing court, should have control over materiality to outcome.

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[20] The Supreme Court justices appear to understand the requirement in similar terms. After a number of justices made similar points, Justice Kennedy summed up his understanding of *Brady* during the oral arguments in the Supreme Court's most recent *Brady* decision: "I think you mis-spoke when you . . . were asked what is the test for when *Brady* material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." Transcript of Oral Argument at 49, *Smith v. Cain*, 132S.Ct. 627(2012)(No. 10-8145), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf.

Id. at 308.

3. The broader interpretation of materiality pretrial is consistent with the government's own policy.

a. The government's own policy acknowledges "that it is sometimes difficult to assess the materiality of evidence before trial," and thus directs that "prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM § 9-5.001.B.1.

b. Pursuant to the government's policy, prosecutors "must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001.C.1.

c. Pursuant to the government's policy, prosecutors "must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001.C.2.

d. The government's policy acknowledges that "items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in [USAM § 9-5.001.C.1 & 2], [but that] several items together can have such an effect. If this is the case, all such items must be disclosed." USAM § 9-5.001.C.4.

4. The broader interpretation of materiality pretrial does not, as of now, dispense with the materiality inquiry entirely.

a. The same considerations (*see* IV.A *supra*) that have led the Court of Appeals to acknowledge a broader interpretation of materiality pretrial, have led other courts to dispense with the materiality inquiry entirely pretrial. For example, in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005), the Court held that "the only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial. *See also United States v. Carter*, 313 F. Supp. 2d 921 (E.D. Wisc. 2004) (rejecting pretrial materiality analysis); *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999) (same).

b. At least for the time being, the Court of Appeals has rejected this approach. In *Boyd*, the Court of Appeals stated that it "would be inclined to follow *Safavian* if we considered ourselves to be at liberty to do so. We believe, however, that the opinion in *Safavian* cannot be reconciled with *Agurs, Bagley*, and *Kyles.* Indeed,

the reasoning in *Safavian* parallels and expands upon that of Justice Marshall's *dissenting* opinion in *Bagley.*" 908 A.2d at 61 n.32.

NOTE: Despite its omission of any mention of materiality, D.C. R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor cannot be cited as imposing an obligation on prosecutors to make disclosures of favorable information regardless of materiality. The rule states that the prosecution has an obligation "to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, *any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense*." *Id.* (emphasis added). A comment to this rule, however, states that the rule is not intended to increase the prosecutor's obligations beyond those required by the constitution, statute, or local court rules. Comment[1] to Rule 3.8. (No such limitation is imposed on the corresponding ABA rule.)

C. Trial courts have the power and the obligation pretrial to ensure that the government is broadly interpreting the materiality component of the *Brady* analysis.

1. The Court of Appeals in *Boyd* affirmed the trial court's authority and obligation to oversee *Brady* disclosures and to ensure that the government is properly assessing materiality pretrial: "**[T]he trial court must take into account the reality that the prosecutor has no crystal ball, and must review the exercise of prosecutorial discretion accordingly."** *Boyd*, 908 A.2d at 61; *see also id*. at 59 (regarding *Brady* disclosures, prosecutorial "discretion is not unlimited, and courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial").

   a. *United States v. Edwards*, 887 F. Supp. 2d 63 (D.D.C. 2012) (Kollar-Kotelly, J.), recently applied these principles. Taking a broad view of pretrial materiality because "neither the Government nor the Court is in a position **to conclusively determine** at this stage" whether the information "**will not be favorable** to the Defendant in preparing his defense," *id.* at *5-7, the District Court ordered the government to produce any information concerning "the purported failure of one or more co-conspirators to name Williams as a member of the conspiracy."

2. One means for the trial court to exercise its oversight over the prosecution's materiality assessments is to review documents *in camera*.

   a. "In arguable cases" the prosecution is supposed to "provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection." *Boyd*, 908 A.2d at 61.

   b. But even when the prosecution does not request it, "when the issue appears to be a close one," the court "*should insist upon reviewing*" arguable *Brady* information

      and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure

> may affect the outcome. All such rulings must be made in full recognition of the reality that *Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation, and that compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system.
>
> *Boyd*, 908 A.2d at 61 (emphasis added; internal quotations and citation omitted); *see also Smith v. United States*, 665 A.2d 962, 969 (D.C. 2008) (abuse of discretion for court to refuse to review a transcript in camera where prosecution conceded there were "'minor inconsistencies in the testimony as to how the shooting happened'[;] [a]t that point it was incumbent on the trial court to review the transcript and determine whether the inconsistencies were indeed 'minor' or whether they were material to appellant's guilt or innocence. Without knowledge of what those inconsistencies were, the court was not in a position to make an informed decision 'relevant to the exercise of its discretion.'") (internal quotations and citations omitted).

3. Another option short of *in camera* review is for the trial court to order the prosecution to file a nonmateriality log (akin to a privilege log in civil litigation) that lists all the information that the government has identified as favorable to the defense but nonetheless decided to withhold on the grounds that it is not arguably material.

   a. There is some precedent for this in Superior Court. For example, in *United States v. Ralph Price,* 2008 CF1 18280 (Weisberg, J.), the government filed *ex parte* a document (later disclosed to the defense by the court) in which it detailed "things that the government has and has not turned over to the defense and reasons for each," so that the trial court could assess whether the government had satisfied its disclosure obligations under *Brady*. Tr. 3 (9/14/09).

   b. In other jurisdictions prosecutors are required to file declination notices when they decide to withhold discovery and *Brady* information. For example, in the District of Massachusetts, if either the government or a defendant determines that disclosures "required by the Local Rules" (which includes disclosures of *Brady* information[21]) "would be detrimental to the interests of justice," they must file a declination notice "before or at the time that disclosure is due." D. MASS. L. R. 116.6(a). The party withholding information has the option of either "advis[ing]" the opposing party "in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining," or "fil[ing] its submissions in support of declination under seal . . . for the Court's in camera consideration." *Id.* The government is required to follow similar declination procedures in other jurisdictions when it opts not to disclose *Brady* information. [22]

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[21] D. MASS. L. R. 116.2; s*ee also United States v Jones*, 620 F.Supp.2d 163, 170 (D. Mass. 2009) (noting that "[t]he government is required to provide . . . exculpatory information automatically . . . unless a declination procedure is invoked or an *ex parte* protective order is obtained.").

[22] *United States v. Thomas*, 2006 WL 3095956 *1-2 (D.N.J. 2006) (court ordered the government to disclose, *inter alia*, *Brady* information, and to "advise[]" defense counsel "in writing of the

D. What the defense can do to establish materiality pretrial.

In order for the defense to obtain favorable information from the prosecution, the prosecution – or if court intervention is sought, the trial court – must conclude that the information is at least arguably material, see IV.B *supra*. The defense may need to persuade the government or a court that this is the case. Similarly, if the government belatedly discloses favorable information on the eve of trial, the defense will have to establish that the withheld favorable information is material and that the delay in its production was prejudicial in order to obtain a remedy for the belated disclosure. See V.E *infra*.

1. Actions the defense should take.

a. Make *Brady* requests with as much specificity as possible.

1) Although the defense has no obligation to request *Brady* information, *see* II.E. *supra*, defense counsel should, to the best of his/her ability make specific requests in writing – and should update *Brady* letters/emails as the defense investigation progresses.

2) Requests put the prosecution on notice as to what to look for and show that this information is important to the defense – almost by definition a demonstration of materiality. *See Zanders***,** 999 A.2d at 163-64 ("It should by now be clear that in making judgments about whether to disclose potentially exculpatory information, the guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel… It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder."); *Boyd*, 908 A.2d at 57 (holding that materiality determinations should be made "with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense").

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declination," within 5 days of the discovery conference); W.D. TEX. L. Crim. R. 16-1 (requiring parties to file a "disclosure agreement checklist" which includes lines for "exculpatory material" and "impeachment material"; the government may indicate it has been "disclosed," that it "will disclose upon receipt," "that it refuses to disclose" or that this is "not applicable"); N.D. W.VA. L. Crim. R. 16.02 ("A declination of any requested disclosure shall be in writing, set forth specific reasons therefore, directed to defendant's counsel, and signed personally by the United States Attorney or the Assistant United States Attorney assigned to the case, and shall specify the specific types of disclosures that are declined"); *id.* 16.05 & 16.06 (requiring disclosure of *Brady* and *Giglio* information); N.M. R. Crim. P. 5-501 (requiring disclosure, *inter alia*, of any favorable material information and also requiring the prosecutor to "file with the clerk of the court" at least 10 days prior to trial "a certificate stating that all information required to be produced has been produced, except as specified").

3) Counsel can use the prosecutor's responses (or failures to respond) in any pleadings/argument to the trial court, see IV.D.2.C. *infra*.

4) Specific requests may demonstrate that any subsequent failure by a trial court to conduct an *in camera* review was an abuse of discretion. *See Smith v. United States*, 665 A.2d 962 (D.C. 2008).

b. **Ask for judicial assistance early and often.**

1) The defense should file its *Brady* letters and any responses from the prosecution with the court.

2) The defense should move to compel production of favorable information that it has a good faith belief is in the prosecution's actual or constructive possession and should be prepared to make a fact-specific showing (*ex parte* if necessary) why this information might be favorable to the defense in the investigation or preparation of the defense case.

3) The defense should request *in camera* review of favorable information that the government refuses to disclose.

2. Arguments the defense should be prepared to make (if applicable).

a. The materiality of the favorable information should be "considered collectively, not item by item." ***Kyles*****, 514 U.S at 436;** *see also Boyd*, 908 A.2d at 61 (quoting *Kyles*).

1. In *Kyles*, the Supreme Court explained that favorable information should not be considered in isolation.

2. Even if a single piece of favorable information on its own may be deemed immaterial, the combination of two or more pieces of favorable information may be arguably material such that disclosure is constitutionally required. *Id.* at 437 (prosecution has responsibility to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").

b. The favorable information is material because it generally undermines the quality of the prosecution's investigation.

1) In addition to explaining why the favorable information is important vis-à-vis the prosecution's theory of the case or the defense's theory of the defense, counsel may want to argue that the information could help the defense attack the quality of the investigation in the case.

2) The Supreme Court endorsed such an argument in *Kyles*, 514 U.S. at 445 (suppressed information was material because "it would have raised opportunities to attack not only the probative value of crucial physical

evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well"); *see also id.* at 446 n.15 ("indications of conscientious police work will enhance probative force [of the prosecution's evidence] and slovenly work will diminish it").

3) *See also Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) ("The defendant could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation. … Presented with detailed information about a contract murder plot and no indication that Mendez was involved or even associated with the participants, the police essentially did nothing."); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (finding *Brady* information would have enabled trial counsel to raise serious questions concerning the "manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial"); *Workman v. Commonwealth*, 272 Va. 633, 646 (Va. 2006) (*Brady* material may have been inadmissible hearsay, but it was admissible in order to "discredit the police investigation.").

c. The government's "no *Brady*" response or silence misled/harmed the defense. As the Supreme Court in *Bagley* specifically acknowledged,

> the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

Bagley, 473 at 682-83.

d. The government's statements/actions demonstrate that the information is material (or that the court cannot defer to the government's materiality determinations).

1) Use failures to respond to *Brady* requests as evidence that the government is ignoring/not taking its *Brady* disclosure obligations seriously and their pretrial materiality calculations must be scrutinized. *Agurs*, 427 U.S. at 106 ("When the prosecutor receives a specific and relevant [*Brady*] request, the failure to make any response is seldom, if ever, excusable.").

2) Use "no *Brady*" responses coupled with subsequent *Brady* disclosures, as evidence that the government is not carefully reviewing the information in its possession – again demonstrating a need for scrutiny by the court – and/or evidence that information that the government is trying to hide is material. *See Silva v. Brown*, 416 F.3d 980, 990 (9th Cir. 2005) (prosecution's efforts to suppress *Brady* demonstrates its materiality: noting with respect to a secret deal with a witness, "Presumably, the importance to the State's case of [the

witness] James's testimony is what initially led the prosecution to make the secret deal; likewise, the importance to James's credibility of his false testimony regarding the absence of a deal is what led the prosecution to endeavor to keep that deal secret.") (internal quotations and citation omitted).

3) To the extent the prosecutor acknowledges that information may be *Brady* but that defense is not entitled to it *yet,* use this response to show that the government is concerned that the defense may effectively use it if given time, thereby acknowledging materiality. See V *infra* (discussing timing of disclosures and why the government should not be permitted to strategically delay disclosure).

3. Arguments the defense should be prepared to rebut.

a. The favorable information is not material because the prosecution deems it not to be credible.

1) The Court of Appeals has held that "[*i*]*t is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder*." *Zanders v. United States*, 999 A.2d 149, 1664 (D.C. 2010) (emphasis added); *Smith v. Cain*, 132 S. Ct. 627 (U.S. 2012) (rejecting arguments that speculated on ways in which the jury "could" have discounted the undisclosed

2) Other jurisdictions have similarly rejected the prosecution's attempt to usurp the jury's function of weighing the evidence and assessing credibility. *See, e.g., Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible, especially where-as here-they were in the nature of an admission against the state's interest in prosecuting Lindsey. On such grounds as these, prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting *Brady* at nought. Such an explanation is laughable, offering it an effrontery. It does not wash, nor do we believe for a moment that the prosecutor could have been so simple-minded as to have believed it would.").

b. The favorable information is not material because it is cumulative.

1) Emphasize how the sought-after information is of a different nature than what the defense already has or that it comes from a source that is neutral or not subject to the same impeachment. *E.g.*, *Boss v. Pierce*, 263 F.3d 734, 744-46 (7th Cir. 2001) (when either of those two factors present, case for materiality is very strong); *see also United States v. Boyd*, 55 F.3d 239, 244-46 (7th Cir. 1995) (The receipt by government prisoner witnesses of "a continuous stream of unlawful, indeed scandalous, favors from staff at the U.S. Attorney's office" – including allowing witnesses to meet with visitors with virtually no

supervision at the U.S. Attorney's office at which time witnesses obtained drugs from and had sex with visitors – was material and not cumulative of other impeachment information where witnesses "claimed to have 'seen the light' when, having been arrested and sentenced or threatened with severe punishment for their activities . . . , they had decided to cooperate with the government.").

2) If the sought-after information might strengthen evidence the defense already has, emphasize that it is often precisely the accumulation of evidence that leads to persuasion. *See United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) (the fact that a witness was impeached does not render additional impeachment information immaterial, particularly if that new information is impeachment evidence of a different kind).

c. The favorable information is not material because it is inadmissible.

The disclosure obligation under *Brady* extends to information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. *See* Point II.D. *supra*.

V. WHEN MUST THE PROSECUTION DISCLOSE *BRADY* INFORMATION?

A. The government has an obligation to provide "timely, pretrial disclosure," *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009); and timeliness is assessed from the perspective of the defense's ability to meaningfully use the information. *Id.*; *Miller*, 14 A.3d 1094, 1111 (D.C. 2011).

1. In *Perez*,

a. The Court of Appeals noted that it had been "repeatedly confronted with complaints of tardy disclosure of exculpatory material," *Perez*, 968 A.2d at 65, and clarified that at-trial disclosure of *Brady* information is presumptively untimely:

> **This Court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under *Brady*,** or that if such disclosure is made, the burden may then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.

Id. at 66 (emphasis added) (internal quotation and citation omitted).

b. The Court explained that "timely, *pretrial* disclosure," *id.* (emphasis added), is necessary because:

> **the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity**

to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.

Id. at 66 (emphasis added).

c. *Perez* is in line with earlier decisions acknowledging that *Brady* information must be disclosed "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *Lindsey v. United* States, 911 A.2d 824, 838 (D.C. 2006) (quoting *Curry v. United States,* 658 A.2d 193, 197 (D.C. 1995) (quoting *Edelen v. United States,* 627 A.2d 968, 970 (D.C. 1993)). But *Perez* is ground-breaking in its explicit recognition that to permit meaningful use, the defense must have *Brady* information pretrial.

1) Subsequent to *Perez*, the Court of Appeals in *Zanders*, 999 A.2d 149 (D.C. 2010), affirmed the obligation of timely, pretrial disclosure.

a) The Court specifically noted that **the defense must have "a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the defense."** *Id.* at 164 (emphasis added).

b) Accordingly, the court stated that "[a]ny doubts should be resolved in favor of full disclosure made **well before the scheduled trial date**, unless there is good reason to do otherwise (such as substantiated grounds to fear witness intimidation or risk to the safety of witnesses), upon request by the defense." *Id*. at 164 (emphasis added).

2) Most recently, the court in *Miller* affirmed the obligation of timely, pretrial disclosure to permit use by the defense of the disclosed information, "not only in the presentation of its case, but also in its trial preparation." 14 A.3d at 1111.

a) Although the court declined to set uniform deadlines for all cases, it made clear that **the most important factor to determine timeliness is "the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made."** *Id*.

b) The court unequivocally rejected a "better late than never" timing analysis employed by the trial court:

As a practical matter the adoption of the trial court's analysis that so long as the prosecution provides exculpatory material to the defense on the eve of trial and in time for a skilled attorney to make some use of it, then no matter how long the government has delayed disclosure, and regardless of how compressed defense counsel's opportunity to make new investigative, strategic and tactical decisions in mid-trial, based on the new evidence, may be, the prosecution has satisfied its obligations under *Brady.* The truism "better late than never," assessed from such a perspective, can too

readily be expanded to embrace the notion that even "very late is good enough." We reject such a theory as inconsistent with *Brady.*

Id.

c) **The court in *Miller* recognized that at the most basic level, the defense needs time to think about *Brady* disclosures and to make "new investigative, strategic and tactical decisions."** 14 A.3d at 1111; *see also id*. at 1112 (*Brady* information should have been "disclosed in time to permit Miller's attorneys to contemplate its implications"). The Court explained

> that "the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." [*Leka v. Portuondo,* 257 F.3d 89, 100 (2d Cir.2001)]. This is so, in part, because "new witnesses or developments tend to throw existing strategies and preparation into disarray." *Id.* at 101. The sequence of events in this case, like the record in *Leka,* "illustrates how difficult it can be to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available." *Id.* "The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing," and counsel may not be able, on such short notice, to assimilate the information into their case. *Id.* Further, "[t]he more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use,'" *DiSimone v. Phillips,* 461 F.3d 181, 197 (2d Cir. 2006), *i.e.,* "the opportunity for a responsible lawyer to use the information with some degree of forethought." *Leka,* 257 F.3d at 103.

Miller, 14 A.3d at 1111-12.

d) Moreover, the court in *Miller* recognized that counsel cannot be expected to incorporate *Brady* information on the fly at trial. The issue in *Miller* was whether the defense should have been able to connect information disclosed as Jencks that the shooter was left handed to an already-disclosed videotape of an interview with a witness and potential alternate suspect, showing him signing his waiver-of-rights card with his left hand. The court explained that

> "[O]nce trial comes, the prosecution may not assume that the defense is still in its investigatory mode." [*Leka,* 257 F.3d] at 100. As the Supreme Court observed in *Banks,* 540 U.S. at 695, 124 S. Ct. 1256, "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." To adapt slightly

> language from the court's opinion in *Leka*, "the prosecution is in no position to fault the defense for [not spotting the evidence on the videotape in time] when the prosecution itself created the hasty and disorderly conditions under which the defense was forced to conduct its essential business."

Id. at 1113.

B. The defense should argue that "timely pretrial disclosure" requires, at least as a default, disclosure early in the life of a case – within weeks of arraignment.

Given that timeliness is viewed from the perspective of the defense's ability to make meaningful use of the information, see V.A *supra*, the defense view of when it needs *Brady* information should carry great weight. Indeed, in *Zanders*, the Court of Appeals indicated that the defense's view of when it needs *Brady* information in an individual case should be dispositive and that the prosecution should disclose *Brady* information "well before the scheduled trial date . . . upon request by the defense." 999 A.2d at 164. The defense should press for disclosure within weeks of arraignment and, *in addition to fact-specific arguments as to why such a schedule is warranted*, it may justify this request on the following grounds:

1. Early-in-the-case disclosure accommodates the reality that it takes time "to investigate the facts of the case and . . . craft an appropriate defense," *Perez*, 968 A.2d at 66 – work that cannot be done on the eve of trial, as the Court of Appeals and others have acknowledged.

    a. As noted above the Court of Appeals in *Perez*, *Zanders* and *Miller* have made clear *Brady* disclosures must be made early in the life of a case to permit meaningful use. Similarly, in *Sykes v. United States*, 897 A.2d 769, 781 (D.C. 2006), the Court held that the government should have revealed the identities of exculpatory witnesses "to the defense *shortly after their 1996 grand jury appearance*" when the government first learned they possessed information favorable to the defense; the court found this would have given the defense "an opportunity to interview them, and to conduct additional pre-trial investigation . . . based on those interviews." (emphasis added).

    b. Beyond the Court of Appeals, the Second Circuit's opinion in *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001),[23] cited by the Court of Appeals in *Miller*, has an excellent discussion of why the defense needs *Brady* information sooner rather than later. *See also United States v. Snell*, 899 F. Supp. 17, 20 (D. Mass. 1995) ("Exculpatory information affects the defense investigation, how it will allocate its resources, the *voir dire* questions the defense will seek, the framing of opening statements, the nature of the pre-trial research on evidentiary issues and jury

[23] Judge Jacobs wrote the opinion in *Leka* on behalf of a panel that included himself, Judge Parker and now-Justice Sotomayor.

instructions, in short, all of the strategic decisions which must be made long in advance of trial.").

2. Early-in-the-case disclosure is consistent with "the ABA standards for Criminal Justice, The Prosecution Function, which directs that 'disclosure of exculpatory information is to be made at the earliest feasible opportunity' and 'as soon as practicable following the filing of charges'" and which were favorably cited by the Court of Appeals in *Miller*, 14 A.3d at 1108; *see also id.* at n.16 (quoting the Supreme Court's observation in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010), that the ABA standards capture the "prevailing norms of practice" and "are guides to determining what is reasonable").

3. Early-in-the-case disclosure is consistent with other local rules[24] that federal prosecutors operate under around the country. [25]

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[24] *See, e.g.,* M.D. ALA. Standing Order on Criminal Discovery § (1)(B)&(C) (requiring disclosure of "*Brady*" and "*Giglio*" material "at arraignment, or on a date otherwise set by the Court for good cause shown"); S.D. ALA. L. R. 16.13 § (b)(1)(B)&(C) (same); D. Conn. L. Crim. R. Appx.§ (A)(11) (requiring disclosure of "[a]ll information known to the government which may be favorable to the defense" within 10 days of arraignment); N.D. FLA. L. R. 26.3(D)(1)&(2) (requiring disclosure of "*Brady*" and "*Giglio*" material within 5 days of arraignment "or promptly after acquiring knowledge thereof"); S.D. FLA. L. Crim. R. 88.10(C)&(D) (requiring disclosure of *Brady* and *Giglio* information); *id.* 88.10(Q)(2) (requiring discovery in connection with trial not later than 14 days after arraignment); S.D. GA. L. Crim. R. 16.1(f) (requiring disclosure of "any evidence favorable to the defendant" within 7 days of arraignment); D. NEV. L. Crim. R. 16-1 (requiring disclosures required by the Constitution within 5 days of filing the Joint Discovery Statement (to be filed within 5 days of arraignment)); E.D. N.C. L. Crim. R..16.1 (b)(1)(7) (requiring disclosure of all "exculpatory evidence" at pretrial conference which must be held within 21 days of indictment or initial appearance); W.D. OK. L. Crim. R. 16.1 & Appx. V (requiring counsel to hold discovery conference within 14 days after a plea of not guilty is entered and to file within 7 days of conference a joint statement that complies with form in appendix; joint statement form requires certification of the fact of disclosure of "all materials favorable to the defendant or the absence thereof within the meaning of *Brady* . . . and related cases"); W.D. PA. L. R.16.1 (requiring disclosure of "exculpatory evidence" at the time of arraignment); M.D. Tenn. L. Crim. R. 16.01(d) (requiring disclosure within 14 days of arraignment, all information "favorable to the defendant on the issues of guilt or punishment within the scope of *Brady* . . . and *Agurs*"); W.D. TEX. L. Crim. R. 16(b)(1)(c) (requiring government to provide discovery "in connection with trial . . . not later than 14 days after arraignment"; discovery checklist includes exculpatory and impeachment information); W.D. WASH. L. Crim. R. 16(a)(1)(K) (requiring disclosure of evidence favorable to defendant and material to guilt or punishment to which he is entitled under *Brady* . . . and *Agurs*" within 14 days of arraignment); S.D. W. VA. L. Crim. R. Standard Discovery Request Form III.1(H) & 2 (requiring disclosure of "all favorable evidence to the defendant, including impeachment," within 14 days of filing Standard Discovery Request Form (filed at arraignment)); *see also* D. E.D. OK. L. Crim. R. 16. 1 & Disclosure Agreement Checklist ("it is anticipated that the government will provide discovery to the Defendant contemporaneously with arraignment"; Disclosure Agreement Checklist includes "exculpatory" and "impeachment" material); D. ID.

4. Early-in-the-case disclosure is consistent with the government's policy.

   a. The government's policy acknowledges that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases." USACRM, Section 165, Step 3.A.

   b. Both the DAG Guidance Memo and the U.S. Attorney's Manual specify that all exculpatory information should be disclosed "reasonably promptly after discovery." DAG Guidance Memo, Step 3.B.; USAM § 9-5.001.D.1 (same).

      NB: The government's policy specifies separate timing requirements for the disclosure of impeaching information. DAG Guidance Memo, Step 3.B

General Order No. 242 § I.5.A-C. ("strongly encourage[ing] the government to produce" within 7 days of arraignment "all material evidence within the scope of *Brady,*" all *Giglio* information, and the criminal record of any government witnesses).

[25] Although a number of jurisdictions distinguish between the timing of disclosure of "excuplatory" and "impeachment" information, disclosure of impeaching information is still required well in advance of trial. D. MASS. L. R. 116.1 &116.2 (requiring disclosure of exculpatory information within 28 days of arraignment and disclosure of impeachment information no later than 21 days before trial); D. N.H. L. Cr. R. 16.1(d) (requiring disclosure of "any evidence material to issues of guilt or punishment within the meaning of *Brady* . . . and related cases" and any impeachment material as defined in *Giglio* . . . and related cases . . . at least" 21 days before trial); N.D.N.Y. L. R..14.1 (requiring disclosure of *Brady* information 14 days after arraignment and *Giglio* information no less than 14 days prior to jury selection); D. VT. L. R.16.1(a)(2) & (d)(1) (requiring disclosure of *Brady* information within 14 days of arraignment and *Giglio* information no later than 14 days before trial); N.D. W.VA. L. Crim. R. 16.01(b)&(d), 16.05 & 16.06 (requiring disclosure of *Brady* within 10 days of filing Standard Discovery Request Form (filed at arraignment), and disclosure of *Giglio* information no later than 14 days before trial); *See, e.g., United States v. Rodriguez,* 2008 CR 1311, 2009 WL 2569116, *12 (S.D.N.Y. 2009) (court ordered government to turn over "*Giglio* material . . . twenty-one days before the commencement of trial"); *United States v. Lekhtman*, 2008 CR 508, 2009 WL 5095379, *1 (E.D.N.Y. 2009) (government ordered to turn over "*Giglio* material . . . two weeks before the commencement of trial"); *United States v. Martinez-Martinez*, 2001 CR 307, 2001 WL 1287040, *5 (S.D.N.Y. 2001) (ordering disclosure of "*Giglio* material. . . not later than fourteen days before trial" to "ensure that the defendants have sufficient time to make effective use of . . . [it and to] enable the parties and the Court to proceed to trial without undue delay or unnecessary continuances."); *United States v. Johnson*, 2008 CR 285, 2010 WL 322143, *9 (W.D. Pa. 2010) (court ordered government to "disclose all *Brady* impeachment material . . . no later than ten days prior to trial"); *cf. United States v. McNeil,* 2009 CR 320, 2010 WL 56096, *5 (M.D. Pa. Jan. 5, 2010) (rejecting government's proposal to delay disclosure of impeachment material until 72 hours before trial, noting that the government had provided "no reason why the relevant material could not be provided immediately," and that "[s]uch information may require more than three days for the defendant to examine and make use of").

(impeaching information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently").

c. The Government's policies require not only early disclosure promptly upon learning of information, but they require supervisory approval and notice to the defendant if disclosure is to be delayed. USAM § 9-5.001.D.4.

NOTE: D.C. R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor would also seem to support early-in-the-case disclosure because it requires "upon request" disclosure. But as noted above, the comment to the rule states that the rule is not intended to increase the prosecutor's obligations beyond those required by the constitution, statute, or local court rules. So the rule itself provides no independent grounds for early-in-the-case disclosure.

C. **The defense may want to ask the trial court to issue a *Brady* scheduling order that requires the prosecution to turn *Brady* information by a date certain and for any later acquired information, promptly upon discovery.**

1. The Court of Appeals has made clear that timing of *Brady* disclosures is critical, *Curry v. United States,* 658 A.2d 193, 197 (D.C. 1995) ("a prosecutor's timely disclosure obligation with respect to *Brady* material cannot be overemphasized") (internal quotation and citation omitted), thus warranting judicial oversight. *See Boyd*, 908 A.2d at 59 (observing that "courts have the obligation to assure that [prosecutorial discretion in making *Brady* disclosures] is exercised in a manner consistent with the right of the accused to a fair trial"); *see also id*. at 57 (The "practice of delayed production must be disapproved and discouraged.").

2. The trial court unquestionably has the authority to issue a *Brady* scheduling order pursuant to its case management authority as well as its obligation to oversee *Brady* disclosures and to ensure a defendant's effective representation of counsel. See VII.A.3 *infra*.

3. Other jurisdictions in which federal prosecutors practice have such deadlines. *See* V.C.3 *supra* (discussing other jurisdictions with deadlines set by local rule or standing order).

4. A huge potential benefit from issuing a *Brady* scheduling order is conservation of judicial resources – the bulk of *Brady* litigation stems from disagreement or misunderstanding about what the prosecution's due process duty is. There will be no such disagreement or misunderstanding, if the Court has ordered production pursuant to a set schedule.

D. **Whether or not the trial court issues a scheduling order, the prosecution cannot make unilateral decisions to delay disclosure of *Brady* information until the eve of trial.**

1. Where *Brady* compels disclosure, a prosecutor should seek court's permission to limit/delay disclosure.

a. *Boyd*, 908 A.2d at 61 (generally affirming trial court's oversight power over Brady disclosures); DAG Guidance Memo Step 3.A. (noting that when "considerations [militating against disclosure] conflict with the[ir] discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures").

b. As one District Court judge explained, when the government "elect[s] to prosecute defendant . . . [the] defendant's due process rights bec[o]me dominant." *United States v. Feeney*, 501 F. Supp. 1324, 1325 (D. Colo. 1980). The prosecution "can, if it wishes, dismiss th[e] case, but so long as [the trial court] must decide the defendant's fate," it has an obligation to "provide [the defendant with all of the rights . . . [that] are guaranteed him by the Constitution and by the United States Supreme Court." *Id.*

2. In particular, witness-safety concerns should be reviewed by a trial court.

   a. The Court of Appeals has acknowledged that in a small subset of cases it may be appropriate for the government to delay disclosure of *Brady* information "to protect the safety of witnesses" but has noted that even in such cases "defense counsel [must be] afforded sufficient time to consider any leads and to make use of exculpatory evidence." *Miller*, 14 A.3d at 1111 n.20.

   b. But, to justify such a delay, **the government must have "*substantiated* grounds to fear witness intimidation or risk to the safety of witnesses." *Zanders*, 999 A.2d at 164 (emphasis added).**

   c. The prosecution should be required to present those "substantiated grounds" to the trial court.

      1) This rightly makes early disclosure the default, preserves judicial oversight over *Brady* disclosures, *see Boyd*, 908 A.2d at 59, 61 (generally affirming trial courts' oversight power over *Brady* disclosures), and precludes the government from using the rare case of witness intimidation as a blanket justification for delayed disclosure in every case.

      2) This is the practice in federal court. *See United States v. Edelin,* 128 F.Supp.2d 23, 30-31 (D.D.C. 2001) (delay in production of *Brady* information justified where the government "proffer[ed] examples of other known attempts made by the defendants and their associates to interfere with the judicial process," and thus established by a preponderance of evidence that earlier disclosure of this information might jeopardize witness safety); *Snell*, 899 F. Supp. at 20 n.5 (noting that the government's anticipated concerns about witness safety "can be dealt with in motions for protective orders or motions for exemption from pretrial disclosure" on a case-by-case basis).

3. Even if the government can "substantiate" security concerns, the defense may want to counter:

a. That any security concerns will eventually have to be dealt with at trial, and that, to accommodate the defendant's due process rights, the prosecution must deal with them now;

b. If any delay is in fact justified, it should be clearly delineated (not left to the prosecution's discretion) and brief, *see Miller*, 14 A.3d at 1111 n.20;

c. If any delay is in fact justified, the trial date should likewise be adjusted (if this is in the client's best interest).

4. As an alternative to delayed disclosure, counsel may want to propose a protective order narrowly tailored to any legitimate security concern.

   a. For example, security concerns from general disclosure, should not preclude disclosure to the defendant and his legal team.

   b. Although far from ideal, there should never be a basis for the government to object to protective order that limits the scope of a *Brady* disclosure to defense counsel.

E. If despite the defense's best efforts to obtain timely access to *Brady* information, the prosecution produces this information late – at or on the eve of trial – the defense must make a record of prejudice from that delay.

1. When a *Brady* claim is premised on delayed disclosure of information, "the defendant must show prejudice from the delay itself." *Miller*, 14 A.3d at 1094.

2. Thus, when litigating a belated disclosure, is it important to develop a narrative about what specifically would have been done if the information had been produced earlier and why the incentive to look for similar information might not have been apparent or of the same priority. See V.A. *supra.* For example, as a result of late disclosure, the defense

   a. May have "abandon[ed] lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued," *Bagley*, 473 U.S. at 682;

   b. Lost access to witnesses. *Sykes*, 897 A.2d at 777-78*; see also United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997) (late disclosure deprived defendant the opportunity to depose the author of a report that contradicted a government witness and to prepare strategy and testimony appropriately);

   c. Or simply have been unable to capitalize on evidence that would have reinforced the defense's theory of the case. *Miller*, 14 A.3d 1094; *United States v. Washington*, 263 F.Supp.2d 413, 422 (D. Conn. 2003) (Because of belated *Brady* disclosure, "there was no opportunity for the defense to weave [prosecution witness'] conviction into its overall trial strategy.").

3. Because it may be difficult on the eve or in the midst of trial to fully appreciate how a belated *Brady* disclosure impaired the defense, counsel should consider filing a post-trial motion to flesh out the record. *See, e.g., Washington*, 263 F.Supp.2d at 420 (*Brady* violation found where government withheld prior conviction of witness until first day of trial and defense investigator submitted an affidavit to trial judge stating that he was helping for trial and thus could not investigate the prior conviction but that, after trial, he had been able to investigate the prior conviction which had led him to more relevant impeachment information).

F. The Prosecution's obligation to disclose *Brady* information extends beyond trial.

1. Throughout the trial and at least until a conviction is final, the Government's duty to disclose exculpatory evidence is unchanged. *Barnes v. United States*, 760 A.2d 556, 562 (D.C. 2000) (court states that it "would expect [the government] to disclose . . . [*Brady*] information to the defense – now [on appeal] as then" because "the government's obligation to disclose exculpatory evidence under *Brady* is continuous").

2. In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct 2308 (2009), the Supreme Court indicated that the government does not have a continuing *Brady* obligation to seek and develop exculpatory evidence after a defendant's conviction has been affirmed on appeal (or the time to appeal has lapsed) and his conviction has become final. In *Osborne* the Court had been asked to determine if a habeas petitioner whose conviction had been affirmed decades earlier had a constitutional right to post-conviction DNA testing. The Court reasoned that *Brady* provided no support for such a constitutional right, and that "once a defendant has been afforded a fair trial and convicted. . . the presumption of innocence disappears." 129 S. Ct. at 2320 (internal quotation and citation omitted). *Osborne* may shield the prosecution from a constitutional post-conviction obligation to develop and disclose new exculpatory information, but it did not address the circumstance where the government comes into possession of such information – or has had exculpatory information in its possession all along, which would clearly call into question the fairness of a defendant's trial. Indeed, numerous cases suggest that the government does have a continuing obligation to disclose *Brady* violations that had already occurred. *See generally, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

VI. IN WHAT FORM MUST THE PROSECUTION MAKE *BRADY* DISCLOSURES?

A. *Brady* is not a rule of discovery BUT the format in which information is disclosed is critical to fulfilling its due process guarantee.

1) Unlike Rule 16 or Jencks, "*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation." *Miller*, 14 A.3d at 1107 (quoting *Curry v. United States,* 658 A.2d 193, 197 (D.C. 1995)). It does not require the production of specific documents. It requires the production of information. See II *supra*.

2) That said, form matters just as much as properly identifying what is favorable information and timely disclosing that information. If the prosecution defines what is *Brady* too narrowly, if it turns over *Brady* information too late, or if it gives only the most skeletal summary disclosure (particularly while it withholds names and/or contact information) – there is a real danger that the defense will not be able to make meaningful use of the information and consequent possibility of a miscarriage of justice.

   a. The key in fulfilling the due process mandate of *Brady* is the "sufficiency, under the circumstances, of the defense's opportunity to use the [*Brady* information] when disclosure is made." *Miller*, 14 A.3d at 1111; *Perez* 968 A.2d at 66 ("[T]he due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.").

   b. It is simply inevitable that when documents or recordings are summarized, detail and nuance are lost. The power of a statement comes from the context in which it is given, the precise wording of the question asked, and the answer given.

      1) In *Kyles*, for example, the force of the "many inconsistencies and variations among Beanie's [undisclosed] statements" came from the statements themselves, 514 U.S. at 430; the Court specifically noted that Kyle's had been prejudiced because he had been precluded from "*expos[ing the jury] to Beanie's own words*." *Id.* at 449 n.19 (emphasis added).

      2) *See also Wiggins v. United States,* 386 A.2d 1171, 1178 (D.C. 1978) (Ferren, J. concurring) ("The fact that the government told [the defense] the names of grand jury witnesses and summarized their testimony did not necessarily meet defendant's needs. . . . we [cannot] assume that the prosecutor summarized the grand jury statements with every detail that might have been relevant to defense counsel's preparation as counsel viewed the case.").

   c. Summaries cannot be used at trial for impeachment or if a witness unexpectedly becomes unavailable.

B. At a minimum, the government is required to make *Brady* disclosures that are "sufficiently specific and complete" to permit effective use by the defense. *United States v. Rodriguez,* 496 F.3d 221, 226 (2d Cir. 2007).

1. Court of Appeals precedent demonstrates that the prosecution must make sufficiently specific and complete disclosures. For example,

   a. In *Zanders v. United States*, 999 A.2d 149 (D.C. 2010), the Court of Appeals determined that the prosecution's summary disclosure did not satisfy the government's pretrial disclosure obligations under *Brady:*

      1) The prosecutor had provided the defense a summary disclosure stating that:

> [Attorney] Betty Ballester represents an individual who was interviewed by the [MPD] [who said that] . . . [Allen] Lancaster was involved in some sort of altercation/argument with [Shawn] LNU in the days immediately preceding his murder. This information was investigated and found to have no bearing on the case. Therefore the government does not believe this information is in any way *Brady* material. However, I am disclosing it now in an excess of caution.

Brief for Appellee, *Thomas Zanders v. United States*, District of Columbia Court of Appeals No. 05-CF-246 at 58. The summary disclosure did not reveal "significant exculpatory information," *id.* at 163, contained in the notes of the witness interview, namely, that the altercation had taken place in the exact location of the decedent's shooting the following night. 999 A.2d at 161.

2) The Court of Appeals concluded that the prosecution's summary *Brady* disclosures were "incomplete and late," *id*. at 164; *see also id*. (admonishing that "[a]ny doubts [regarding *Brady* disclosures] should be resolved in favor of *full* disclosure made well before the scheduled trial date") (emphasis added).

3) The Court declined to reverse in the absence of a showing of prejudice.

b. In *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011), the Court of Appeals held that the prosecution had not timely disclosed all the information it should have pretrial.

1) The Court reviewed whether the government had fulfilled its *Brady* obligations where it disclosed a year before trial notes documenting a description of the shooter that did not match the defendant but withheld until a week before trial the full transcript of the videotaped interview with the witness who provided this description, and where it disclosed a year before trial notes indicating that another witness had failed to identify the defendant in a photo array, but withheld until weeks before trial information that the witness had stated that two other people in the array looked like the shooter.

2) The Court firmly rejected the argument that the videotaped interview was only "potentially exculpatory" and thus did not need to be disclosed pretrial. *Id*. at n.11 ("We are at a loss to understand this reasoning.").

3) The Court also held that the verbatim statements of the witness who had viewed the photo array was "evidence of a kind that would suggest to any prosecutor that the defense would want to know about it." *Id*. at 962 (internal quotation omitted).

4) The Court concluded that the defense was not prejudiced by the prosecution's delay in making full *Brady* disclosures. *Id.* at 958-963.

c. By contrast, in *Matthews v. United States*, 629 A2.d 1185 (D.C. 1993), and *Wiggins v. United States*, 386 A.2d 1171 (D.C. 1978), the Court of Appeals held

that the prosecution had fulfilled its *Brady* obligations where the prosecutor "explained to appellant *exactly what* the [exculpatory] statement said," *Matthews*, 629 A.2d at 1199 (emphasis added), and where the prosecutor disclosed the Grand Jury testimony containing *Brady* information "*substantially verbatim*." *Wiggins,* 386 A.2d at 1173 (emphasis added).

2. Other federal courts have likewise found that the government violated its *Brady* obligations where it provided the defense with inadequate summary *Brady* disclosures.

   a. In the government's failed prosecution of Senator Stevens, Judge Sullivan found that "the use of summaries" for disclosure of favorable information created "an opportunity for mischief and mistake," and was a significant contributor to the government's *Brady* misfeasance in that case. *United States v. Stevens*, Docket No. 08-231, Tr. 4/7/09 at 8-9 (on file with PDS).

   b. *See also Leka*, 257 F.3d at 103 (government violated *Brady* where it "failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use"); *United States v. Service Deli*, 151 F.3d 938, 942-44 (9th Cir. 1998) (*Brady* violation when government produced mere summaries of interviews instead of the actual interview notes); *Jean v. Rice*, 945 F.2d 82, 85-87 (4th Cir. 1991) (withheld audio tapes of hypnosis of key witnesses was *Brady* violation even though the fact of the hypnosis was disclosed because the audio tapes would have been much stronger and more persuasive physical evidence going toward impeachment).

3. The government has conceded in litigation that its *Brady* obligations "do include a fairly precise identification of what the information is and the source of the information" *United States v. Jonathan Phillips,* 2008 F 21826, Tr. 4 (D.C. Super. 7/1/09).

C. Government's own policy acknowledges original format is best:

1. The government's policy correctly assumes that the best way for the government to provide sufficiently specific and complete *Brady* disclosures is to provide the defense with "information in its original form." DAG Guidance Memo Step 3.C.

2. The government's *Brady* policy notes that in some cases this may be "[in]advisable," but warns that if disclosure "is not provided in its original form . . . prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant." *Id.*

D. To make sufficiently specific disclosures prosecutors must disclose the names and contact information for *Brady* witnesses.

1. At least two Superior Court judges have ruled that the government typically must disclose names and contact information for *Brady* witnesses.

a. In 2010 CF1 2883,[26] Judge Fisher held that the USAO could not satisfy its *Brady* disclosure obligations by unilaterally deciding to make anonymous witnesses available to the defense for an interview at the US Attorney's office.

1) In 2010 CF1 2883, the government explained that it had "contacted . . . the witness[] and I asked them their preference, whether or not we would set up a meeting at the US Attorney's Office, [or] whether they would prefer I provide their name and contact information." Tr. 4/8/11 at 13.

2) The court responded "that's not what you're required to do. If you have a witness who has exculpatory material, you have to turn it over. If there's a danger, you legitimately believe that there's a risk of danger to them, then you bring it to the Court's attention and then maybe some sort of secondary circumstance is arrived at. But you just don't have the right to sort of determine where under what circumstances they're going to be interviewed. . . that's not what *Brady* I think commands. So I think you have to provide the information so they can try to talk to them individually." Tr. 4/8/11 at 14-15. The court subsequently reiterated that '[m]y viewpoint on this . . . is if there are legitimate safety concerns about witnesses, I think the government should then bring those to my attention. I can determine whether I agree with that." *Id*. at 18.[27]

3) The court also rejected the government's argument that it had made sufficient disclosure of contact information because the defense had the anonymous *Brady* witness' cell phone number (but not her name or address). The court ruled that the government had to "give [the defense] whatever contact information you have." Tr. 4/8/11 at 15.

b. In *United States v. Burts*, 2010 CF1 7811, Judge Leibovitz likewise acknowledged that disclosure of name and contact information is required in the typical case:

1) The court acknowledged that: "the whole point of *Brady* disclosure is, one way or another, A, that witness has to be available to the defense to present that witness' testimony at trial, if that's what they want; and B, the defense has to be in a position to use whatever investigative leads it wants to and is capable of using, if that's what they want to do. Tr. 4/18/11 at 3.

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[26] The identifying information from this case has been omitted because, subsequent to the *Brady* disclosures, the court sealed the defendant's criminal records in the case on the grounds that the defendant was actually innocent.

[27] As far as safety concerns, neither the fact that the *Brady* witness was "a young woman who resides with her parents" who had "general concerns" about the disclosure of her identity and nor the fact that her parents "are concerned" was a sufficient basis for the Court to endorse the withholding of identifying or contact information in this case. *Id.* at 16.

2) However because the "government ha[d] proffered to me [a] very specific basis for believing that there are security concerns of this particular individual," Tr. 4/18/11 at 11, the court found that this was not the typical case.

3) Even so the court "hesitate[d] to order the defense to stand down and let you serve the witness" because in so doing the court would "have failed to put in the defense hands the very information that *Brady* disclosure puts in their hands." Tr. 4/18/11 at 12.

4) Ultimately the issue mooted out, because counsel, who was sensitive to these concerns and did not want to give the witness further cause for anxiety, did not press for contact information. Thus even though the government agreed to provide the defense with contact information pursuant to a protective order, *id.* at 5, counsel instead agreed to allow the government to put the witness under subpoena. *Id.* at 14. Even so, Judge Leibovitz ordered the government to disclose contact information for the *Brady* witness to the defense if the government was unable to put the witness under subpoena by the end of the day. *Id*. at 12-14, 17.

2. The Court of Appeals has never directly addressed this issue, but has repeatedly indicated that the government must disclose identifying information of *Brady* witnesses.

   a. *See Kerry J. Jackson v. United States*, 650 A.2d 659, 661 n.4 (D.C. 1994) (noting that the government had "wisely conceded . . . that, by failing to reveal the identity of a potentially important exculpatory witness, it violated both the letter and the spirit of *Brady*"); *Wiggins,* 386 A.2d at 1173 (holding that the government had properly discharged its *Brady* obligation where it, *inter alia,* "disclosed to the defense the identity of witnesses whose grand jury testimony might be favorable"); *John L. Jackson v. United States*, 329 A.2d 782, 788 (D.C. 1974) (observing that *Brady v. Maryland* "would seem to require that the prosecutor provide the names of exculpatory witnesses upon request" but withholding in this case was harmless error).

   b. In *Johnson v. United States*, 980 A.2d 1174, 1188 n. 4 (D.C. 2009), the government "point[ed] out in its brief" that it had disclosed favorable information without identifying the source, apparently as a basis for arguing that it had fulfilled its *Brady* obligations. But the Court, having explicitly noted this argument, conspicuously declined to adopt it as a reason for rejecting the appellants' *Brady* claim.

3. Disclosure of identifying information is compelled by Supreme Court and Court of Appeals precedent.

   a. As the Court of Appeals has made clear, the key to fulfilling the mandate of *Brady* is ensuring the defense's opportunity to use favorable information; but the

defense cannot meaningfully use favorable information if it does not know its source.

b. At a minimum, the defense cannot assess the value of the *Brady* information in a witness' possession without knowing who the witness is, what his basis of knowledge is, and what biases he has. As the Supreme Court explained in *Smith v. Illinois*, 390 U.S. 129, 131 (1968), "when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth . . . must necessarily be to ask the witness who he is and where he lives." *See also id.* at 132 (internal quotation and citation omitted) ("Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise [the facts of the case]."). [28]

c. Without a *Brady* witness' name the defense cannot conduct its own investigation or place the witness under subpoena and thereby ensure that he or she appears in court.

   1) As Chief Judge Satterfield noted, one of the dangers when the government keeps "under wraps" the identities of "witnesses who are exculpatory, or who may give exculpatory information" is that "you get in this posture where you lose track of the witness and the defense has never had an opportunity to really track them down." *United States v. James Carter*, 2006 CF1 10651, Tr. 10/16/06 at 4.

   2) This is precisely what happened in *Sykes v. United States*, 897 A.2d 769, 773-76 (D.C. 2006), where the government, which had no interest in calling the *Brady* witnesses in its case-in-chief, delayed disclosure of their existence until the eve of trial by which time neither the government nor the defense could locate them. *See also Curry*, 658 A.2d at 196-98 (government conceded and the Court held that the Government had violated its duty of disclosure when prosecution withheld for over a year and failed to disclose until two days before trial the fact that on the night of the charged murder, an eyewitness gave a description of the shooter that did not match the defendant, by which time the witness could not be found).

d. Allowing the government to withhold the names of *Brady* witnesses denies the defense equal access to *Brady* witnesses. The law is clear that witnesses to a

[28] The Court in *Smith* addressed the defendant's right to obtain a witness' name and address in the context of a defendant's right to confrontation, but the same analysis applies to a *Brady* witness who, if sponsored by the defense, would be subject to cross-examination and potential impeachment by the prosecution. Defense counsel must fully investigate that witness to determine, for example, if anyone else saw or was with the witness who corroborates or contradicts the witness, or if the witness has a history of substance abuse or a criminal record with which he could be discredited. *Id*. at 131 ("The witness' name and address open countless avenues of in-court examination and out-of-court investigation.").

crime do not belong to the prosecution; rather, as the court acknowledged in *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), "[b]oth sides have an equal right, and should have an equal opportunity, to interview them." This is certainly *no less true* when those witnesses possess information that is material and favorable to the defense.[29]

e. Disclosing the names of *Brady* witnesses does not implicate limits on requiring the prosecution to disclose its witnesses. *See Will v. United States*, 389 U.S. 90, 101 (1967) ("The reason for requiring disclosure of their names . . . is not that they will or may be witnesses, but that defendant requires" this information "in order to prepare his defense.") (internal quotation and citation omitted).

f. *See, e.g., United States v. West*, 790 F. Supp. 2d 673 (N.D. Ill. 2011) (holding that *Brady* required government to disclose contact information of *Brady* witnesses).

VII. PRETRIAL ORDERS, REMEDIES, AND NEW LINES OF DEFENSE.

A. Pretrial Orders:

In the wake of the well-publicized *Brady* violations in the prosecution of Senator Stevens, United States District Court Judge Emmet Sullivan called on his "judicial colleagues on every trial court everywhere . . . to consider entering an exculpatory evidence order at the outset of every criminal case." *United States v. Stevens,* 2008 CR 231, Tr. 8 (4/7/09).[30]

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[29] That *Brady* requires the disclosure of identifying and contact information is further evident from case law discussing when the government must disclose such information for confidential informants who possess *inculpatory* information. Prior to its decision in *Brady*, the Supreme Court in *Rovario* adopted a balancing test to determine when the government must disclose the identity of an informant, weighing "the public interest in protecting the flow of information against the individual's right to present a defense." *Rovario v. United States*, 353 U.S. 53, 62 (1957). But the Court also noted that the government's "privilege" to keep secret the identity of a confidential informant "gives way" where the informant possesses "information [that] is relevant and helpful to the defense of an accused or [that] is essential to a fair determination of a cause." *Id.* at 60-61; *see also id*. at 64 (determining that access to identifying information was required in a drug case because the informant "might have" provided information supporting a defense of entrapment, or "might have thrown doubt on petitioner's identity or on the identity of the package"). The Court's subsequent decision in *Brady*, requiring the government to disclose all favorable and material information to the defense, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), only expanded what must be disclosed to the defense pursuant to the same "the fundamental requirements of fairness," *Rovario,* 353 U.S. at 60, and necessarily requires the disclosure of the *Brady* witness' identifying and contact information.

[30] After the *Stevens* case was dismissed, the Court appointed a special prosecutor, Henry F. Schuelke to investigate the government's misconduct. Mr. Scheulke recently completed his investigation and "concluded that the investigation and prosecution of Senator Stevens were "permeated by the systematic concealment of significant exculpatory evidence." *United States v. Stevens,* 2008 CR 231, Order dated November 21, 2011, at 4 (internal quotation and citation omitted). Mr. Scheulke detailed his findings in a 500 page report, filed under seal, which has yet

1. **Rationale:** As the Court of Appeals recognized in *Boyd*, "the most effective mechanism for enforcing the due process rights of criminal defendants and avoiding the needless expenditure of judicial resources is to require strict compliance with the demands of *Brady* . . . *in the first instance*[.]" 908 A.2d at 63 (emphasis added).

   a. A pretrial *Brady* order clarifies obligations by providing the government with a checklist and/or a timetable to follow in making its *Brady* disclosures.[31]

   b. In so doing, a pretrial *Brady* order promotes fairness and confidence in the courts.

      1) The failure to timely and completely disclose information that is favorable and material to a defendant not only undermines the fundamental fairness of his particular prosecution and the legitimacy of any conviction, but also calls into question the validity of the criminal justice system as a whole.

      2) As the government itself has recognized,

         Any discovery lapse, of course, is a serious matter. . . . [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the

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to be released to the public. *Id.*; *see also* http://legaltimes.typepad.com/blt/2011/11/judge-ted-stevens-investigation-reveals-prosecutorial-misconduct.html (last accessed December 4, 2011). On February 8, 2012, Judge Sullivan, citing the egregious and repeated conduct of the government and the importance of the matter for the "fair administration of justice," denied the government's request to seal and ordered that the report and related filings were to be made public on March 15, 2012. *In Re Special Proceedings*, Misc. No. 09-0198 (EGS) (Feb. 8, 2012), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009mc0198-73.

Despite his conclusion that the prosecution had concealed *Brady* information, and that some of this concealment was willful, Mr. Scheulke did not recommend prosecution of the government attorneys for criminal contempt. Mr. Scheulke reasoned that to prove criminal contempt, "the contemnor must disobey an order that is sufficiently 'clear and unequivocal at the time it is issued.'" *Id*. at 4. In the *Stevens* case, however, no such order was given; "[r]rather, the Court accepted the repeated representations of the subject prosecutors that they were familiar with their discovery obligations, were complying with those obligations, and were proceeding in good faith." *Id*. at 4-5.

[31] To the extent the government's new policy reforms provide prosecutors with better guidance regarding their *Brady* obligations, they still do not obviate a court order since they are wholly unenforceable. The DAG Guidance Memo, like the revisions to USAM before it, specifically states that it "is not intended to have the force of law or to create or confer any rights, privileges, or benefits." DAG Guidance Memo, Introduction; *see also* USAM § 9-5.001.E (USAM *Brady* policy "does [not] provide defendants with any additional rights or remedies"); ***cf. Jones***, 620 F. Supp.2d at 173 (quoting from 2007 Report to the Advisory Committee on Criminal Rules, n.4 *infra*, which, for this reason, recommended a revision to Rule 16 even after the USAM revisions).

individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.

David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors dated January 4, 2010 re: Issuance of Guidance and Summary of Actions Taken in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group.[32]

c. A pretrial *Brady* order also promotes judicial efficiency.

1) Just as "[p]roviding broad and early discovery . . . promotes the truth-seeking mission of the Department [of Justice] and fosters a speedy resolution of many cases," DAG Guidance Memo, Step 3.A, providing belated and/or incomplete *Brady* information complicates cases and slows them down.

2) Litigating *Brady* disputes pretrial is time-consuming. The court may be forced to schedule additional hearings, to adjudicate additional motions, and/or to review contested documents *in camera.*

3) When a *Brady* violation is uncovered in the midst of trial, the costs to the court and the community, particularly jurors and witnesses, are even greater. The court may have to interrupt the presentation of evidence to allow the defense to process the information and/or to conduct further investigation, witnesses may have to be recalled to the stand, or if some other remedy is needed, the court and the parties will have to take the time to determine what that remedy is, which may include ordering a mistrial.[33]

4) Even worse than the multiplication of court proceedings, pretrial or midtrial delay, or even mistrying a partially tried case, is the cost of negating a conviction following a trial – especially when the *Brady* information gives rise to a concern that the resources of the judiciary and executive have been spent prosecuting the wrong person while the true perpetrator remains at liberty, free to commit more crimes.

2. Because it makes infinite sense, regulating *Brady* disclosures pretrial is commonplace in federal court.

a. *See, e.g.,* United States v. *Johnson*, 2010 WL 322143, *9 (W.D. Pa. 2010) (court ordered government to "disclose all *Brady* exculpatory material forthwith" and "all *Brady* impeachment material . . . no later than ten days prior to trial"); *United States v. Lekhtman*, 2009 WL 5095379, at *1 (E.D.N.Y. 2009) (court ordered

[32] Available at http://www.justice.gov/dag/dag-memo.html.

[33] *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) is an example of a trial derailed by late *Brady* disclosures.

government to turn over "*Brady* material . . . as it is discovered," and "*Giglio* material . . . two weeks before the commencement of trial"); United States v. *Rodriguez*, 2009 WL 2569116, at *12 (S.D.N.Y. 2009) (court ordered government to turn over "*Brady* material . . . as it is discovered by the Government" and "*Giglio* material . . . twenty-one days before the commencement of trial"); *United States v. Libby*, 432 F.Supp.2d 81, 86-87 (D.D.C. 2006) (ordering the government to "produce, forthwith" "[a]ll documents, from any individuals, whether or not they will be called as witnesses in the government's case-in-chief, that are discoverable under *Brady*"); *United States v. Thomas*, 2006 CR 553, 2006 WL 3095956, *1 (D.N.J. 2006) (unreported) (ordering the government to disclose within ten days of the issuance of the order "[a]ny material evidence favorable to the defense related to issues of guilt, lack of guilt or punishment which is known or that by the exercise of due diligence may become known to the attorney for the United States, within the purview of *Brady v. Maryland* and its progeny");

b. In a number of jurisdictions, pretrial *Brady* orders have been incorporated into the local rules with the result that a number of United States Attorney's Offices, including those in large metropolitan areas like Boston and Miami, operate under such orders *in every case. See, e.g.*, M.D. ALA. Standing Order on Criminal Discovery § (1)(B)&(C) (requiring disclosure of "*Brady*" and "*Giglio*" material "at arraignment, or on a date otherwise set by the Court for good cause shown"); S.D. ALA. L. R. 16.13 § (b)(1)(B)&(C) (same); D. Conn. L. Crim. R. Appx.§ (A)(11) (requiring disclosure of "[a]ll information known to the government which may be favorable to the defense" within 10 days of arraignment); N.D. FLA. L. R. 26.3(D)(1)&(2) (requiring disclosure of "*Brady*" and "*Giglio*" material within 5 days of arraignment "or promptly after acquiring knowledge thereof"); S.D. FLA. L. Crim. R. 88.10(C)&(D) (requiring disclosure of *Brady* and *Giglio* information); *id.* 88.10(Q)(2) (requiring discovery in connection with trial not later than 14 days after arraignment); S.D. GA. L. Crim. R. 16.1(f) (requiring disclosure of "any evidence favorable to the defendant" within 7 days of arraignment); D. HAW. L. R. 16.1(a)(7) (requiring disclosure of *Brady* material within 7 days of arraignment and impeachment material upon court order); D. MASS. L. R. 116.1 &116.2 (requiring disclosure of exculpatory information within 28 days of arraignment and disclosure of impeachment information no later than 21 days before trial); D. NEV. L. Crim. R. 16-1(b)(1) (requiring disclosures required by the Constitution within 5 days of filing the Joint Discovery Statement (to be filed within 5 days of arraignment)); D. N.H. L. Cr. R. 16.1(d) (requiring disclosure of "any evidence material to issues of guilt or punishment within the meaning of *Brady* . . . and related cases" and any impeachment material as defined in *Giglio* . . . and related cases . . . at least" 21 days before trial); N.D.N.Y. L. R. 14.1 (requiring disclosure of *Brady* information 14 days after arraignment and *Giglio* information no less than 14 days prior to jury selection); E.D. N.C. L. Crim. R..16.1 (b)(1)(7) (requiring disclosure of all "exculpatory evidence" at pretrial conference which must be held within 21 days of indictment or initial appearance); W.D. OK. L. Crim. R. 16.1 & Appx. V (requiring counsel to hold discovery conference within 14 days after a plea of not

guilty is entered and to file within 7 days of conference a joint statement that complies with form in appendix; joint statement form requires certification of the fact of disclosure of "all materials favorable to the defendant or the absence thereof within the meaning of *Brady* . . . and related cases"); W.D. PA. L. R.16.1 (requiring disclosure of "exculpatory evidence" at the time of arraignment); M.D. Tenn. L. Crim. R. 16.01(d) (requiring disclosure within 14 days of arraignment, all information "favorable to the defendant on the issues of guilt or punishment within the scope of *Brady* . . . and *Agurs*"); W.D. TEX. L. Crim. R. 16(b)(1)(c) (requiring government to provide discovery "in connection with trial . . . not later than 14 days after arraignment"; discovery checklist includes exculpatory and impeachment information); D. VT. L. R.16.1(a)(2) & (d)(1) (requiring disclosure of *Brady* information within 14 days of arraignment and *Giglio* information no later than 14 days before trial); W.D. WASH. L. Crim. R. 16(a)(1)(K) (requiring disclosure of evidence favorable to defendant and material to guilt or punishment to which he is entitled under *Brady* . . . and *Agurs*" within 14 days of arraignment) N.D. W.VA. L. Crim. R. 16.01(b)&(d), 16.05 & 16.06 (requiring disclosure of *Brady* within 10 days of filing Standard Discovery Request Form (filed at arraignment), and disclosure of *Giglio* information no later than 14 days before trial); S.D. W. VA. L. Crim. R. Standard Discovery Request Form III.1(H) & 2 (requiring disclosure of "all favorable evidence to the defendant, including impeachment," within 14 days of filing Standard Discovery Request Form (filed at arraignment)); *see also* E.D. OK. L. Crim. R. 16. 1 & Disclosure Agreement Checklist ("it is anticipated that the government will provide discovery to the Defendant contemporaneously with arraignment"; Disclosure Agreement Checklist includes "exculpatory" and "impeachment" material); D. ID. General Order No. 242 § I.5.A-C. ("strongly encourage[ing] the government to produce" within 7 days of arraignment "all material evidence within the scope of *Brady,*" all *Giglio* information, and the criminal record of any government witnesses).

3. The Superior Court has the authority to issue pretrial *Brady* orders.

a. *Brady* itself is the first foundation for the Superior Court's authority.

1) The Superior Court not only has the broad authority to fashion "appropriate remedial sanctions" when the government fails to disclose *Brady* information in a timely fashion, *United States v. Odom*, 930 A.2d 157, 158 (D.C. 2007), it also has the power *ex ante* to regulate disclosures under *Brady* pretrial and to make certain that this constitutional rule – which exists "to ensure that a miscarriage of justice *does not occur*," *United States v. Bagley*, 473 U.S. 667, 675 (1985) (emphasis added) – is working as it should.

2) Indeed, in *Boyd*, the Court directed that trial courts must, "as a constitutional matter," exercise such oversight. 908 A.2d at 61; *see also id. at* 59 (holding that the government's "discretion" in determining how to fulfill its *Brady* obligations "is not unlimited, and courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial."); *see also United States v. Starsuko*, 729 F.2d 256, 261 (3d Cir. 1984) ("The

district court may dictate by court order when *Brady* material must be disclosed, and absent an abuse of discretion, the government must abide by that order.").

b. The Superior Court's obligation to protect a defendant's right to the effective assistance of counsel is another foundation for a pretrial *Brady* order.

1) As the Court of Appeals has acknowledged the government's disclosure obligations under *Brady* implicate a defendant's Sixth Amendment right to effective representation. *Boyd*, 908 A.2d at 61 (discussing prosecutor's *Brady* obligations "[i]n light of the defendant's Fifth Amendment right to due process, as well as his Sixth Amendment right to the effective assistance of counsel"); *see also United States v. Snell*, 899 F.Supp. 17, 20 n.5 (D. Mass. 1995) (ordering immediate disclosure of *Brady* information and noting that "the civil discovery rules recognize that effective advocacy and case management depend upon effective trial preparation. On the criminal side, where liberty is at risk, this conclusion is no less clear.").

2) The Court of Appeals has also acknowledged that "the right to [effective] assistance" of counsel is of such importance that it "invokes, of itself, the protection of a trial court," and confers upon the trial court the power "to take steps to eliminate any deficiencies in the representation of counsel before the resources…have been invested in a full-blown trial." *Monroe v. United States*, 389 A.2d 811, 816, 818 (D.C. 1978) (internal quotation and citation omitted).

c. A third foundation for the court's authority to issue a pretrial *Brady* order is the court's general inherent power "to effectuate . . . the speedy and orderly administration of justice." *United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975) (affirming trial court's authority to order the disclosure of the government's witnesses both on grounds of "fundamental fairness" and "administrative efficiency").[34]

1) The Supreme Court has acknowledged that trial courts are empowered "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (internal quotations and citations omitted); *see also Geders v. United States*, 425 U.S. 80, 86 (1976) (The trial court "must have broad power to cope with the complexities and contingencies inherent in the adversary process . . . [and] [i]f truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.").

[34] Rule 57(b) of the Superior Court Rules of Criminal Procedure acknowledges this inherent power and provides that "[w]hen [t]here [i]s [n]o [c]ontrolling [l]aw," "[t]he [trial] court may regulate practice in any manner consistent with applicable law and these Rules."

2) Similarly, the Court of Appeals has recognized that a "trial court has inherent authority . . . to control the conduct of the proceedings before it, in order to ensure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done." *Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. 1994).

3) Pursuant to this "broad power," a trial court has

> the authority to enter pretrial case management and discovery orders designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly.

United States v. W.R. Grace, 526 F.3d 499, 509 (9th Cir. 2008) (affirming trial court's order requiring government to disclose its finalized witness list a year prior to trial as an exercise, *inter alia*, of the court's "general inherent authority to manage its docket"); *see also United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001) (acknowledging that a trial court has "discretion to order pretrial disclosures as a matter of sound case management"); *United States v. Rigas*, 779 F.Supp.2d 408, 414 (M.D. Pa. 2011)("district courts have general discretionary authority to order the pretrial disclosure of *Brady* material to ensure the effective administration of the criminal justice system) (internal quotation and citation omitted); *United States v. Cerna*, 633 F.Supp.2d 1053, 1057 (N.D. Cal. 2009) (applying *W.R. Grace* to *Brady* disclosures and ruling that it had power to issue a pretrial *Brady* order); *United States v. Thomas*, 2006 WL 3095956, *1 (D.N.J. 2006) (issuing pretrial order regulating, *inter alia*, *Brady* disclosures "[i]n order to eliminate unnecessary motions for discovery in this case [and] to eliminate delays in the presentation of evidence and the examination of witnesses").

d. Cases the government may try to cite in opposition to a pretrial order:

1) *Miller*: The case for a pretrial order is not undermined by the Court of Appeals' observation in *Miller* that "factual scenarios vary . . . and constitutionally, it is not feasible or desirable to specify the extent or timing of disclosure *Brady* and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made." *Miller*, 14 A.3d at 1111 (internal quotation and citation omitted). First, the Court made this comment in the context of rejecting the government's "very late is good enough" argument, *id.*; it was never asked in *Miller* to weigh in on the issue of a trial court's authority to issue pretrial *Brady* orders; second, any suggestion that it might be "constitutionally" impermissible to set default deadlines to apply to all cases is questionable given that a number of courts do this, see VII.A.2 *supra*; third and most importantly, this dicta should not preclude a pretrial order issued in a particular case that *is* tailored to defense needs in a particular case.

2) The government may also try to rely on *United States v. Coppa*, 267 F.3d 132, 136-37 (2d Cir. 2001), where the Second Circuit held that the trial court did not have authority to issue an order directing immediate production, before a trial date had been set, of all impeaching information, without regard to materiality, and without regard to the defendant's need to use it to prepare his case. Notably, the government did not seek appellate review of the provision in the trial court's order requiring immediate disclosure of all exculpatory information regardless of materiality. 267 F.3d at 136. *Coppa* is distinguishable where the pretrial order is tailored to the needs of the defense in a particular case and preserves the pretrial materiality inquiry (as discussed above *see* IV supra).

4. The substance of a pretrial *Brady* order:

   a. Depending on the needs of the case, a pretrial *Brady* order could provide checklists addressing what constitutes favorable information and where the government must look for this information, how the government must assess materiality, when *Brady* information must be disclosed, and in what format.

      1) The most common orders govern timing of disclosure, see VII.A.2 *supra.*

      2) Massachusetts' local rule is an example of a more comprehensive approach. *See* D. MASS. L. R. 116.1 &116.2.

   b. In addition to case law and local rules, the government's own policy obligations may serve as the foundation of a proposed order.

      1) Certainly, the government should be hard-pressed to object to provisions of a proposed order that simply mirrors "the government's own stated sense of fairness vis-a-vis criminal defendants." *Miller*, 14 A.3d at 1109-10.

      2) Indeed, if the government is actually following its policy, an order that renders its policy enforceable by a court should be of no concern.

B. Remedies:

1. **The trial court has broad discretion to remedy the government's failure to fulfill its *Brady* obligations pretrial**:

> In lieu of granting a continuance or a mistrial or striking the government's evidence, a trial court has discretion to fashion other appropriate remedial sanctions for the government's failure to make timely disclosure of apparently material, exculpatory evidence as the Constitution requires. . . . The trial judge enjoys a broad range of possible sanctions, *with the sole limitation being that the sanction be just under the circumstances*.

Odom v. United States, 930 A.2d 157, 158-159 (D.C. 2007) (emphasis added).

2. **The remedy the defense gets will depend on the record it makes**.

   a. To get a remedy, the defense must show harm that needs to be remedied: *e.g.*, witnesses it needs to interview that it did not know about previously, a criminal record that needs to be investigated, an opening statement or a line of cross that would have been different if the defense had known about the *Brady* information.

   b. It is difficult to generalize about prejudice – the defense must think about the particulars of its case and ask:

      1) What would it have done differently in the investigation and preparation of its case and if trial has started, what would it have done differently in the presentation of its case?

      2) Have any witnesses died, gone missing or become otherwise unavailable?

      3) Has any evidence been destroyed?

      4) Has so much time passed that memories are now lost, witnesses are too difficult to locate?

      5) Has the prosecution gained some strategic advantage, and if so, how could the playing field be leveled?

   c. Be prepared to push back against the argument that there is no need to remedy the belated disclosure of impeaching information because the defense does not need more time either to investigate this information or incorporate it into its theory of the defense.

      1) For example, prior inconsistent statements about an incident may provide an investigative lead to others who could corroborate that the inconsistent statement is the truth. *See, e.g., Sykes*, 897 A.2d at 781.

      2) Even evidence of prior criminal convictions may need to be investigated. For example, there may be pleadings in those prior cases where the government makes representations about the witness' lack of veracity.

3. **Possible remedies:**

   a. **Mistrial, Dismissal & Vacatur:**

      1) To convince a court to grant a mistrial/dismissal, the defense must show that the harm the defense has suffered cannot be remedied by any lesser means and/or that any lesser remedy will only allow the government to profit from its *Brady* violation.

      2) It is best to acknowledge that in the vast majority of the cases a mistrial/dismissal/vacatur will not be a realistic possibility.

a) The defense should preserve the argument, but do not expect that the court will grant your request.

b) The defense should ask for a lesser remedy in the alternative.

3) That said, courts have granted mistrials and have dismissed cases and vacated convictions as a remedy for *Brady* violations:

a) Superior Court judges have granted mistrials: *United States v. Antonio Linder*, 2005 F 5706 (Christian, J.) (November 28, 2006, court ordered a mistrial in second-degree murder case), *United States v. Antonio Clark*, 2003 F 6781 (Puig-Lugo, J.) (April 18, 2006, court ordered mistrial in a first degree murder case); *United States v. Leroy Beach*, 2005 F 984 (Johnson, J.) (February 17, 2006, court ordered a mistrial in an assault with a deadly weapon case).

b) Superior Court judges have **dismissed cases pretrial**, *United States v. Leandrew Randolph*, 2011 CMD 1216 (Wynn, J.) (May 9, 2011, case dismissed with prejudice); *United States v. Theresa Green aka Tracy Tobin*, 2004 F 6457 (Holeman, J.) (November 14, 2008, court dismissed with prejudice this robbery and simple assault case); *United States v. Leonardo Delacruz*, 2008 CF2 10259 (Gardner, J.) (August 7, 2008, court dismissed with prejudice assault on a police officer case midtrial); *United States v. Tracy Vandyke*, 2004 F 7347 (Christian, J.) (September 11, 2006, in a second degree murder case, court dismissed indictment without prejudice);

c) Superior Court judges have **vacated convictions**, *United States v. Dwight Grandson*, 2004 F 5751 (May 11, 2010, court vacated convictions for premeditated murder, obstruction of justice, and related offenses and ordered a new trial); *United States v. Joseph Harrington*, Crim. No. 2007-CF1-22855 (April 17, 2009, court vacated a jury's verdict for first-degree murder and ordered a new trial for *Brady* violations); *United States v. Lamont Johnson*, 2001 F 5105 (Ross, J.) (February 23, 2005, in an assault with intent to kill case, court vacated the conviction, and ordered a new trial).

More detailed descriptions of a number of these cases may be found in a letter posted on the PDS website from Avis Buchanan to The Honorable Richard C. Tallman, Chair of Judicial Conference Advisory Committee On The Rules of Criminal Procedure, dated July 16, 2010 (http://www.pdsdc.org/Resources/SLD/PDS%20Letter%20to%20Judge%20Tallman,%20%20Chair,%20Judicial%20Conference%20Advisory%20Committee,%20on%20amending%20Rule%2016.pdf).

NOTE: Because these cases are often not published in reported opinions, the special litigation division at PDS asks that trial attorneys consider

notifying us when judges make findings of *Brady* violations or other prosecutorial misconduct (Obviously, counsel must first determine if publicizing this fact is in the best interest of the client or at least not adverse to the client's interests). SLD is also interested in the cases in which the government voluntarily dismisses to avoid a ruling that it violated its *Brady* obligations. Only by recording, compiling, aggregating, and analyzing these cases can any real change come to the system.

d) Federal courts have also dismissed cases: *see, e.g., United States v. Fitzgerald*, 615 F.Supp.2d 1156 (S.D. Cal. 2009) (Lorenz, J.); *United States v. Diabate*, 90 F.Supp.2d 140 (D. Mass. 2000); *United States v. Dollar*, 25 F.Supp.2d 1320 (N.D. Ala. 1998); *United States v. Raming*, 915 F.Supp 854 (S.D. Tex. 1996); *United States v. Lyons*, 352 F.Supp.2d 1231 (M.D. Fla. 2004); *United States v. Cheng Yong Wang*, 1999 U.S. Dist. LEXIS 2913 (S.D.N.Y. Mar. 15, 1999); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), and vacated convictions and granted new trials, *see, e.g., United States v. Quinn*, 537 F.Supp.2d 99 (D.D.C. 2008) (Bates, J.) (finding that the government had violated its *Brady* obligations and ordering a new trial where the government (1) failed to inform the defendant that a "critical" witness had made false statements and would no longer be called at trial because the witness had become the target of an investigation and (2) withheld information about the same witness's plea negotiations).

b. **Lesser remedies**:

1) Possible lesser remedies include:

* A continuance;

* An order precluding the government from introducing particular evidence;

* An order requiring the government to make a witness available to the defense;

* Admission of an otherwise inadmissible statement, *Odom*, 930 A.2d at 159; *see also, e.g., United States v. Joseph Brown,* 2008 CMD 21398 (Morrison, J.) (May 31, 2010, ordering admission of hearsay statements as remedy for *Brady* violation);

* An instruction to the jury that the government withheld evidence from the defense to explain, for example, why defense counsel may not have had the ability fully to prepare for the information or why a certain exculpatory witness could not be located and did not testify. (Such an instruction is distinct from a *Shelton*-type instruction, see VII.C. *infra*).

2) Defense counsel should think strategically about what is best for the defendant. For example, the court may be willing to grant a continuance – but does the defense want it?

a) Perhaps yes, because there are many seemingly fruitful lines of investigation to be pursued, or because client is out and this will give the defense more time to prepare.

b) But perhaps no, because client is being held pretrial, it does not appear that the defense will be able to unearth any more information, and the defense feels it has at least a temporary strategic advantage because the government has not yet determined how it is going to respond to newly discovered *Brady* information. Counsel may want to make release of the defendant a condition of accepting a continuance caused by the government's failure to disclose.

4. **Be careful to distinguish the defense request for a remedy from any request for a sanction.**

a. Remedies are a realistic possibility; sanctions are not a priority for Superior Court judges. Few if any judges are interested in punishing the prosecution for their conduct. Their focus is on the trial over which they are presiding. Sanctions are considered collateral to that proceeding.

b. By requesting sanctions, the defense takes on an additional burden of proving bad faith. A showing of bad faith is *not* required to establish a *Brady* violation. *Brady*, 373 U.S. at 87 ("[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."); *see also, e.g.*, *Virgin Islands v. Fahie*, 419 F.3d 249, 254 (3d Cir. 2005) (holding that dismissal with prejudice can be appropriate sanction for a willful *Brady* violation).

C. A new line of defense – admission by conduct.

1. The defense may want to present evidence concerning the prosecution's untimely disclosure of *Brady* information to support an argument and possible jury instruction that the Government's suppression constituted an admission by conduct that its case was weak.

a. This is a defense that a panel of the Court of Appeals endorsed in *Shelton v. United States*, 983 A.2d 363 (D.C. 2009) – although the opinion was subsequently modified and superseded on rehearing. 26 A.3d 216 (D.C. 2011).

1) In *Shelton*, the government suppressed the complainant's initial statement to the police at the hospital that: "I don't know or I didn't see or all's I saw was. . . someone shoot at me from a dark-colored car." 983 A.2d at 366. At trial, though, the complaining witness identified Mr. Shelton as the shooter.

Although Mr. Shelton was tried twice (the first case mistried after the jury hung), the government did not disclose the complainant's exculpatory statement until the eve of the second trial. At the second trial, the defense sought to question the detective about the government's suppression of *Brady* information, but the trial court precluded this line of inquiry.

2) The panel reversed noting that such a line of questioning/defense was akin to permitting a party to present evidence to support an inference of a party's consciousness of guilt:

> It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. *The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. . . .*
>
> We are persuaded by the analysis in the cases we have discussed and conclude that defense counsel had a basis in law to argue that the government's nondisclosure of exculpatory information was akin to an admission by conduct that the government was conscious that its case was weak (and that it was in fact weak) and that appellant should have been allowed to present that evidence.
>
> 983 A.2d at 370-71 (emphasis added) (internal citation and quotation omitted).

b. In making a consciousness of weakness argument it is important:

1) To make clear that developing the evidence to support this inference is neither a remedy nor a sanction, but a separate line of defense. *See Shelton*, 983 A.2d at 369 (citing *Kyles* and noting that attacking the quality of the investigation is a long-standing line of defense).

2) To support this "consciousness of weakness" inference with evidence that the prosecution knew about the *Brady* information and deliberately did not disclose it. BUT the defense need *not* establish that the prosecution acted in "bad faith." *See United States v. Shelton*, Opposition to Petition for Rehearing en Banc, dated May 19, 2010.

2. Whether this is a viable line of defense in the District is an open question – and one the defense should press courts to decide in our favor.

a. As noted above, a panel of the Court of Appeals approved such a defense argument in *Shelton*, 983 A.2d 363 (D.C. 2009). But the Court subsequently

granted rehearing and vacated its opinion, *United States v. Shelton*, 26 A.3d 233 (D.C. 2011).

b. Although the Court acknowledged that this was "a difficult question of first impression as to which reasonable judges may disagree," 26 A.3d at 233, it did not reject the earlier panel's analysis – it simply held that the issue did not need to be reached in this case:

1) Because any error was harmless. *Id.* ("Resolution of that question is unnecessary to the disposition of this appeal, since all members of the division agree that any error in excluding such evidence was harmless, and that appellant's conviction must be affirmed");

2) And because "[t]here is substantial doubt whether this claim of error was preserved." *Id.*

3) Accordingly, the Court determined that "resolution of the above-described question of first impression should not be undertaken" *id.*, and the court issued a modified opinion in which it declined to "decide . . . whether the claim was adequately preserved because, assuming, without deciding, that the trial court erred in excluding the evidence and precluding counsel from arguing its relevance to the jury, we conclude that the error was harmless." 26 A.3d at 222.

4) Judge Ruiz concurred in affirming the conviction but disagreed with the panel's decision to vacate its original opinion because "there is evidentiary relevance to a prosecutor's purposeful failure to disclose exculpatory evidence." 26 A.3d at 224 (Ruiz, J. concurring). The opinion in *Shelton I* was included as an Appendix to Judge Ruiz's concurrence.

VIII. Significant Cases:

A. Pre-*Brady* Supreme Court Cases:

1. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (The deliberate use of perjured evidence and suppression of impeaching evidence by state prosecutors constitutes a due process violation).

2. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (A defendant makes a viable due process claim if his imprisonment resulted from "perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him.").

3. *Mesarosh v. United States*, 352 U.S. 1 (1956). Government acknowledged after trial that informant/witness had given false testimony in several other proceedings in different courts concerning the general subject matter of his testimony at trial (relating to Communist Party activities). Government argued that his testimony at defendant's trial was truthful and that there was sufficient other evidence. In

rejecting this argument the Court observed that the informant "by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." *Id*. at 14. "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." ***Id.*** The Court ordered a new trial because "it cannot be determined *conclusively* by any court that his testimony was *insignificant* in the general case against the defendants." (emphasis added).

4. *Alcorta v. Texas*, 355 U.S. 28 (1957). Defendant argued that he stabbed his wife only after seeing her with another man. That other man, who was the only witness, testified that he had no romantic relationship with the wife and was just driving her home. The prosecutor knew about the romantic relationship but told the man not to volunteer that information but to testify truthfully if asked about it. His testimony, however, implied falsely that there was no relationship. The prosecutor did not disclose that the witness had admitted to the sexual relationship, which would have seriously corroborated the "heat of passion" defense. That defense could have made him ineligible for the death sentence that he had received. Court held due process violation because the testimony, even if not knowingly false, certainly gave a "false impression" that prejudiced the defendant. ***Id.*** at 31.

5. *Napue v. Illinois*, 360 U.S. 264 (1959). Key witness testified that he was offered no consideration for his testimony. Even though prosecutor had actually promised him consideration, the prosecutor did nothing to correct the false testimony on that question.

    a. When government uses false evidence or allows it to go uncorrected, the conviction "must fall under the Fourteenth Amendment." *Id*. at 269.

    b. Impeachment is just as important as any other evidence. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id*. at 269. The question is whether the testimony "may have had an effect on the outcome." *Id*. at 272.

    c. "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth*. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." *Id*. at 269-270 (internal quotations and citation omitted) (emphasis added).

    d. The fact that witness was impeached by testimony that a public defender had promised to help him after testifying did not cure the violation because the word of the prosecutor was much stronger and more effective impeachment. Thus,

evidence that defendant had access to some impeachment information does not render additional, important impeachment evidence immaterial.

B. *Brady* and Supreme Court Progeny:

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

a. Brady confessed to murder but argued that he should not get the death penalty because he did not perform the actual killing. The Government did not disclose to Brady that the co-defendant admitted to performing the killing.

b. "[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." *Id.* at 87. "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." *Id.* at 87.

c. It is often overlooked that the Court employed a fairly lenient materiality standard in *Brady*. The suppressed confession by the co-defendant also stated that Brady likewise wanted to kill the victim, but that Brady wanted to strangle the victim and the co-defendant wanted to shoot him. Even so, the Court held that the confession would have been favorable to *Brady* and found a due process violation.

2. *Giglio v. United States*, 405 U.S. 150 (1972).

a. Key witness testifies that he and Mr. Giglio forged $2300 in money orders, and that witness believes witness "still could be prosecuted," *id.* at 151; and Government argues in closing that witness "received no promises that he would not be indicted." *Id.* at 152. But, in fact, grand jury prosecutor had, unbeknownst to trial prosecutor, promised witness that if he testified before grand jury he would not be indicted. The trial prosecutor denied any knowledge of the promise and thus any knowing use of false testimony.

b. The Court clarifies that the *Brady* disclosure obligation does not turn on the trial prosecutor's actual knowledge of the information. The Court imputed the promise of the first prosecutor to the entire office, holding that the burden should be placed on the Government to develop "procedures" to ensure that "all relevant information" is communicated to each lawyer who handles any case. *Id*. at 154.

c. The Court clarifies that impeachment information falls under *Brady*: "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*]." *Id.* at 154.

d. The court clarifies that reversal under *Brady* requires a finding of materiality (though what "materiality" means will evolve), which is defined as a showing that

the withheld evidence could "in any reasonable likelihood have affected the judgment of the jury." *Id.* at 154 (internal quotation and citation omitted).

3. *United States v. Agurs*, 427 U.S. 97 (1976).

a. Agurs was convicted of murder after she and a man had checked into a motel. Witnesses heard Agurs screaming for help and came to the room to find Agurs and the man struggling for a knife. The man was on top of Agurs, and he was bloody and was trying to jam the knife into Agurs' chest. The man died of multiple stab wounds, and Agurs was not wounded. The evidence established that the man had been carrying two knives with him when he checked into the hotel. The prosecutor did not disclose the man's prior criminal record, including assault with a deadly weapon and carrying a deadly weapon (both knives).

b. The Court holds that there are three different standards of review for *Brady* violations.

1) The highest level of scrutiny is reserved for cases involving knowing perjury and false evidence. Reversal is warranted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id*. at 103.

2) An intermediate level of scrutiny is used in cases where a specific *Brady* request is made. A failure to disclose evidence that had been specifically requested is "seldom, if ever, excusable." *Id.* at 106.

3) For all other cases, including when no *Brady* request is made or when just a general request for "*Brady* information" is made, the prosecutor still has an independent disclosure obligation. But, in those cases, the Court applies a less stringent standard: whether, after viewing everything, there is any reasonable doubt about the conviction. *Id*. at 112-13. Applying this standard *the court finds that the suppressed evidence was not material:* Evidence of guilt was strong, given that Sewall had multiple stab wounds and Agurs had none. Sewall's criminal record did not contradict any evidence offered by the prosecution and was largely cumulative of other evidence about Sewall's violent character, including undisputed evidence that he arrived at the hotel room with two knives.

NOTE: The bright-line distinction between specific request and "no request" or "general" request has since been abolished by *Bagley*, see below.

c. The Court also notes in Agurs that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108.

d. The court reiterates that the heart of the *Brady* inquiry is about fairness not bad faith: Suppression violates constitution because of "character of the evidence, not the character of the prosecutor." *Id.* at 110. Failure to disclose highly probative

evidence violates the constitution even if it was wholly inadvertent, and failure to disclose trivial evidence is not a constitutional violation even if prosecutor is trying to suppress a vital fact.

***4. United States v. Bagley*, 473 U.S. 667 (1985**).

a. Government's two key witnesses on narcotics and firearms charges testify that their statements have been made without any promise of reward. Post-trial defense learns (via FOIA request) that witnesses had agreements with ATF to receive financial "rewards" for their cooperation. Court of Appeals holds that automatic reversal is required when government fails to disclose impeachment evidence of this sort because its suppression also amounts to a Confrontation Clause violation.

b. The Supreme Court explains that *Brady* is a rule of fairness that is a "departure from a pure adversary model," *id.* at 675 n.6, that "requir[es] the prosecutor to assist the defense in making its case." *Id.*

c. The Court reaffirms holding of *Giglio*: "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *Id.* at 676. But the Court holds that the failure to disclose impeachment evidence is of the same – not of greater or lesser – constitutional import, under *Brady*, as the failure to disclose exculpatory evidence. In fact, the Court is so concerned about the prejudice to the defense from the suppression of this impeachment information it remands the case for a reassessment of materiality under the correct standard (see below).

d. The Court discards the *Agurs* distinction between specific request and general/no request situations. Standard of materiality to show a *Brady* violation is the same: whether "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." *Id.* at 682.

1) Even so, the Court holds that specific requests matter, because the prosecution's failure to respond may mislead the defense and thus impair the adversary process:

> the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

Id. at 682-83.

2) The standard for false evidence and testimony still remains the same: it is material unless the government can show beyond a reasonable doubt that it was harmless. *Id*. at 678-79.

e. The Court remanded the case because it "think[s] there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government." *Id*. at 683. The Court notes that "the fact that the [witnesses'] stake [in the outcome] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." *Id*.

5. *Kyles v. Whitley*, 514 U.S. 419 (1995).

a. A woman is murdered in a parking lot, and her car is stolen. Six eyewitnesses give statements containing physical details that are inconsistent with Kyles but consistent with another man named Beanie. Beanie, using different names, contacts police several times and tells several different stories. He claims that he bought the victim's car from Curtis Kyles and expresses concern that he, himself, is a suspect. Beanie also knows a number of details about the crime, asks for a reward, and, curiously, goes to Kyles' apartment before telling police where exactly particular inculpatory items will be located, including the murder weapon. Police prepare a photo lineup with Kyles' picture, not Beanie's. Some witnesses identify Kyles but others do not or are not asked. Kyles is tried twice based on eyewitness testimony alone; Beanie is never called to testify. The first trial concludes with a hung jury and a mistrial is declared. Kyles is convicted after the second trial.

b. Government failed to disclose the six exculpatory eyewitness statements, records of police dealings with Beanie, recording of Beanie's inconsistent statements, a written statement by Beanie, a computer printout of cars from a parking lot that shows Kyles' car was not there, an internal memo in which police plotted to seize Kyles' trash at the suggestion of Beanie, and evidence linking Beanie to other crimes in the same location, including another murder.

c. *Kyles* is the source of the understanding that the duty of disclosure extends to the prosecution team: The Court clarifies that prosecutors are charged with knowledge of information in the possession of police and that they have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in a case." *Id*. at 437.

d. The Court discusses the materiality component of the *Brady* inquiry in depth and clarifies:

1) "A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* at 434 (internal quotations and citation omitted).

2) "It is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35.

3) In assessing materiality, *Brady* information must be evaluated cumulatively, not item by item. *Id.* at 436.

e. The Court rejects the State's invitation to limit the prosecution's duty of disclosure pretrial:

1) The State had "asked [the Court] at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult ... to know" from the "perspective [of the prosecutor at] trial ... exactly what might become important later on." *Id.* at 438.

2) But instead of giving the State "a certain amount of leeway in making a judgment call as to the disclosure of any given piece of evidence" as requested, the Court shifted the disclosure equation in the other direction:

> A prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See Agurs,* 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. at 439-40.

f. The Court concludes that disclosure of suppressed evidence in *Kyles* would have made a different result reasonably probable. In so doing:

1) The Court acknowledges that inconsistent eyewitness statements are material because the "evolution over time of a given eyewitness's description can be fatal to its reliability," *id.* at 444, and "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." *Id*. at 445.

2) Information can be material if its disclosure could help a defendant attack the thoroughness of the police investigations. The disclosure of the information in *Kyles* "would have revealed a remarkably uncritical attitude on the part of the police." *Id*. at 445.

6. *Strickler v. Greene*, 527 U.S. 263 (1999).

a. This case involved evidence of guilt that was overwhelming, but the government failed to disclose important impeachment information of the sole eyewitness to the abduction, including correspondence with police and notes from interviews that establish that her confidence about her trial testimony was highly questionable. In state post-conviction proceedings, government said that disclosure was unnecessary because it maintained an "open file."

b. The Court reiterates three elements of a *Brady* violation on appeal*:* 1) favorable evidence is 2) suppressed by government 3) resulting in prejudice. The court also makes clear that the prosecution has a "broad" duty of disclosure pretrial that is not limited to that which establishes a *Brady* violation post-trial:

> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Id. at 281.

c. The Court rejects state court and 4th Circuit arguments that the *Brady* claim was defaulted because habeas petitioner was not "diligent" in discovering this information himself. Diligence is not an element of *Brady*. If the "suppression" prong of *Brady* is met—and a defendant is relying on the state's representations, implicit or explicit, that no *Brady* material exists—a court cannot expect or require a defendant to investigate to find out if the state is lying. The defense is entitled to rely on the representations of the prosecution. *Id*. at 284 ("[I]t was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination.").

d. Justice Souter, concurring in part and dissenting in part, attempts to clarify the materiality standard employed by the Court in *Brady* and its progeny. He argues that "significant probability" rather than "reasonable probability" is the legal shorthand for establishing prejudice under *Brady*. He expresses concern that the use of "reasonable probability" risks confusion with the far more demanding "more likely than not." *Id*. at 297-301.

7. *United States v. Ruiz,* 536 U.S. 622 (2002).

a. Defendant enters guilty plea after initially refusing to accept a more favorable "fast track" plea bargain, under which government would recommend downward departure under Sentencing Guidelines if she pleaded guilty, because government demanded waiver of *Brady* right to disclosure of impeachment evidence and any information supporting an affirmative defense. (The rejected fast-track plea agreement provided that the government would "provide any information establishing the factual innocence of the defendant regardless." *Id.* at 631).

b. The Court holds that because "[t]he principle supporting *Brady* was 'avoidance of an unfair trial'. . .[and] that concern is not implicated at the plea stage," *Brady* does not require disclosure of impeachment information prior to plea negotiations pursuant to plea deal where government had promised to disclose all evidence of innocence at time of plea. *Id.* at 634 (Thomas, J. concurring).

c. Likewise with respect to information supporting an affirmative defense, the Court held "*in the context of this agreement*, the need for this information is more closely related to the fairness of a trial than to the voluntariness of the plea." *Id.* at 632 (emphasis added).

d. *Ruiz* should be interpreted to have limited import, bounded by its facts. It was looking at the voluntariness of a plea prior to indictment, not the impact of withheld information on the fairness of a trial (indeed there was no allegation that any information had been withheld). *See United States v. Ohiri*, 133 Fed. Appx. 555 (10th Cir. 2005) (*Ruiz* did not excuse suppression of exculpatory (not impeachment) information where plea was executed the day jury selection was to begin (not pre-indictment as part of a "fast-track" plea)); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (Given *Ruiz's* distinction between exculpatory and impeachment evidence, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.").

***8. Banks v. Dretke,* 540 U.S. 668 (2004).**

a. In a capital murder case, State represents that it would provide all discovery to which the defendant was entitled but fails to disclose evidence that would have allowed Banks to discredit key government witnesses – the status of Farr as a paid government informant and a pre-trial transcript revealing that Cook's testimony had

been intensively coached. State further fails to correct false statements made by the witnesses on cross-examination regarding these facts. In penalty phase, the government relied heavily on Farr's testimony about his and Bank's supposed future plan to commit an armed robbery. However, in a 1999 affidavit Farr represented that he had received $200 from a police officer to stage a set up. Farr asked Banks to obtain a gun for Farr to commit robbery. He further stated that he believed that if he didn't help the officer with his investigation, he would be arrested for drug charges. The Court reverses a denial of habeas relief, finds that there was a *Brady* violation, and overturns the death sentence. The Court remanded for further proceedings on the guilt-phase *Brady* claim.

b. Where as here "prosecutors represented at trial and in state post conviction proceedings that the State had held nothing back," *id.* at 698, the Court holds that defendants need not "scavenge for hints of undisclosed *Brady* material." *Id*. at 695. Defendants can reasonably rely on representations and conduct of government officials. "A rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696.

c. The Court also stresses importance of being able to impeach and fully cross-examine informants because of the suspect nature of their testimony. Here, the informant's status was withheld, and his testimony was critical to the penalty phase. Even though there was some impeachment of the informant, the Court stresses that impeachment was quantitatively and qualitatively different than it would have been had the information been disclosed. *Id*. at 699-703.

9. *Cone v. Bell*, 556 U.S. 449 (2009).

a. Prosecutor suppressed various evidence tending to show that defendant had a drug problem and may have been drunk or high when committing the murders.

b. This evidence was not material to guilt, but Court holds that it may have been material to punishment because it tended to mitigate culpability, and the government had tried to discount any idea that Cone was affected by drugs. The Court remanded to have the lower court decide the issue in the first instance.

c. The suppressed evidence amounts to a few statements that merely would have helped the defendant establish that he was a serious drug user. *Cone* is thus important because it demonstrates that evidence need not be overwhelming in the slightest to be *Brady* material—it just needs to speak to one of the many things that courts have found to be material to mitigation.

10. *Smith v. Cain*, No. 10-8145, 2012 U.S. LEXIS 576 (January 10, 2012).

a. The Supreme Court reversed a conviction pursuant to a straightforward application of *Brady*. Eight members of the Court easily rejected the position urged by the State of Louisiana and by Justice Thomas, the sole dissenter.

b. The only eyewitness, who had testified at the murder trial that he was sure of his identification, had told police the night of the murder and a few days later that he could not make an identification. The Court called this information, which revealed inconsistent statements by the only eyewitness to the crime, "plainly material."

c. The rest of the justices rejected the prosecution's argument—supported by Justice Thomas—that the prosecution may have been able to provide other evidence that could have led to the jury discounting the undisclosed inconsistent statements. The Court refused to "speculate" about whether the prosecution could have explained away the inconsistencies or which of the inconsistent statements a jury would believe, confirming that *Brady* requires disclosure even if the prosecutor can think of reasons that she does not find the evidence convincing.

C. Significant D.C. Court of Appeals *Brady* cases:

1. *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011).

a. In this murder case, the court reviewed whether the government had fulfilled its *Brady* obligations where it disclosed a year before trial notes documenting a description of the shooter that did not match the defendant but withheld until a week before trial the full transcript of the videotaped interview with the witness who provided this description, and where it disclosed a year before trial notes indicating that another witness had failed to identify the defendant in a photo array, but withheld until weeks before trial information that the witness had stated that two other people in the array looked like the shooter.

b. The Court of Appeals held that the prosecution had not timely disclosed all the information it should have pretrial but ultimately affirmed the conviction because of its conclusion that the defense had not been prejudiced by the government's untimely disclosures.

c. The Court firmly rejected the argument that the videotaped interview was only "potentially exculpatory" and thus did not need to be disclosed pretrial. *Id*. at 956 n.11 (observing that Court was "at a loss to understand th[e] reasoning" of the prosecution that videotaped statement of witness who gave police "a physical description [of the shooter] that could not match Mr. Mackabee" "was not the kind of exculpatory information that [the government] would immediately go around and turn over").

d. The Court also held the witness's failure to identify defendant in a photo array coupled with statement that the shooter "sort of look[ed] like" the photographs of two other people in the photo array was exculpatory in that it was "evidence of a kind that would suggest to any prosecutor that the defense would want to know about it." *Id*. at 962.

2. *Miller v. United States*, 14 A.3d 1094 (D.C. 2011).

a. Defendant was charged with assault with intent to commit murder and related offenses arising out of a shooting. Notwithstanding multiple *Brady* requests, the government withheld until the evening before opening statements, grand jury testimony in which the government's principal eyewitness stated that the gunman held the pistol in his left hand. Defendant is right-handed. The defense argued that it was unable to effectively use this information at trial, and in particular, that it did not have time to appreciate that another prosecution witness, Lindsay, who was a potential suspect, had given the police a videotaped statement in which he signed his rights card with his left hand. The Court found a *Brady* violation and reversed.

b. The Court begins its opinion by emphasizing the importance of the *Brady* rule in ensuring fairness and avoiding wrongful convictions, stressing that "the principles of *Brady* must therefore be conscientiously applied not only by judges, but by prosecuting attorneys," and noting that "*Brady* unambiguously prescribes the prosecutor's priorities: The prosecutor's obligation is to see justice before victory." 14 A.3d at 1107 (internal quotation and citation omitted).

c. Regarding what is exculpatory information, the Court endorses a simple, "eminently sensible standard": Evidence is "exculpatory for *Brady* purposes because it [i]s of a kind that would suggest to any prosecutor that the defense would want to know about it." *Id.* at 1110 (quoting *Leka v. Portuondo*, 257 F.3d 89, 99 (2d Cir. 2001)).

d. The Court rejects the government's claim, "remarkable for its breadth," that the prosecution was not obligated to disclose the information about the shooter being right-handed because the government had determined this information was not material. *Id.* at 1109.

    1) The Court reaffirms its analysis in *Boyd* that the duty of disclosure pretrial is broader than what ultimately constitutes a *Brady* violation post-conviction. *Id.* at 1109.

    2) The Court also reiterates its admonition in *Zanders* that "*It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact-finder.*" *Id*. at 1110 (quoting *Zanders*, 999 A.2d at 164; adding emphasis).

    3) In the course of its materiality discussion, the Court notes that the government's own policy requires that prosecutors take a broad view of what must be disclosed, and also notes the "telling contrast between the government's own stated sense of fairness vis-a-vis criminal defendants [as documented by the government's *Brady* policy] and its unqualified assertion, in this case, that it was not obliged to disclose to the defense Taylor's plainly exculpatory testimony before the grand jury." Id. at 1109-10.

e. Regarding timing, the Court emphasizes the importance of timely pretrial disclosure.

1) The Court reiterates its statement in *Perez*, 968 A.2d at 66, that the object of the *Brady* is to "allow defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense" and condemns "[p]rosecutorial resort to a strategy of delay and conquer" as "not acceptable." 14 A.3d at 1108.

2) The Court subsequently rejects the "very late is good enough" arguments made by the government in support of eve or midst of trial disclosure as "inconsistent with *Brady*," *id*. at 1111, and cogently explains why the defense needs *Brady* information early enough in the life of the case so that it can actually make use of it. The Court also acknowledges that once trial has begun, defense counsel is distracted with other matters, is not in investigative mode, and may not be able to incorporate new exculpatory information into its case. *Id.* at 1111-13.

3) Although the Court acknowledges that where "a *Brady* claim is predicated upon the timing of the disclosure, the defendant must show prejudice from the delay itself," *id*. at 1115, the Court also makes clear that the defense's ability to make some use of the information is not equivalent to "effective use." *Id.* at 1115. In *Miller*, the Court determined that the good job defense counsel did under challenging circumstances could not be held against the defense in the context of the materiality inquiry. Timely disclosure would have helped the defense make an even more persuasive case that the government had not met its burden of proof and indeed that another man might have been responsible for the shooting. *Id*. at 1115-16.

3. ***Zanders v. United States***, 999 A.2d 149 (D.C. 2010).

a**.** In this murder case**,** the Court of Appeals determined that the prosecution's summary disclosure did not satisfy the government's pretrial disclosure obligations under *Brady,* but declined to reverse in the absence of a showing of prejudice.

b**.** The prosecutor had provided the defense a summary disclosure stating that:

> [Attorney] Betty Ballester represents an individual who was interviewed by the [MPD] [who said that] . . . [Allen] Lancaster was involved in some sort of altercation/argument with [Shawn] LNU in the days immediately preceding his murder. This information was investigated and found to have no bearing on the case. Therefore the government does not believe this information is in any way *Brady* material. However, I am disclosing it now in an excess of caution.

Brief for Appellee, *Thomas Zanders v. United States*, District of Columbia Court of Appeals No. 05-CF-246 at 58. The summary disclosure did not reveal "significant exculpatory information," 999 A.2d at 163, contained in the notes of

the witness interview, namely, that the altercation had taken place in the exact location of the decedent's shooting the following night. *Id.* at 161.

c. The Court of Appeals concluded that the prosecution's summary *Brady* disclosures were "incomplete and late." *Id*. at 164; *see also id*. (admonishing that "[a]ny doubts [regarding *Brady* disclosures] should be resolved in favor of *full* disclosure made well before the scheduled trial date") (emphasis added).

d. Regarding what the government must disclose as *Brady* information:

1) The Court observes that "[i]t should by now be clear that in making judgments about whether to disclose potentially exculpatory information, the guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel." 999 A.2d at 163-64.

2) The Court also admonishes the government for withholding information because it has decided that the information is not creditable: "It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder." *Zanders,* 999 A.2d at 164.

e. Regarding when the government must disclose *Brady* information:

1) The Court specifically noted that the defense must have "a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the defense." *Id.* at 164.

2) Accordingly, the Court stated that "[a]ny doubts should be resolved in favor of full disclosure made well before the scheduled trial date, unless there is good reason to do otherwise (such as substantiated grounds to fear witness intimidation or risk to the safety of witnesses), upon request by the defense." *Id*. at 164.

4. *Perez v. United States,* 968 A.2d 39 (D.C. 2009).

a. In murder case, government withheld pretrial, among other things, key witness's statements to the grand jury that he was drunk at the time of the incident and had no memory of it. Court holds that government should have disclosed this information pretrial, *id.* at 66 ("There is no question here that Alemán's grand jury testimony should have been disclosed before trial."), but affirms after concluding that the defense was not prejudiced from the belated disclosure of this information.

b. Regarding timing, the Court of Appeals:

1) Admonishes the government, noting that it had been "repeatedly confronted with complaints of tardy disclosure of exculpatory material," *id*. at 65;

2) Clarifies that at trial disclosure of *Brady* information is presumptively untimely:

> *This Court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under Brady,* or that if such disclosure is made, the burden may then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.

Id. at 66 (emphasis added);

3) And explains that "timely, *pretrial* disclosure," *id.* (emphasis added), is necessary because:

> *the due process obligation under Brady to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.*

Id. at 65-66 (emphasis added).

5. *Lindsey v. United States*, 911 A.2d 824 (D.C. 2006).

a. In this first degree murder case, the government concedes and the Court holds that the prosecution made *Brady* disclosures that were both incomplete and late.

b. The Court reiterates that impeachment information is *Brady* information and "may well be determinative of guilt or innocence." *Id*. at 838 (quoting *Giglio*, 405 U.S. at 154).

c. Here, "the government had given the defense some *Brady* evidence prior to trial, but it became clear as the proceedings progressed that the disclosures were substantially incomplete." *Id*. at 839. Specifically,

1) "Each of the eyewitnesses had been treated favorably by the government in exchange for their testimony by garnering plea agreements on other charges or being paid with federal witness vouchers, but impeachment evidence on three of the four eyewitnesses was not disclosed before trial and had to be supplemented by the government as the trial progressed." *Id.*

2) "The failures were the most egregious with regards to eyewitness Kevin Perry, who had to be excused twice during his testimony when defense counsel uncovered further evidence of Perry's cooperation with police officers that the government had not disclosed." *Id.*

3) "Finally, the trial court delayed the proceedings for an entire day mid-trial so that the government could supplement their deficient disclosures." *Id.*

d. The Court affirms the conviction however because it finds that there is no reasonable probability that the result would have been different had the government fulfilled its *Brady* obligations.

6. *Sykes v. United States*, 897 A.2d 769 (D.C. 2006).

a. In this murder case, Court reverses and remands for a new trial where government belatedly discloses impeachment information.

1) Sykes and two co-defendants were charged with armed robbery and murder outside the Bulgarian Embassy. Government witness Williams claims the defendants confessed crime to him at a boarding house and showed him jacket stolen from victim, and that two other witnesses, Parrott and Sellers, were also there. A year before trial, Parrott and Sellers testify before the grand jury and say that they weren't at the boarding house and never heard the defendants confess. Government doesn't disclose that grand jury testimony exists until two days before trial and defense doesn't get transcripts until after trial has started.

2) At trial, government relies heavily on Williams and states that Sellers is in custody in MD and under writ to testify and detectives are trying to locate Parrott. Trial judge offered a continuance, which defense rejected in light of Sykes' long incarceration pending trial and belief that Sellers would testify. Sellers is then released and neither he nor Parrott can be located by detectives or defense investigators to testify at trial. Trial judge allows only "substantially redacted" grand jury testimony of both to come in.

b. The Court notes that the fact that this information was impeaching did not weaken the government's disclosure obligation: "[U]nder our precedents, . . . the [withheld] grand jury testimony . . . should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence." 897 A.2d at 778.

c. The Court held that the government should have revealed the identities of exculpatory witnesses "to the defense *shortly after their 1996 grand jury appearance*" when the government first learned they possessed information favorable to the defense; the court found this would have given the defense "an opportunity to interview them, and to conduct additional pre-trial investigation . . . based on those interviews." *Id.* at 781 (emphasis added).

d. The Court also held the fact that the jury heard substantially redacted grand jury testimony of the witnesses did not make up for the lack of having those impeachment witnesses testify live, subject to direct and cross examination:

While Mr. Sykes had an opportunity to conduct rigorous cross-examination of Mr. Williams, he had no opportunity to present Mr. Sellers or Mr. Parrott, or both, to the jury. Hence, their credibility was not tested by direct or cross-examination, and the prosecutor was able to cast doubt on their credibility by suggesting that

they were not being truthful in saying that they did not hear the appellants discuss the October 23, 1995 events at the Bulgarian Embassy. And, the substantially redacted grand jury testimony of Mr. Sellers and Mr. Parrott, which the jury heard, did not provide a complete picture of them, or afford the jury the opportunity to see their demeanor.

Id. at 780-81.

7. *Boyd v. United States,* 908 A.2d 39 (D.C. 2006).

a. In this murder case, where defense theory was that three people (not including defendant) had committed the crime, not four, government withheld multiple witness statements supporting defense theory of the case (some statements were not revealed until the appellate litigation).

b. The Court mandates trial court oversight over pretrial *Brady* disclosures. After an extensive discussion of the prosecution and defense theories, in which the court agrees with the defense that the prosecution is too pinched in its assessment of what might have been helpful to the defendant at trial, the Court observes that:

> [t]he government is not in a position to be a perfect arbiter of defense strategy. . . . Although we are required to leave the prosecutor "with a degree of discretion" in identifying information that must be turned over to the defendant pursuant to *Brady* . . . that discretion is not unlimited, and *courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial*.

Id. at 59 (emphasis added).

c. Although the Court rejects the approach of requiring the government to disclose all favorable information to the defense regardless of its assessment of its materiality, *id.* at 61 n.32, the Court holds that the government has a "broad" pretrial duty that obligates it to disclose "arguabl[y] material" favorable information, even if that information later proves not to be material:

> In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for in camera inspection. Further, when the issue appears to be a close one, the trial court should insist upon reviewing such material, and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure may affect the outcome. All such rulings must be made in full recognition of the reality that "*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation," and that "compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system."

Id. at 60-61 (internal quotations and citations omitted).

8. Bennett v. United States, 797 A.2d 1251 (D.C. 2002).

a. The Court reversed defendant's conviction for first degree murder because the government failed to disclose information that would have impeached a prosecution witness.

b. At trial, the government disclosed as Jencks material, a key witness' grand jury testimony but redacted portions of her testimony referring to a separate murder. Defense Counsel asked for the redacted portions to be disclosed. The prosecution conceded that the witness had been untruthful with respect to her testimony about the other murder, but asserted that this information was irrelevant to the charged crime. The trial court reviewed the full grand jury transcript in camera and declined to order disclosure to the defense.

c. The Court of Appeals had a very different view. It determined that "the jury in this case was denied information which was of critical importance to its assessment of the evidence," *id.* at 1255, and concluded that the failure to disclose this impeachment information constituted a *Brady* violation:

1) The Court concluded that "[t]here c[ould] be no doubt that the redacted evidence, which showed that Delores Smith lied either to the police or to the grand jury about a murder that she allegedly witnessed, was evidence favorable to the defense. *Id*. at 1256 (internal quotations and citation omitted).

2) The Court concluded that this information was material:

> The question of Bennett's innocence or guilt of a brutal murder turned entirely on the credibility of the witnesses. Delores Smith was perhaps the most important of these witnesses, and the jury was faced with the question whether this witness should be believed when she testified, under oath, regarding Bennett's involvement in a wanton and intentional killing.
>
> Murder is, perhaps, the ultimate crime. To lie to the police or to a grand jury about a murder is to pervert the course of justice with respect to the willful taking of a human life. If a witness is willing to lie about a murder, a jury may well conclude that she is likely to be willing to lie about anything. More particularly, if she has lied about one murder, there may be little if any reason to credit her testimony about a different murder.

Id. at 1255 -1256; *see also id*. at 1256-57.

3) Finally, the Court rejected the trial court's determination that this information could not have been used to impeach Ms. Smith because it was minimally relevant or cumulative.

a) The Court found that the trial court's discretion to limit the scope of cross-examination is not so broad as to "justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Id.* at 1257 (internal quotations and citation omitted).

b) The Court also determined that the information about Ms. Smith's lie to the police or the grand jury about whether or not she witnessed another murder was not cumulative:

> We have held that even where a prosecution witness has been "substantially impeached," the trial court's refusal to permit further and different impeachment may warrant reversal of the defendant's conviction. . . . If the defense had been permitted to cross-examine Delores Smith about, and impeach her with, her two irreconcilable versions of the second murder, there is, at least, a reasonable probability that her credibility in Bennett's case, already shaky as a result of other impeachment, would have been fatally undermined.

Id. at 1258.

9. *Gaither v. United States,* 759 A.2d 662 (D.C. 2000), *mandate recalled and opinion amended by,* 816 A.2d 791 (D.C. 2003).

a. The Court remanded for an evidentiary hearing to determine whether there were suggestive procedures used in the identification process and, even if those procedures did not ultimately influence the witness, whether their use caused doubt on the thoroughness and good faith of the investigation such that they should have been disclosed under *Brady*. *Id.* at 663.

b. The Court also directed the trial court on remand to determine whether the government had given the witness benefits of between $400-800 in witness voucher payments, a $100 loan, free lunches, and promises of help and friendship. *Id*. at 663-64.

c. On remand, conviction was vacated and new trial ordered. *United States v. Reginald Gaither*, F-5286-88 (Feb. 5, 2004).

***10. Black v. United States,* 755 A.2d 1005 (D.C. 2000).**

a. A witness had given "possibly deceptive answers on a CVSA lie detector test that may have been inconsistent with her later statement to" police. *Id.* at 1010. Counsel tried to probe the nature of the statements at a pretrial hearing but trial court sustained prosecution's objections to defense questions.

b. The Court of Appeals remands to trial court to hold a hearing to determine if there was a *Brady* violation and observes that this is what the trial court should have done in the first instance:

> Because we do not know the deceptive statements made by Marshall to Detective Young during the interview, we cannot make an informed determination of whether the information was material under *Brady.* It may be that Marshall's statements to Detective Young contradicted her inculpatory trial court testimony that identified Black as the shooter. Thus, the information could have served to impeach Marshall's testimony, and if timely disclosed by the government, may have produced a different result in this case. *The trial court should have conducted an inquiry,* either by requiring Detective Young to testify at the suppression hearing about the content of Marshall's statements during the CVSA test, or otherwise by requiring the government to produce more information about the substance of Marshall's interview.

Id. at 1010 (emphasis added).

11. *Farley v. United States*, 694 A.2d 887 (D.C. 1997).

a. In this drug distribution case the Court remands to determine if government violated its *Brady* violations when it failed to disclose statements that witness gave to police as well as the complaint witness filed with the Civilian Complaint Review Board.

b. In so doing, the Court rejected the government arguments that (1) by disclosing to the defense, the witness' "name and address and the substance of his statement to the police," . . . it fulfilled its *Brady* obligations and (2) that the government had no obligation to disclose the CCRB complaint because it was unaware of its existence. *Id.* at 889.

c. The Court specifically notes that the government is responsible for knowing about Civilian Complaint Review Board complaints against individual police officers, particularly because D.C. municipal regulations require notice of any complaints to be given to the officer accused, and if the individual officer was notified, his knowledge could be imputed to the government. *Id*. at 889-90.

d. The Court remands for the trial court to conduct a materiality analysis of the suppressed information.

12. *Curry v. United States*, 658 A.2d 193 (D.C. 1995).

a. Government withholds for over a year and fails to disclose until two days before trial the fact that on the night of the charged murder, an eyewitness gave a description of the shooter that did not match the defendant. By this time, the witness was gone, and no party could find him. The government conceded and the Court held that the Government had violated its duty of disclosure and that the information should have been disclosed. *Id*. at 197. Defense counsel moved for dismissal or in the alternative that the defense be permitted to introduce into evidence the witness' statements to police. The trial court denied the motion finding the witness had disappeared soon after the shooting and that the defense

would not have been able to locate him even if the information had been disclosed earlier. *Id.*

b. The Court explains that *Brady* "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. Effective compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system." *Id.* (internal quotation and citation omitted).

c. Regarding timing:

1) The Court holds that the identity of the witness should have been disclosed "soon after the return of Curry's indictment," particularly because the government was on notice of witness mobility and knew that the "the trail might quickly turn cold if it were not promptly and energetically pursued." *Id*.

2) The Court emphasizes the importance of timely disclosure: "[T]he practice of delayed production must be disapproved and discouraged. . . ." *Id.* The Court also stated: "Such delay may imperil a defendant's right to a fair trial, and a conscientious prosecutor will not countenance it." *Id*. at 198.

d. The Court affirms because, under a deferential standard of review, the trial judge's factual holding that the defense would not have been able to locate the witness even had the identity been disclosed at indictment, was not "clearly erroneous." *Id.* at 198. Thus, while the Court might have been permitted to order other relief, such as the uncross-examined use of the witness's statement, the trial judge did not abuse his discretion in not permitting that.

13. *Smith v. United States*, 666 A.2d 1216 (D.C. 1995).

a. In *Smith*, the government did not disclose until trial that the victim/witness had misrepresented to police that the assailant had waved a gun in his face during the 911 call. He did this in order, he said, to have the police come more quickly. The Court held that the failure to disclose this information pretrial was a *Brady* violation. 666 A.2d at 1225.

b. In so doing the Court rejected the government's argument that this was mere impeachment information that could properly be disclosed as Jencks material. *Id*. at 1224-25.

c. Although defense could have tried to use this information to seek reconsideration of the ruling, admitting the complainant's initial report of the crime as an excited utterance, *id.* at 1225 (citing *James v. United States*, 580 A.2d 636 (D.C. 1990), the Court ultimately affirmed because it determined that the defense had the opportunity to use this information to impeach the witness during cross-examination and in closing argument. *Id.* at 1225-1226.

14. *Jackson v. United States*, 650 A.2d 659 (D.C. 1994).

a. In this murder case, defendant and co-defendants made a Rule 16 and *Brady* request for "any and all photo spreads shown to witnesses" and "non-identification by any witnesses of any defendant." *Id.* at 661 n.4. The government responded that "all photo spreads have been shown to counsel. . . there is no *Brady* information concerning the identification of any defendant." *Id.* But, "[t]his statement proved to be false." *Id.*

b. In fact "within two days of the murder, the police questioned Mr. Jose Garcia, a college-educated investment analyst, who witnessed the murder. When shown a photo array by the police that included a photo of appellant Kerry Jackson, Mr. Garcia was unable to identify anyone as the assailant. . . . [And] when queried whether the assailant was six feet, six inches tall and light-skinned (Kerry Jackson's description), Mr. Garcia responded that the assailant was only five feet, eight inches tall and dark-skinned. On November 2, 1990, Mr. Garcia died of a terminal illness." *Id.*

c. The government on appeal "wisely conceded in oral argument that, by failing to reveal the identity of a potentially important exculpatory witness, it violated both the letter and the spirit of *Brady*," and the Court of Appeals accepted without discussion the trial court's ruling that the government had violated its *Brady* obligations. *Id.*

d. However, the Court affirmed the trial court's denial of the defense motion to dismiss the indictment where the trial court determined that the *Brady* violation "could be 'cured' by requiring the parties to enter into a stipulation setting forth the testimony of Mr. Garcia, which was then read to the jury." *Id.*

15. *Edelin v. United States,* 627 A.2d 968 (D.C. 1993).

a. In this murder case, the government disclosed on the eve of trial just after opening statements that a witness had seen another man, Anthony Pate, wearing the distinctive green jacket that the shooter was believed to be wearing. Subsequently the government disclosed as Jencks a statement from this witness describing the defendant's clothing that day and omitting any mention of a green jacket. The prosecutor disclosed during trial that a witness had given some inconsistent statements about the attire of the suspect and of the defendant (which was relevant to identification).

b. Regarding timing the Court held that:

1) It was now "well settled" that the prosecution must disclose *Brady* information "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." *Id*. at 970.

2) That disclosure as Jencks does not satisfy *Brady*. *Id.*

3) And that if the prosecution belatedly discloses *Brady* information the burden "may [not] then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy." *Id*.

c. Regarding materiality, the court noted that "we rightly expect prosecutors to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of prompt disclosure, especially in response to a pointed request." *Id*. at 971.

d. Court declined to reverse, finding that the trial judge did not abuse his discretion in determining that the defense was able to make adequate use of the belatedly disclosed information.

16. *James v. United States,* 580 A.2d 636 (D.C. 1990).

a. In this murder case, the government withheld until the fifth day of a six-day trial a statement by an eyewitness which undercut a determination that a statement by another person present at the time of the crime but who did not testify at trial could be admitted as a spontaneous utterance. Specifically, the eyewitness, Essie Bowman, testified that Gary Augustine instructed her to remove the guns from the scene before he made the statement "Keith [James] shot at Ben." The statement that was admitted as an excited utterance. *Id.* at 641-42.

b. Noting the defense's failure to request a mistrial or seek a continuance, the Court declined "to impose upon defense counsel the obligation, every time Jencks material is disclosed, . . . to evaluate—or to request a continuance in order to evaluate—the material's relevance not only to the witness who is testifying, but also to every witness who has previously testified…. [T]he result would be that a prosecutor's *Brady* obligations would extend no further than the requirements of the Jencks Act. That is to say, the prosecutor could withhold evidence material to various evidentiary rulings during the course of the trial and ultimately, perhaps, to the outcome of the trial as long as the evidence was eventually disclosed to the defense as Jencks material. At that point, the burden would be on the defense to evaluate the evidence's relevance to every previous evidentiary ruling in the trial, or else waive the right to complain later. We do not read *Brady* or the due process clause so narrowly that they would allow such a result.

Id. at 643-44.

c. The Court remanded to the trial court to determine if "(1) earlier disclosure of Bowman's police statement have had any effect on the court's spontaneous utterance ruling? If so, (2) is there a reasonable probability that the exclusion of Augustine's statement to Baptiste would have changed the outcome of this apparently close trial?" *Id.* at 645.

17. *Lewis v. United States,* 408 A.2d 303 (D.C. 1979).

a. In an initial opinion the Court held that the prosecution must disclose impeachable convictions for its witness to the defense upon request, and that the government would be imputed with knowledge of convictions in an FBI rap sheet.

b. The Court granted rehearing to consider "the government's arguments that (1) the impeachable convictions of government witnesses are not *Brady* material, automatically producible at trial upon request, and that (2) even if they are, this court's order [imputing knowledge of the FBI rap sheet] is too broad." *Id.* at 305. The Court reaffirms its opinion.

c. Regarding the requirement that impeaching convictions be turned over upon request:

1) The Court "begin[s] from the premise that 'impeaching evidence' is exculpatory and thus can be material to guilt or punishment, within the meaning of *Brady*." *Id.* at 307.

2) The Court then defends its requirement that all impeachable convictions be disclosed upon request regardless of materiality

> because there can be no objective, ad hoc way to evaluate before trial whether an impeachable conviction of a particular government witness will be material to the outcome. No one has that gift of prophecy. To argue that the court can apply a material-to-outcome test before trial is to argue a contradiction. . . . It also raises the serious possibility that a defendant may be forced, unfairly, to disclose his or her case before trial, in an effort to carry a virtually impossible burden.

Id. at 307.

3) The Court further observes that

> a defendant's actual use of convictions for impeachment at trial before the jury decides is a better test of materiality than a retrospective inquiry by an appellate court, limited to review of a less-than-vivid trial transcript, or an even later evaluation in a collateral proceeding under D.C. Code 1973, s 23-110 . . . . It follows, that a defendant is entitled to disclosure because "a substantial basis for claiming materiality exists"; a defendant should have no less a constitutional claim to at-trial disclosure of exculpatory information, when he or she has a chance to make use of it, than to post-trial appellate or collateral analysis of omitted evidence (which, absent a fortuity, the defendant will not even discover). In short, the defendant, not the post-trial reviewing court, should have control over materiality to outcome.

Id. at 308.

4) Given the alternative of having a blanket disclosure rule and leaving the disclosure of impeachable convictions to the discretion of the prosecution ("prosecutorial grace," *id.* at 306), the Court chooses the former:

> The government is not in a position to be a perfect arbiter of defense strategy, let alone a defendant's constitutional rights. It follows that the government's current policy of disclosing only those impeachable convictions about which a particular prosecutor happens to be aware makes the criminal trial process too fortuitous, and thus unfair, in a significant respect. We conclude, accordingly, that the integrity of the criminal trial process requires uniformity of access to impeachable convictions of government witnesses when requested.

Id. at 309; *see also id*. ("Although it may be somewhat strained to conclude that potentially all impeachable convictions can affect the outcome, we believe it is more strained to assume, as the government does, that failure to disclose such convictions is Not likely to affect the outcome.").

d. Regarding imputing knowledge of the FBI rap sheet to the prosecution, the Court determines that the government has easy access to these records, *id*. at 310, and that any cost of imputing this knowledge to the government "cannot be relevant here. If a defendant has a constitutional right to the disclosure of impeachable convictions or adjudications, the government must bear that cost, whatever it is." *Id.* at 311.

e. The Court sets up framework for ex parte review of witness' juvenile records and notes that general request for impeachable convictions encompasses request for juvenile records. *Id*. at 312.

Sample – State's Draft of Discovery Log (with comments)

Purpose

To illustrate improper language that is being used to turn discovery logs into discovery waivers

NO. D1DC_____

THE STATE OF TEXAS

V.

_____

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

DISCOVERY COMPLIANCE STATEMENT PURSUANT TO ARTICLE 39.14(J) TEXAS CODE OF CRIMINAL PROCEDURE

COMES NOW, the State of Texas, by and through the District Attorney of Travis County, Texas, and pursuant to Article 39.14(j) of the Texas Code of Criminal Procedure would respectfully show the Court the disclosure, receipt, and list of the following documents, items, and information provided to the defense in the above styled and numbered cause:

[ ] OFFENSE REPORT(S) _____

[ ] 911 RECORDING(S) [ ] CAD

[ ] WITNESS STATEMENTS _____

_____

[ ] STATEMENTS OF DEFENDANT_____

[ ] SCIENTIFIC REPORTS

[ ] DRUG_____ [ ] BALLISTIC_____

[ ] PRINTS_____ [ ] DNA_____

[ ] BLOOD/BREATH_____ [ ] OTHER_____

[ ] AUTOPSY REPORT(S)_____ [ ] AUTOPSY PHOTO

[ ] CSU REPORTS_____

[ ] CRIME SCENE PHOTOS/VIDEO_____

[ ] CRIME SCENE DIAGRAM

[ ] PATROL CAR VIDEO(S)_____

[ ] OTHER VIDEO(S)/PHOTOS_____

Each of these items needs to list the date generated (since oftentimes items such as offense reports are updated). This is probably more important in serious felony cases. I suggest that a more comprehensive list, an attachment, (or even an attached electronic cd copy_ should be utilized in discovery-heavy cases, especially child abuse, sex assaults, and homicides. I would be wary of any list that does not list witness statements, the date taken and by whom or of any attempt by the prosecution to be less specific in their documentation. The intent of the act is to ensure full disclosure and accountability; I would be suspicious of any attempts at watering down the requirements. The Act means more work for prosecutors and more vigilance for us.

[ ] SEARCH WARRANT(S)_____

[ ] MEDICAL RECORDS _____

[ ] BUSINESS RECORDS_____

[ ] EXPERT REPORTS _____

[ ] OTHER OFFENSE REPORTS_____

[ ] CRIMINAL HISTORY(S)___Defendant_____ (view only)

_____ (view only)

[ ] GRAND JURY TESTIMONY_____ (court order required)

[ ] OTHER_____

[ ] OTHER_____

I suggest adding this in. It follows the law verbatim. There is no reason why any prosecutor should oppose it.

The above documents, items, and information have been provided to the defense in the above styled and numbered cause.

The state acknowledges the disclosure of all exculpatory, impeachment, or mitigating documents, items or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or that tends to reduce the punishment for the offense charged. The state further acknowledges its continuing duty to disclose the existence of any document, item, or information required to be disclosed by TCCP 39.14(h).

The above documents, items and information have been provided to me in the above styled and numbered cause. As counsel for the defense, I am aware of the obligations and restrictions contained in Article 39.14 concerning the use, redaction, and dissemination of these materials.

~~After consultation with my client, we are satisfied with the discovery set forth above and wish to proceed with, and derive the benefits of, a plea of guilty. Accordingly, we withdraw our request for any other documents, items, or information which may have been previously designated for production, and waive our right to view any criminal history not listed above.~~

_____ _____

~~Defendant~~ ~~Counsel for Defendant~~

This section violates (n) because it makes the D agree to requirements less than required by law. It is also unnecessary. 39.14 (n) reads: "This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required by law." Our clients should simply acknowledge receipt of the materials tendered, not be required to waive or withdraw previous requests. The plea should not be contingent on the D waiving or withdrawing lawful requests.

It is the State's burden to ensure they have complied with both open file discovery and Brady. The law intends for the state to document its good faith discovery effort, not for the D to waive anything so that they their plea bargain can be accepted.

UNDER NO CIRCUMSTANCES WOULD I AGREE TO THIS PROVISION. 39.14(j) requires acknowledgment only, not proactive waivers, agreements, or statements of satisfaction with the product.

Template:
Inspect Discovery Only (General)

Purpose

To allow the defense to review discovery without obtaining copies if a prosecutor claims that a client must wait in jail until discovery is complete

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUEST TO INSPECT DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure makes this self-executing request to the attorney for the State of Texas to give access to the Respondent the following:

I.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection (checked boxes only):

- ☐ Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;
- ☐ All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;
- ☐ All written or recorded statements of the Respondent;
- ☐ All written or recorded statements of any witness;
- ☐ All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and
- ☐ All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

- ☐ All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

- ☐ Review of Respondent's criminal history through NCIC and TCIC;

- ☐ Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

- ☐ Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code; and/or

- ☐ Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request to Inspect Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

Template:
Inspect Discovery Only (Checklist)

Purpose

To allow the defense to review discovery without obtaining copies if a prosecutor claims that a client must wait in jail until production of discovery is complete. This is a more limited discovery request for specific items.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUEST TO INSPECT DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure makes this self-executing request to the attorney for the State of Texas to give access to the Respondent the following:

I.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection (checked boxes only):

OFFENSE REPORTS

☐ Offense Reports & Supplements
☐ CAD report
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit
☐ Complaint / Information
☐ Indictment
☐ Search Warrant

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order

☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER INFORMATION

☐ Criminal History
  ☐ Respondent
  ☐ Co-Respondent
  ☐ Victim
  ☐ Witness:
  _____
  ☐ Other:

☐ Child Advocacy Video
☐ Article 39.15 materials
☐ Physical evidence:
_____

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request to Inspect Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

Template: Discovery Only (General)

Purpose

To obtain initial round of discovery

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of:

1. Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;

2. All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;

3. All written or recorded statements of the Respondent;

4. All written or recorded statements of any witness;

5. All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and

6. All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

1. Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

2. Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code;

3. Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure.

III.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com ; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

Template: Discovery Only (Checklist)

Purpose

To obtain initial round of discovery in a more limited discovery request for specific items

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland,* 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of the following checked items:

OFFENSE REPORTS

☐ Offense Reports & Supplements
☐ CAD report
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit
☐ Complaint / Information
☐ Indictment
☐ Search Warrant
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

☐ Toxicology
☐ Fingerprints:

LAB TESTS

☐ Breath
☐ Blood

OTHER EVIDENCE

☐ Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

_____

III.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of

the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

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discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

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206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

Template:
Discovery & Notice
(Checklist)

Purpose

A template for specific discovery requests
and requests for notice.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
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ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of the following checked items:

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☐ Offense Reports & Supplements
☐ CAD report
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COURT FILINGS

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☐ Indictment
☐ Search Warrant
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

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☐ Handle-by's for Complainant
☐ Handle-by's for _____
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☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
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☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER EVIDENCE

☐ Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF WITHHELD OR REDACTED DISCOVERY (PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

V.
TRE RULE 404

Pursuant to Rule 404(a) of the Texas Rules of Evidence, Respondent requests the State to give reasonable notice in advance of trial of its intent to introduce evidence of a pertinent character trait of the accused. *See Stitt v. State*, 102 S.W.3d 845, 849 (Tex.App. - Texarkana 2003, pet.ref'd) ("A pertinent character trait is one that relates to a trait involved in the offense charged or a defense raised."); *see also Santellan v. State*, 939 S.W.2d 155, 167 (Tex.Crim.App.1997).

Pursuant to Rule 404(b) of the Texas Rules of Evidence, Respondent requests the state to give reasonable notice in advance of trial of its intent to introduce evidence of other crimes, wrongs, or acts in an attempt to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. *Ex Parte Varelas*, 45 S.W.3d 627, 631 (Tex.Crim.App.2001) (jury cannot consider extraneous act evidence unless they believe beyond a reasonable doubt that the Respondent committed that act); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (all the facts which must exist in order to subject the Respondent to a legally prescribed punishment must be found by the jury); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (reaffirming a Respondent's Sixth Amendment rights regarding burden of proving sentencing allegations).

Specifically, Respondent requests that the notice include the following:

-dates;
-locations;
-types or nature of the alleged crimes, wrongs, or acts involved;
-names of the individuals involved; and
-names of any courts involved.

Rodgers v. State, 111 S.W.3d 236 (Tex.App.- Texarkana, 2003).

VI.
TRE RULE 609

Pursuant to Rule 609(f) of the Texas Rules of Evidence, Respondent requests that the State give sufficient advance written notice of its intent to use evidence of a conviction to impeach the credibility of the following witness:

_____

_____

_____

This request includes providing the discovery of any supporting documentation regarding such prior convictions.

VII.
ARTICLE 37.07

Pursuant to Article 37.07, Section 3(g) of the Texas Code of Criminal Procedure, Respondent requests that the State give reasonable notice of intent to introduce against the Respondent evidence of an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated suspended sentence as provided for in Article 37.07 Section 3(a) of the Code of Criminal Procedure. Respondent further requests written notice of the State's intent to introduce evidence of the prior criminal record of the Respondent, their general reputation, their character, an opinion regarding their character, and the circumstances of the offense for which they are being tried. Respondent also requests written notice of any evidence pertaining to an adjudication of delinquency of the grade of a felony or a misdemeanor punishable by confinement in jail.

Specifically, Respondent requests that the notice include the following: dates; locations; types or nature of the alleged crimes, wrongs, or acts involved; names of the individuals involved; and names of any courts involved. Notice of that intent is reasonable only if the notice includes the date on which and the county in which each alleged crime or bad act occurred and the name of each alleged victim of the crime or bad act.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. This request includes providing the discovery of any supporting documentation regarding any prior convictions.

VIII.
WITNESS LIST

Respondent requests that at least thirty (30) days before the commencement of trial the State provide the name, address and telephone number of each person whom the State intends to call as a witness at any stage of the trial. Notice of the State's witnesses shall be given upon request. *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977); *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993), cert. denied, 512 U.S. 1246 (1994) ("It is established that notice of the State's intended witnesses should be given upon proper request.").

This request encompasses those persons whom the State reasonably anticipates may testify during its case-in-chief, case-in-rebuttal, or, in the event of a conviction, at the punishment stage.

IX.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com ; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

EXHIBIT A:
PRIVILEGE LOG

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of:_____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____

Prosecuting Attorney

Template:
Discovery & Brady
(Checklist)

Purpose

A template for specific discovery requests
and Brady information.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and provide an electronic duplicate of the following checked items:

OFFENSE REPORTS

☐ Offense Reports & Supplements
☐ CAD report
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit
☐ Complaint / Information
☐ Indictment
☐ Search Warrant
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

☐ Toxicology

LAB TESTS

OTHER EVIDENCE

☐ Breath
☐ Blood
☐ Fingerprints:

☐Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

_____

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF
WITHHELD OR REDACTED DISCOVERY
(PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information

has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: State's Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

V.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of

the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

EXHIBIT A:
PRIVILEGE LOG

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of:_____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____

Prosecuting Attorney

Template:
Discovery & Brady
(Detailed)

Purpose

This is the most exhaustive set of requests for discovery, notice and Brady information of the templates provided. You should adapt this motion for your particular case after you have received your first round of discovery and are preparing for pretrial litigation.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of:

1. Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;

2. All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;

3. All written or recorded statements of the Respondent;

4. All written or recorded statements of any witness;

5. All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and

6. All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

1. Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

2. Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code;

3. Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure; and

4. Review of Respondent's criminal history through NCIC and TCIC.

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF WITHHELD OR REDACTED DISCOVERY (PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: State's Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

A. SPECIFIC REQUESTS FOR THE PROSECUTOR TO INQUIRE ABOUT EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

The obligation to disclose favorable evidence to the accused is that of the government and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence. *United States v. Auten*, 632 F. 2d 478 (5th Cir. 1980); *Rhinebart v. Rhay*, 440 F. 2d 725 (9th Cir 1971), cert. den. 404 U.S. 825. The State's suppression of exculpatory evidence violates due process if the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Brady* at 87. "The duty of disclosure affects not only the prosecutor, but the government as a whole, including its investigative agencies." *United States v. Bryant*, 439 F. 2d 642, 658 (D.C. Cir. 1971).

In many cases exculpatory information in the possession of the prosecution team may be unknown to the prosecutor that handles the case at trial. In order to prevent an inadvertent or unintentional *Brady* violation, counsel requests the prosecutor to do the following:

1. Speak to all members of the "prosecution team." It is likely that many other people have worked on the case, either in your office or in an investigative capacity. I am requesting that you speak with anyone who has worked on the case and determine whether they possess any information or have made any promises that constitute *Brady* or *Giglio* material. People you would speak to include:

• **All employees of the [INSERT NAME OF PROSECUTOR'S OFFICE] office involved with the case**. If any attorney in your office has knowledge of *Brady* or *Giglio* material, that knowledge will be attributed to the entire office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")

• A**ll investigators who handled the case**. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1568 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" (citing *Giglio*))

• **All federal, state and local law enforcement agents who worked on the case.** If the Texas State Securities Board, the Austin Police Department, Homeland Security, ICE, TSA, airport police, FBI, ATF, or any other law enforcement agencies participated in the investigation of this case, those agents are part of the prosecution team. *See United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) ("extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [witness]'s lawyer was paid from state funds must be imputed to the federal team."); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[J]oint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team."); *United States v. Safavian 233 F.R.D. 12*, 15 (D.D.C. 2005) ("In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the Justice Department remains available for disclosure.") ; *United States v. Jennings*, 960 F.2d. 1488, 1490 (9th Cir. 1992) ("There is no question that the AUSA prosecuting a case is responsible for compliance with the dictates of *Brady* and its progeny. This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies."(citations omitted)).

2. Review all case files maintained by your office and any law enforcement agencies to ensure that all *Brady* material is disclosed to the defense. Sometimes police officers or law enforcement agents will not provide the prosecution with all of the information collected during their investigation. Nonetheless, you are responsible for reviewing all of the information in their investigative files, and you must make sure that all exculpatory material is turned over to the defense. *See, e.g., Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002).

3. Investigate your witnesses. Material that impeaches a government witness must be disclosed to the defense, and any impeachment material that you possess or can access easily. There are a few things you must do to guarantee that you meet your *Brady* and *Giglio* obligations:

• **Examine the personnel files of all investigating agents who may testify at trial.** If there is impeachment evidence regarding any officers involved with the investigation of the case, especially those who may testify at hearings or at trial, it must be disclosed to the defense. *See, e.g., Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000); *United States v. Muse*, 708 F.2d 513 10th Cir. 1983); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). Thus, you should search the personnel files of all officers involved with the case for such evidence.

• **Examine the personnel files of all prosecution witnesses who work for the government.** If any prosecution witnesses work for other branches of the government, you should search their personnel files for impeachment evidence, as with the files of law enforcement officers. *See, e.g., United States v. Deutsch,* 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (holding that contents of postal worker's personnel file, if they could be used for impeachment, would constitute *Brady* material).

Further, pursuant to *United States v. Bagley*, 473 U.S. 667, 676 (1985), any evidence that can be used to impeach a prosecution witness's credibility should be disclosed to the defense. This type of evidence includes but is not limited to the following:

- Contrary, conflicting statements;
- False Reports;
- Inaccurate statements and reports;
- Other evidence contradicting prosecution witness statements and/or reports;
- Promises or offers of leniency, or other inducements, express or implied;
- Felony convictions;
- Misconduct involving moral turpitude;
- Misdemeanor convictions involving moral turpitude;
- Pending criminal charges;
- Parole or Probation status;
- Reputation for untruthfulness;
- Alcohol and/or drug use;
- Gang membership;
- Bias toward the Respondent.

• **Search all criminal record databases to which you have access for criminal records of potential prosecution witnesses.** I presume that you have checked both local and national databases for any criminal convictions of government witnesses. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that failure to search a local criminal database for informant's criminal convictions is *Brady* violation); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding that failure to run FBI or NCIC checks on a prosecution witness constitutes a *Brady* violation).

• **Ask the TRAVIS COUNTY SHERIFF'S DEPARTMENT, AUSTIN police department and other region law enforcement agencies if they have files on any of your witnesses.** Even if you are unaware of deals that your witnesses have made with law enforcement agencies, such deals are *Brady* material and must be disclosed to the defense. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999). I presume that you have spoken with all of these agencies to ensure that they have not made any deals with or payments to any of your witnesses.

• **Examine the school and disciplinary records of all witnesses.**

• **Examine the pre-sentence reports and probation files of all witnesses.**

o Exculpatory information in a witness's probation file, including the witness's criminal record or personal information that could be used for impeachment, should be released to the defense. *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988).

o Pre-sentence reports (PSIs) of any government witnesses should be provided to the trial court for *in camera* examination to determine whether they contain *Brady* or *Giglio* material. *See, e.g., United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993).

• **If any government witnesses have been incarcerated, examine their department of corrections and/or bureau of prisons files.** *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*) ("The state had an obligation, before putting [a career burglar and six-time felon] on the
stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.")

4. Speak with the victim witness coordinator involved with the case. *Commonwealth v. Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001).

5. If another government agency investigated the alleged offense, examine the files from that investigation or have the court examine them. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60. (holding that Respondent was entitled to have court conduct *in camera* examination of Child and Youth Services (CYS) file investigating Respondent's alleged rape of his daughter to determine if it contained *Brady* material).

B. SPECIFIC REQUESTS: EXCULPATORY INFORMATION

When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *See Bagley, supra*. The Respondent specifically requests the prosecution to provide defense counsel with any information or material that is exculpatory, favorable to the accused or which acts to impeach any witness for the State, including but not limited to the following:

1. Any evidence or statement which would tend to show that the Respondent did not commit the offense alleged in this cause.

2. The existence of a witness who would provide testimony favorable to the defense, even if learned from the witness during trial.

3. Any evidence or statement which is inconsistent with another witnesses' statement.

4. Any evidence or statement which would support the defense of necessity, provocation, or duress.

5. A list of other suspects and unindicted co-conspirators who were also under investigation for the present offense.

6. Any evidence or statement which would indicate that a person other than the Respondent committed or is criminally responsible for the offense alleged.

7. All statements made by any party or witness to this alleged offense in the possession of or within the knowledge of the State or any of his agents, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to the innocence of the Respondent or to the punishment, if any, to be set in this case.

C. SPECIFIC REQUESTS: IMPEACHMENT INFORMATION

1. <u>Information regarding State witnesses</u>

    a. **Any information tending to show a State's witness's bias in favor of the State or against the Respondent or which otherwise impeaches a witness's testimony**

(including pending complaints against police officers and closed administrative or civil cases, whether resolved for or against the officer, that involve facts similar to those of this case). *See United States v. Bagley*, 473 U.S. 667 (1985);

b. **Any information indicating a witness's hostility towards or dislike of the Respondent.** *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004) (witness's dislike of Respondent); *United States v. Sperling*, 726 F.2d 69 (2nd Cir. 1984) (tape of pre-trial conversation indicating that government witness was motivated by revenge).

c. All "consideration" or promises of "consideration" given to or on behalf of **all State's witnesses or expected or hoped for by said State witnesses**. *See Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 668 (2004). Respondent requests all documents, records, memoranda, notes, or other records in any form reflecting "consideration" as set forth below. By "consideration," the Respondent refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness, including, but not limited to, formal or informal, direct or indirect; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal action, parole, probation, commutation of sentence, pardon, clemency, civil or administrative dispute; criminal, civil, or tax immunity grants of letters of non-prosecution; relief from forfeitures; payments of money, rewards or fees, witness fees and special witness fees; provision of food, clothing, shelter, or housing arrangements, transportation, legal services, employment or other benefits; placement in a "witness protection program"; informer status of the witness; and anything else which arguably could reveal an interest, motive, or bias in the witness in favor of the State or against the defense or act as an inducement to testify or to color testimony. **This consideration also includes:**

   i. **Favors from prosecution such as telephone calls, conjugal visits, etc.** *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009)(witnesses' involvement in uncharged murder should have been disclosed as motive to testify to avoid murder charges); *See* El Rukn cases, *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Boyd*, 883 F. Supp. 1227 (N.D. Ill. 1993).

   ii. **Promises as to witness' civil tax or administrative liability.** *United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986); *United States v. Wolfson*, 437 F.2d (2d Cir. 1970); *United States v. Dawes*, 1990 US Dist. LEXIS (D. Kan. Oct. 15).

   iii. **Help in forfeiture proceedings.** *United States v. Parness*, 408 F. Supp. 440 (S.D.N.Y. 1975).

d. **Any and all threats, express or implied, direct or indirect, or other coercion** made or directed against any witness, criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any witness, any

probationary, parole, deferred prosecution or custodial status of any witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the State or over which the State has real, apparent or perceived influence.

e. All information in the possession of the government indicating that any State witness has had a **pending juvenile or criminal case** on or since the offense in this case; any State witness has had an arrest, guilty plea, trial, or sentencing on or since the date of the offense in the present case; any State witness has been on juvenile or criminal parole or probation on or since the date of the offense; and any State witness now has or has had any other liberty interest which the witness could believe or could have believed might be favorably affected by State action. With respect to this information, I request cause numbers, dates and jurisdiction for all such cases. *See Davis v. Alaska*, 415 U.S. 508 (1974);

f. **Exculpatory and/or impeachment Grand Jury Testimony.** *See Sykes v. United States*, --A.2d.-- 2006 WL 564050 (D.C. 2006).

g. **Agreements/Deals with State witnesses**. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose promise of immunity in exchange for testimony violates *Brady*); *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985) (failure to disclose payment of $300 to two key State witnesses violates *Brady*); *Singh v. Prunty*, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (failure to disclose that star witness had a very favorable deal with State to avoid a very serious charge is *Brady* violation); *United States v. Smith*, 77 F.3d 511, 513-16 (D.C. Cir. 1996) (failure to disclose a deal in which state charges were dismissed as part of a federal plea is *Brady* violation); *In Re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 891, 896 (D.C. Cir. 1999) (remand to determine *Brady* information with instruction to district court to require the U.S. Attorney's Office to review the records in the possession of the prosecution team for evidence indicating that a government informant who provided information leading to the Respondent's arrest had a deal with the prosecution, the D.C. Circuit observed that it is "irrelevant . . . that the requested records may have been in the possession of the Metropolitan Police Department, of the FBI or DEA, rather than the U.S. Attorney's Office.").

h. **Payments to investors and potential State witnesses**: *See, e.g., Mastracchio v. Vose*, 274 F.3d 590, 602-03 (1st Cir. 2001) (knowledge of Witness payments or favors made by the Witness Protection team is *Brady*); *In re Sealed Case (Brady Obligations)*, 185 F.3d 887, 894 (D.C. Cir. 1999) (failure to disclose a cooperation agreement that included payments to a witness is *Brady* information).

i. **Witness's tax returns - especially for informant**. See Internal Revenue Code § 6103(i)(1)(2). *United States v. Lloyd*, 992 F.3d 348 (D.C. Cir. 1993)(remanded for hearing); *United States v. Wigoda*, 521 F.2d 1221 (7th Cir. 1975)(in camera inspection); *Johnson v. Sawyer*, 640 F. Supp. 1126 (D. Tex. 1986)(tax returns may be disclosed).

j. **Criminal history of investors and potential government witnesses**: All prior convictions and juvenile adjudications of all State witnesses and all persons identified in the offense report who could likely be called as a witness for the State. These records should include all arrests and convictions, whether as a juvenile or as an adult, including, but not limited to: all felony convictions and all misdemeanor convictions involving moral turpitude which have occurred in the last ten (10) years; all felony convictions and all misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; all pleas of guilty or nolo contendere which resulted in dispositions of "deferred adjudication" or "deferred prosecution" or "deferred disposition"; all felony and misdemeanor cases that have resulted in the witness being placed on probation, wherein the period of probation has not expired; all pending felony and misdemeanor offenses alleged to have been committed by the witness. The Respondent requests that the State be ordered to request the proper law enforcement authorities to obtain a full and complete criminal record of all such witnesses and reveal same to the Respondent, and the State should not be permitted to respond to this motion by advising the Court that the prosecutor does not have any indication in his file of any prior criminal record of such witnesses. *See, e.g., Crivens v. Roth*, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by State witness is *Brady* even when government witness used aliases); *Carriger v. Stewart*, 132 F.3d 463, 480-82 (9th Cir. 1997) (failure to obtain or disclose Department of Corrections file that would have showed lengthy criminal history, and history of lying to police and blaming others for his own crimes is *Brady*).

k. **Misconduct by potential State witnesses**: All records and information revealing prior misconduct or bad acts attributed to any State witness. *See, e.g., United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness, and "continuous stream of unlawful favors" including phone privileges, presents, special visitors, provided by prosecution to witnesses is considered *Brady* material).

l. **All handle-bys for all potential State witnesses**: A report called a "handle-by" is created whenever a person contacts the police or when the police respond to a person's address. Handle-bys typically do not result in an arrest, but often include a police narrative. These are hidden records only available to law enforcement officers and are often used to gather information on suspects. The defense asks for handle-bys to be run on potential State witnesses as it may reveal why certain investors are not being called as witnesses at trial.

m. **Bias of State witnesses**: *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (*Brady* obligation for government to reveal witness portrayed as neutral and disinterested expert actually had been investigating Respondent for years); *United States v. Abel*, 469 U.S. 45 (1984); *United States v. O'Connor*, 64 F.3d 355, 359-60 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence

testimony of another government witness is *Brady*); *Reutter v. Solem*, 888 F.2d 578, 581-82 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days is a *Brady* violation).

n. **Pecuniary or other interest of State witness**: *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006)(disclosure required where, although no express agreement between prosecution and witness, prosecution knew of witness' expectation for deal and fulfilled that expectation); *United States v. Blanco*, 391 F.3d 382 (9th Cir. 2004)(fact that investigating agency kept evidence of informant's immigration benefits from prosecution did not justify nondisclosure); *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988)(information contained in witness' probation file should have been disclosed because it related to his motives for informing as well as his tendency to overcompensate for problems and to lie).

o. **Kinship with person adverse to client.**

p. **Character of witness**. *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of key government informant); *United States v. Bernal-Obeso, 989 F.2d 331* (9th Cir. 1993) (remand to determine whether government witness lied to DEA about his prior criminal record).

q. **Witness's use of alcohol or drugs**. *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009)(CI's drug use was Brady based on CI's centrality to case); *King v. Ponte*, 717 F.2d 635 (1st Cir. 1983)(witness under heavy medication as treatment for unstable mental condition); *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991)(sole eyewitness had been to methadone clinic within 2 hours of crime).

2. Inconsistent Statements

a. **The existence and identification of each occasion on which a State witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to the Respondent, the investigation, or the facts of this case.**

b. **The existence and identification of each occasion on which each witness who has been or is now an informer, accomplice, co-conspirator, or expert that has testified before any court, grand jury, or other tribunal or body.**

c. **Statements of potential witnesses not called to testify**: *See, e.g., United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of potentially exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).

d. **Contradictory or inconsistent statements**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to turn over statement by co-Respondent that he had planned the killing, and that co-Respondent had performed actual killing is violation of due process); *Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles' car in supermarket parking lot); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995)(discrepancies between law enforcement officers and reports and grand jury testimony); *United States v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989).

e. **Inconsistent notes**: Prosecutor and law enforcement notes from interviews with State witness: *See, e.g., United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998) (*Brady* obligation to turn over original notes from witness interview that contained three key pieces of impeachment information that showed that story had changed, change may have been brought about by threats of imprisonment, and witness had claimed to have suffered a stroke); *United States v. Pelullo*, 105 F.3d 117, 122-23 (3d Cir. 1997) (failure to disclose rough notes of FBI and IRS agents corroborating Respondent's version of events and impeaching testimony of government agents).

f. **Expert reports inconsistent with the State case or tends to support the defense case**: *See, e.g., United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (*Brady* violation when government failed to disclose ballistics worksheet that showed gun Respondent was accused of firing was inoperable).

3. Information regarding law enforcement and prosecution

a. **Instructions to a State's witness by the police, a prosecutor, a victim-witness coordinator, or any agent of the State to not speak with defense counsel or to do so only in the presence of the State's counsel.** *See, e.g., Gregory v. United States*, 369 F. 2d 185 (D.C. Cir. 1966).

b. Instructions to a State's witness by law enforcement, a prosecutor, or any agent of the State to inquire about privileged communications between the Respondent and his lawyer.

c. **Personnel files, especially of testifying officers**: Any information on any pending or closed internal disciplinary investigation of police officers involved in the case, including, but not limited to, information regarding any administrative suspensions or civilian complaints. *See, e.g., United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (if specific request is made, prosecutor must search personnel records of police officer/witnesses to fulfill *Brady* obligations); *United States v. Muse*, 708 F.2d 513, 516 (10th Cir. 1983) (recognizing that prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.).

d. **Presentence Reports of testifying witnesses**: *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (information in probation file relevant to government witness credibility must be disclosed, and could not be deemed privileged by making it part of probation file); *United States v. Carreon*, 11 F.3d 1225, 1238 (5th Cir. 1994) (prosecution should allow trial court to conduct in camera review of presentence reports of government witnesses to determine whether they contain *Brady/Giglio* material).

e. **Police perjury in motions hearings**: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding is considered material *Brady* evidence relevant to impeachment).

f. **Knowledge of police intimidation of witnesses**: *See, e.g., Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting is considered *Brady*).

g. **Facts or evidence indicating the unreliability of any State's witness.** *See, e.g. Mesarosh v. United States*, 352 U.S. 1 (1956);

h. **All information indicating that the mental state of any witness for the State is below normal or in any way abnormal.**

i. **All information that any witness for the State was under the influence of alcohol, narcotics, or any other drug, prescription or otherwise, at the time of the observations about which the witness will testify, or that the witness' faculties or observations were impaired in any way.**

j. **Evidence or information indicating the untruthfulness of a State's witness.** *See, e.g. Napue v. Illinois*, 360 U.S. 264 (1959);

k. **Evidence regarding any prior false accusations made by any State witness in this case, if any, on behalf of the complaining witness against the Respondent**. *See, e.g. Davis v. Alaska*, 415 U.S. 308, 318 (1984).

l. **Perjury by any State witness at any time, whether or not adjudicated and whether or not in connection with this case.** *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935);

D. SPECIFIC REQUESTS: IMPEACHMENT INFORMATION

1. **All information from victims or complainants who do not want to prosecute the Respondent or who have asked for leniency.**

2. **Mitigating evidence in aid of sentencing**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, § 3-6.2 (b) (3d Ed. 1993) Information Relevant to Sentencing ("The prosecutor should disclose to the defense and to the court at or prior to the sentencing all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

E. REQUEST FOR IMMEDIATE DISCLOSURE

The Respondent requests the State to disclose any and all impeachment, exculpatory, and mitigating information as soon as the prosecutor learns of its existence. The Texas State Bar Rules also require a prosecutor in a criminal case to "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 mitigate the offense, and, in connection with sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor...." Rule 3.09(d), Article 10, Section 9, State Bar Rules (emphasis added).

V.
TRE RULE 404

Pursuant to Rule 404(a) of the Texas Rules of Evidence, Respondent requests the State to give reasonable notice in advance of trial of its intent to introduce evidence of a pertinent character trait of the accused. *See Stitt v. State*, 102 S.W.3d 845, 849 (Tex.App. - Texarkana 2003, pet.ref'd) ("A pertinent character trait is one that relates to a trait involved in the offense charged or a defense raised."); *see also Santellan v. State*, 939 S.W.2d 155, 167 (Tex.Crim.App.1997).

Pursuant to Rule 404(b) of the Texas Rules of Evidence, Respondent requests the state to give reasonable notice in advance of trial of its intent to introduce evidence of other crimes, wrongs, or acts in an attempt to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. *Ex Parte Varelas*, 45 S.W.3d 627, 631 (Tex.Crim.App.2001) (jury cannot consider extraneous act evidence unless they believe beyond a reasonable doubt that the Respondent committed that act); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (all the facts which must exist in order to subject the Respondent to a legally prescribed punishment must be found by the jury); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (reaffirming a Respondent's Sixth Amendment rights regarding burden of proving sentencing allegations).

Specifically, Respondent requests that the notice include the following:

-dates;
-locations;
-types or nature of the alleged crimes, wrongs, or acts involved;
-names of the individuals involved; and
-names of any courts involved.

Rodgers v. State, 111 S.W.3d 236 (Tex.App.- Texarkana, 2003).

VI.
TRE RULE 609

Pursuant to Rule 609(f) of the Texas Rules of Evidence, Respondent requests that the State give sufficient advance written notice of its intent to use evidence of a conviction to impeach the credibility of the following witness:

_____

_____

_____

This request includes providing the discovery of any supporting documentation regarding such prior convictions.

VII.
ARTICLE 37.07

Pursuant to Article 37.07, Section 3(g) of the Texas Code of Criminal Procedure, Respondent requests that the State give reasonable notice of intent to introduce against the Respondent evidence of an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated suspended sentence as provided for in Article 37.07 Section 3(a) of the Code of Criminal Procedure. Respondent further requests written notice of the State's intent to introduce evidence of the prior criminal record of the Respondent, their general reputation, their character, an opinion regarding their character, and the circumstances of the offense for which they are being tried. Respondent also requests written notice of any evidence pertaining to an adjudication of delinquency of the grade of a felony or a misdemeanor punishable by confinement in jail.

Specifically, Respondent requests that the notice include the following: dates; locations; types or nature of the alleged crimes, wrongs, or acts involved; names of the individuals involved; and names of any courts involved. Notice of that intent is reasonable only if the notice includes the date on which and the county in which each alleged crime or bad act occurred and the name of each alleged victim of the crime or bad act.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. This request includes providing the discovery of any supporting documentation regarding any prior convictions.

VIII.
WITNESS LIST

Respondent requests that at least thirty (30) days before the commencement of trial the State provide the name, address and telephone number of each person whom the State intends to call as a witness at any stage of the trial. Notice of the State's witnesses shall be given upon request. *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977); *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993), cert. denied, 512 U.S. 1246 (1994) ("It is established that notice of the State's intended witnesses should be given upon proper request.").

This request encompasses those persons whom the State reasonably anticipates may testify during its case-in-chief, case-in-rebuttal, or, in the event of a conviction, at the punishment stage.

IX.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com; and

gavila@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

EXHIBIT A:
PRIVILEGE LOG

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of:_____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____

Prosecuting Attorney

Template:
Brady Request
(Letter format)

Purpose

This template provides an alternate format you prefer making your discovery, notice and Brady requests by a letter that is filed with the court clerk.

SUMPTER &GONZÁLEZ L.L.P.
ATTORNEYS AND COUNSELORS AT LAW

206 EAST 9TH ST
SUITE 1511
AUSTIN TX 78701

T 512 381 9955
F 512 485 3121

WWW.SG-LLP.COM

Today's Date

VIA ELECTRONIC MAIL

Prosecutor's Name
Assistant County / District Attorney
Name of Office
Street Address
City, Texas Zip Code
Email Address

Re: *Case Style;*
Cause No.

Dear Mr. / Ms. Prosecutor:

I write for three reasons:

(1) To follow up regarding plea negotiations;
(2) To make specific requests for you to investigate information that may be discoverable under *Brady*, *Giglio*, and *Bagley*; and
(3) To make specific discovery requests.

I.
STATUS OF PLEA NEGOTIATIONS

The Supreme Court has devoted much attention in recent decisions regarding Mr. ClientLastName's right to effective assistance of counsel during plea negotiations. This pertains to my obligations as defense counsel both when an offer is accepted (s*ee Padilla v. Kentucky*, 559 U.S. 356 (2010)) as well as when an offer is rejected (*see Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012)).

I write to confirm that the current plea offer in this matter is as follows:

[*insert terms and conditions of plea offer*]

[*insert specific issues regarding counter-offers*]

[*insert specific issues why client is unable to accept or reject offer at this time*]

In order for me to intelligently and effectively engage in plea negotiations I am writing to request additional information so that I can adequately advise my client and so that he can make an informed decision to accept or reject the plea offer.

II.
BRADY, GIGLIO, & BAGLEY INFORMATION

The second reason I have a difficult time advising my client on what an appropriate plea agreement would be in this case is that I have not received any *Brady*, *Giglio or Bagley* information. While it may not exist, my concern is that there has been no effort to search for its existence.

During our conversation on [*insert date of conversation with prosecutor about Brady*], you suggested that you were aware of your obligations under *Brady* and you would comply with your *Brady* obligations the before trial. I write with the following specific requests pursuant to the "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the United States Attorney's Manual, and 2010 memo "Guidance for Prosecutors Regarding Criminal Discovery" codified at Section 165 of the United States Attorney's Criminal Resource Manual, and the ABA Standards for Criminal Justice, Prosecution Function, § 3-3.11(a)(c) (3d Ed. 1993) DISCLOSURE OF EVIDENCE BY THE PROSECUTOR.

WHAT TO DO & WHERE TO LOOK

1. SPEAK TO ALL MEMBERS OF THE "PROSECUTION TEAM." It is likely that many other people have worked on the case, either in your office or in an investigative capacity. I am requesting that you speak with anyone who has worked on the case and determine whether they possess any information or have made any promises that constitute *Brady* or *Giglio* material. People you would speak to include:

> • **ALL EMPLOYEES OF THE [INSERT APPROPRIATE NAME – DISTRICT OR COUNTY OR U.S. ATTORNEY] ATTORNEY'S OFFICE INVOLVED WITH THE CASE.** If any attorney in your office has knowledge of *Brady* or *Giglio* material, that knowledge will be attributed to the entire office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")
>
> • **ALL INVESTIGATORS WHO HANDLED THE CASE**. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1568 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" (citing *Giglio*))

• **ALL FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENTS WHO WORKED ON THE CASE.** If the Texas State Securities Board, the Austin Police Department, Homeland Security, ICE, TSA, airport police, FBI, ATF, or any other law enforcement agencies participated in the investigation of this case, those agents are part of the prosecution team. *See United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) ("extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [witness]'s lawyer was paid from state funds must be imputed to the federal team."); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[J]oint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team."); *United States v. Safavian 233 F.R.D. 12,* 15 (D.D.C. 2005) ("In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the Justice Department remains available for disclosure.") ; *United States v. Jennings*, 960 F.2d. 1488, 1490 (9th Cir. 1992) ("There is no question that the AUSA prosecuting a case is responsible for compliance with the dictates of *Brady* and its progeny. This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies."(citations omitted)).

2. REVIEW ALL CASE FILES MAINTAINED BY YOUR OFFICE AND ANY LAW ENFORCEMENT AGENCIES TO ENSURE THAT ALL *BRADY* MATERIAL IS DISCLOSED TO THE DEFENSE. Sometimes police officers or law enforcement agents will not provide the prosecution with all of the information collected during their investigation. Nonetheless, you are responsible for reviewing all of the information in their investigative files, and you must make sure that all exculpatory material is turned over to the defense. *See, e.g., Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002).

3. INVESTIGATE YOUR WITNESSES. Material that impeaches a government witness must be disclosed to the defense, and any impeachment material that you possess or can access easily. There are a few things you must do to guarantee that you meet your *Brady* and *Giglio* obligations:

• **EXAMINE THE PERSONNEL FILES OF ALL INVESTIGATING AGENTS WHO MAY TESTIFY AT TRIAL.** If there is impeachment evidence regarding any officers involved with the investigation of the case, especially those who may testify at hearings or at trial, it must be disclosed to the defense. *See, e.g., Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000); *United States v. Muse*, 708 F.2d 513 10th Cir. 1983); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). Thus, you should search the personnel files of all officers involved with the case for such evidence.

• **EXAMINE THE PERSONNEL FILES OF ALL PROSECUTION WITNESSES WHO WORK FOR THE GOVERNMENT.** If any prosecution witnesses work for other branches of the government, you should search their personnel files for impeachment evidence, as with the files of law enforcement officers. *See, e.g., United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (holding that contents of postal worker's personnel file, if they could be used for impeachment, would constitute *Brady* material).

Further, pursuant to *United States v. Bagley*, 473 U.S. 667, 676 (1985), any evidence that can be used to impeach a prosecution witness's credibility should be disclosed to the defense. This type of evidence includes but is not limited to the following:

- **Contrary, conflicting statements**;
- False Reports;
- **Inaccurate statements and reports**;
- **Other evidence contradicting prosecution witness statements and/or reports**;
- Promises or offers of leniency, or other inducements, express or implied;
- Felony convictions;
- Misconduct involving moral turpitude;
- Misdemeanor convictions involving moral turpitude;
- Pending criminal charges;
- Parole or Probation status;
- Reputation for untruthfulness;
- **Alcohol and/or drug use**;
- Gang membership;
- **Bias toward the Respondent**.

Given the facts of this case, I have specific concerns about the items in boldface delineated above. I also have specific concerns about _____ and would request that you obtain copies of his confidential employment records from the two previous law enforcement agencies where he was employed.

• **SEARCH ALL CRIMINAL RECORD DATABASES TO WHICH YOU HAVE ACCESS FOR CRIMINAL RECORDS OF POTENTIAL PROSECUTION WITNESSES.** I presume that you have checked both local and national databases for any criminal convictions of government witnesses. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that failure to search a local criminal database for informant's criminal convictions is *Brady* violation); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding that failure to run FBI or NCIC checks on a prosecution witness constitutes a *Brady* violation).

• **ASK THE TRAVIS COUNTY SHERIFF'S DEPARTMENT, AUSTIN POLICE DEPARTMENT AND OTHER REGION LAW ENFORCEMENT AGENCIES IF THEY HAVE FILES ON ANY OF YOUR WITNESSES.** Even if you are unaware of deals that your witnesses have made with law enforcement agencies, such deals are *Brady* material and must be disclosed to the defense. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999). I presume that you have spoken with all of these agencies to ensure that they have not made any deals with or payments to any of your witnesses.

• **EXAMINE THE PRE-SENTENCE REPORTS AND PROBATION FILES OF ALL WITNESSES.**

o Exculpatory information in a witness's probation file, including the witness's criminal record or personal information that could be used for impeachment, should be released to the defense. *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988).

o Pre-sentence reports (PSIs) of any government witnesses should be provided to the trial court for *in camera* examination to determine whether they contain *Brady* or *Giglio* material. *See, e.g., United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993).

• **EXAMINE THE SCHOOL AND DISCIPLINARY RECORDS AND FILES OF ALL WITNESSES.**

• **IF ANY GOVERNMENT WITNESSES HAVE BEEN INCARCERATED, EXAMINE THEIR DEPARTMENT OF CORRECTIONS AND/OR BUREAU OF PRISONS FILES.** *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*) ("The state had an obligation, before putting [a career burglar and six-time felon] on the stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.")

4. SPEAK WITH THE VICTIM WITNESS COORDINATOR INVOLVED WITH THE CASE. *Commonwealth v. Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001).

5. IF ANOTHER GOVERNMENT AGENCY INVESTIGATED THE ALLEGED OFFENSE, EXAMINE THE FILES FROM THAT INVESTIGATION OR HAVE THE COURT EXAMINE THEM. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60. (holding that Respondent was entitled to have court conduct *in camera* examination of Child and Youth Services (CYS) file investigating Respondent's alleged rape of his daughter to determine if it contained *Brady* material). I am specifically asking for you to inquire about all school investigations that may have occurred.

WHEN TO DISCLOSE INFORMATION

As is recommended by the ABA Standards, I respectfully request the material be turned over as soon as you learn of it. *See* ABA Standards for Criminal Justice, Prosecution Function, § 3-3.11(a) (c) (3d Ed. 1993) DISCLOSURE OF EVIDENCE BY THE PROSECUTOR ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused. … A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused"); s*ee also Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (The duty of disclosure is not limited to evidence in the actual possession of the prosecutor. Rather, it extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies.); *see also Strickler v. Greene*, 527 U.S. 263 275, n. 12 (1999) (Prosecutor has constructive knowledge of all favorable evidence known to those acting on the government's behalf, even if no actual knowledge of materials, and even if materials are in the file of another jurisdiction's prosecutor); *United States v. Safavian*, 233 F.R.D. 205, 207 (D.D.C. 2006) (Prosecutor has a duty to search and disclose *Brady* evidence, within reason, in the possession of all Executive Branch agencies and departments, rather than solely the agencies "closely aligned" with the prosecution.)

The federal courts have repeatedly emphasized the requirement of prompt pre-trial disclosure. *See Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993) ("It is now well settled that the prosecution must disclose [*Brady*] material at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." (citations and internal quotation marks omitted). In *United States v. Sykes*, the court overturned a murder conviction due to the government's late disclosure of *Brady* material:

> We conclude that the government's late disclosure of *Brady* information, and the consequent inability of the government or the defense to locate two potential defense witnesses who had given grand jury testimony that was favorable and potentially exculpatory, impinged on Mr. Sykes' constitutional due process right to a fair opportunity to defend himself. Furthermore, on the record in this case, we hold that there was a reasonable probability that the outcome would have been different had the defense been able to present at trial one or both of the witnesses whose grand jury testimony rebutted that of a key government witness.

Sykes v. United States, --A.2d.-- 2006 WL 564050, at *1 (D.C. March 9, 2006).

In *Sykes*, the Prosecutor failed to disclose favorable grand jury testimony of two witnesses until two days prior to trial. Once the information was revealed to the defense, the witnesses could no longer be located. The Court stated "the grand jury testimony of Mr. Parrott and Mr. Sellers should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence." *Id.* at *8. The Court went on to state that the time for disclosure was as soon as the information was known to the prosecution because "[h]ad the government apprised the defense about the Parrott/Sellers' testimony shortly after their

May 2, 1996, grand jury appearance, they would have had the opportunity to speak with both men long before the commencement of appellant's trial on April 9, 1997." *Id*.

The *Sykes* decision reaffirmed the Court's earlier position in *Ebron v. United States*, where the Court emphasized that:

> prosecutors are expected to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of *prompt* disclosure . . . When the government fails to make prompt disclosure, as required, the opportunity for use of the material by the defense may be impaired, and the administration of justice may be impeded by the necessity for a continuance to allow the defense to make use of the material or by the need for reversal of a conviction.

838 A.2d 1140, 1156 n.13 (D.C. 2003) (internal quotations and citations omitted). "[A] prosecutor's timely disclosure obligation with respect to *Brady* material cannot be overemphasized, and the practice of delayed production must be disapproved and discouraged . . . [D]elay may imperil a Respondent's right to a fair trial, and a conscientious prosecutor will not countenance it." *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995) (internal quotations and citations omitted). Pre-trial disclosure of statements that qualify as both *Jencks* material and *Brady* material should also be disclosed before trial to allow effective use in the preparation of the defense case.

WHAT TO DISCLOSE

I am writing to ensure the disclosure of all information to which I am entitled under *Brady v. Maryland*, 373 U.S. 83 (1963) in the above captioned case. The requested information includes all information material to guilt, punishment, and the credibility of government witnesses, including potential impeachment material for all government witnesses. Failure to disclose impeachment information is the same, under *Brady*, as the failure to disclose exculpatory information. This request includes impeachment material that may also fall under the Jencks Act.

The requested information includes all information that you or any part of the prosecution team know or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. Under *Brady* and its progeny, this request extends to all information known by all law enforcement or other government agencies involved in this case, whether or not personally known to the individual prosecutor.

Our definition of *Brady* is the same as Judge Friedman's definition as stated in *Safavian*:

> "It is any information in the possession of the government -- broadly defined to include all Executive Branch agencies -- that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses. It covers both exculpatory and impeachment evidence. The government is obligated to disclose all evidence relating to guilt or

punishment which might be reasonably considered favorable to the Respondent's case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness. Where doubt exists as to the usefulness of the evidence to the Respondent, the government must resolve all such doubts in favor of full disclosure." *Id.*

However, if there is any ambiguity, the following are examples of evidence other courts have construed as *Brady*:

INFORMATION REGARDING GOVERNMENT WITNESSES

• **Exculpatory and/or impeachment Grand Jury Testimony.** *See Sykes v. United States*, --A.2d.-- 2006 WL 564050 (D.C. 2006).

• **Agreements/Deals with government witnesses**. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose promise of immunity in exchange for testimony violates *Brady*); *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985) (failure to disclose payment of $300 to two key government witnesses violates *Brady*); *Singh v. Prunty*, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (failure to disclose that star witness had a very favorable deal with government to avoid a very serious charge is *Brady* violation); *United States v. Smith*, 77 F.3d 511, 513-16 (D.C. Cir. 1996) (failure to disclose a deal in which state charges were dismissed as part of a federal plea is *Brady* violation); *In Re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 891, 896 (D.C. Cir. 1999) (remand to determine *Brady* information with instruction to district court to require the U.S. Attorney's Office to review the records in the possession of the prosecution team for evidence indicating that a government informant who provided information leading to the Respondent's arrest had a deal with the prosecution, the D.C. Circuit observed that it is "irrelevant . . . that the requested records may have been in the possession of the Metropolitan Police Department, of the FBI or DEA, rather than the U.S. Attorney's Office.").

• **Payments to witnesses**: *See, e.g., Mastracchio v. Vose*, 274 F.3d 590, 602-03 (1st Cir. 2001) (knowledge of Witness payments or favors made by the Witness Protection team is *Brady*); *In re Sealed Case (Brady Obligations)*, 185 F.3d 887, 894 (D.C. Cir. 1999) (failure to disclose a cooperation agreement that included payments to a witness is *Brady* information).

• **Criminal history of informants**: *See, e.g., Crivens v. Roth*, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by government witness is *Brady* even when government witness used aliases); *Carriger v. Stewart*, 132 F.3d 463, 480-82 (9th Cir. 1997) (failure to obtain or disclose Department of Corrections file that would have showed lengthy criminal history, and history of lying to police and blaming others for his own crimes is *Brady*).

• **Bias of government witnesses**: *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (*Brady* obligation for government to reveal witness portrayed as neutral and disinterested expert actually had been investigating Respondent for years); *United States v. O'Connor*, 64 F.3d 355, 359-60 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence testimony of another government witness is *Brady*); *Reutter v. Solem*, 888 F.2d 578, 581-82 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days is a *Brady* violation).

• **Personnel files, especially of testifying officers**: *See, e.g., United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (if specific request is made, prosecutor must search personnel records of police officer/witnesses to fulfill *Brady* obligations); *United States v. Muse*, 708 F.2d 513, 516 (10th Cir. 1983) (recognizing that prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.).

• **Presentence Reports of testifying witnesses**: *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (information in probation file relevant to government witness credibility must be disclosed, and could not be deemed privileged by making it part of probation file); *United States v. Carreon*, 11 F.3d 1225, 1238 (5th Cir. 1994) (prosecution should allow trial court to conduct in camera review of presentence reports of government witnesses to determine whether they contain *Brady/Giglio* material).

• **Misconduct by government witnesses**: *See, e.g., United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness, and "continuous stream of unlawful favors" including phone privileges, presents, special visitors, provided by prosecution to witnesses is considered *Brady* material).

• **Police perjury in motions hearings**: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding is considered material *Brady* evidence relevant to impeachment).

• **Knowledge of police intimidation of witnesses**: *See, e.g., Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting is considered *Brady*).

OTHER SUSPECT INFORMATION

• **Contradictory eyewitness testimony**: *See, e.g., Clemmons v. Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997) (failure to disclose internal government memo

generated on day of prison killing which indicated that eyewitness saw someone else commit murder is *Brady*).

• **Prior identifications of other suspects**: *See, e.g., White v. Helling*, 194 F.3d 937, 944-46 (8th Cir. 1999) (habeas relief granted in 27 year old robbery/murder case because of failure to disclose that government's chief eyewitness had originally identified someone else and had identified Respondent only after several meetings with police); *Hudson v. Whitley*, 979 F.2d 1058, 1065 (5th Cir. 1992) (remand on *Brady* grounds because of failure to disclose that the only eyewitness had originally identified third party, and that third party had originally been arrested).

• **Prior statements that eyewitness could not identify anyone:** *See, e.g., Spicer v. Roxbury*, 194 F.3d 547, 557-60 (4th Cir. 1999) (failure to disclose witness' prior inconsistent statement that he did not see Respondent is *Brady*); *Lindsey v. King*, 769 F.2d 1034, 1041-43 (5th Cir. 1985) (failure to disclose initial statement of eyewitness that he could not make an ID because he never saw murderer's face is *Brady*).

• **Arrests/investigation of other suspects**. *See, e.g., Banks v. Reynolds*, 54 F.3d 1508, 1517, 1520 (10th Cir. 1995) (failure to reveal that another individual or individuals had been arrested for same crime was a *Brady* violation); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 829-835 (10th Cir. 1995) (failure to disclose information indicating that uncharged third party had committed the offense was a *Brady* violation); *Miller v. Angliker*, 848 F.2d 1312, 1321-23 (2d Cir. 1988) (failure to disclose information that would suggest another person committed offense is *Brady*); *Bowen v. Maynard*, 799 F.2d 593, 610-12 (10th Cir. 1986) (*Brady* violation where prosecution failed to disclose that police considered another man a suspect when the other man better fit the description of eyewitnesses; he was suspected by law enforcement in another state of being a hit man, and carried same weapon used in murders).

INCONSISTENT STATEMENTS

• **Contradictory or inconsistent statements**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to turn over statement by co-Respondent that he had planned the killing, and that co-Respondent had performed actual killing is violation of due process); *Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles' car in supermarket parking lot).

• **Inconsistent notes**: Prosecutor and law enforcement notes from interviews with government witness: *See, e.g., United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998) (*Brady* obligation to turn over original notes from witness interview that contained three key pieces of impeachment information that showed that story had changed, change may have been brought about by threats of

imprisonment, and witness had claimed to have suffered a stroke); *United States v. Pelullo*, 105 F.3d 117, 122-23 (3d Cir. 1997) (failure to disclose rough notes of FBI and IRS agents corroborating Respondent's version of events and impeaching testimony of government agents).

• **Statements of potential witnesses not called to testify**: *See, e.g., United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of potentially exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).

• **Expert reports inconsistent with the government case or tends to support the defense case**: *See, e.g., Ex parte Mowbray*, 943 S.W.2d 461, 466 (Tex. Crim. App. 1996) (*Brady* violation when State failed to disclose exculpatory expert report); *United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (*Brady* violation when government failed to disclose ballistics worksheet that showed gun Respondent was accused of firing was inoperable); *State v. DelReal*, 593 N.W. 2d 461, 464, 466 (Wis. App. 1999) (*Brady* violation when government failed to disclose fact that a swab for gunshot residue had taken place, which would have provided Respondent the opportunity to have swabs tested and also would have allowed Respondent to challenge reliability/credibility of police investigation and testimony).

• **Mitigating evidence in aid of sentencing**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, § 3-6.2 (b) (3d Ed. 1993) Information Relevant to Sentencing ("The prosecutor should disclose to the defense and to the court at or prior to the sentencing all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

MATERIALITY

I hereby request disclosure of all evidence in the government's possession that might reasonably be considered favorable to the defense, regardless of your determination of its materiality. In a pretrial posture, the government's duty to disclose all favorable evidence must be complied with without regard to the government's opinion of its materiality.

Recently, Judge Friedman ruled in *United States v. Safavian* that a materiality requirement is simply inapplicable to pretrial disclosure. As Judge Friedman explained, a materiality requirement is unsuitable to pretrial discovery:

> Because the definition of "materiality" discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery

> phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

233 F.R.D. at 16; *See United States v. Sudikoff*, 36 F.Supp.2d 1196, 1198 (C.D. Cal. 1999); *United States v. Carter*, 313 F.Supp.2d 921, 925 (E.D. Wis. April 12, 2004) ("[I]n the pre-trial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."); *see also Monroe v. Angelone*, 323 F.3d 286, 301 (4th Cir. 2003) (although the apparent redundancy of *Brady* information that comes to light post-trial may avert a finding of a constitutional violation, it "does not excuse disclosure obligations" pre-trial).

Although a lack of "materiality" may be a defense post-conviction to suppression of *Brady* information, a determination of materiality pre-trial is simply not appropriate. *See Lewis v. United States*, 408 A.2d 303, 306-07 (D.C. 1979) (although "the constitutional question commonly comes up retrospectively, the due process underpinning of *Brady-Agurs* is a command for disclosure Before an accused has to defend himself"). As explained in *Sudikoff*,

> This [materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighted against the presumed effect of the undisclosed *Brady* material. … This analysis obviously cannot be applied by a trial court facing a pretrial discovery request.

36 F.Supp.2d at 1198-99; *see also Carter*, 313 F.Supp.2d at 924 ("[T]he materiality prong presumes that the trial has already occurred and requires the court to determine whether the result could have been different had the evidence been disclosed. But a court deciding whether materiality should be disclosed prior to trial does not have the luxury of reviewing the trial record."); *Lewis*, 408 A.2d at 307 (requiring pre-trial disclosure of impeachable convictions of government witnesses "because there can be no objective, ad hoc way to evaluate before trial whether an impeachable conviction of a particular government witness will be material to the outcome. No one has that gift of prophecy.")

Just as a trial court cannot determine materiality before trial, neither can the United States Attorney's Office substitute its judgment of pretrial materiality. Accordingly, the United States Attorney's Office must disclose all information "favorable to an accused," *Brady*, 373 U.S. at 87, including all evidence relating to guilt or punishment and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses. *See Giglio*, 405 U.S. at 154-55; *Sykes*, --A.2d.--2006 WL 564050, at *8 ; *Safavian*, 233 F.R.D. at 15-16.

MEANS OF COMPLIANCE

Recognizing your heavy caseload, and the seriousness with which you take your prosecutorial responsibilities, I understand that this request places additional affirmative burdens on you to investigate and determine potential difficulties in the prosecution case. However, I do not believe that providing access to portions of your file while under supervision in your office under the time constraints and scheduling imposed by your investigators allows us to adequately defend the case at trial. I would ask that if you discover any evidence that qualifies as *Brady, Giglio, or Bagley* that you provide this notice to me in writing the same as you would a notice under Rule 404(b).

If your understanding of your *Brady* obligations diverges from the parameters of this letter, please let me know so that I can determine whether litigation of this issue is necessary.

III.
DISCOVERY

The amount of discovery in this case is voluminous. I would imagine that a significant amount of discovery has been scanned or is available in digital format. From the information that has been provided to date, there are still a number of documents that are referred to in the offense report but have not been produced:

[*insert specific discovery requests*]

Thank you for your time and attention to this matter.

Sincerely,

David M. González
david@sg-llp.com

Template:
Motion for Exculpatory Information

Purpose

This is a standard Brady / Giglio / Bagley motion.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

MOTION FOR PRODUCTION OF EXCULPATORY,
MITIGATING & IMPEACHMENT INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and respectfully moves this Court to order the State to forthwith make inquiry and disclose all of the following within the possession, custody or control of the State or the existence of which is known, or by the exercise of due diligence could become known, to the Respondent:

I.
DEFINITION & SCOPE OF EXCULPATORY EVIDENCE

Material or information in the hands of the prosecution is discoverable "where the evidence is material to guilt or to punishment." It includes evidence "favorable to the accused either direct or *impeaching*" (emphasis added). *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66, 76 (1967); *Giglio v. United States*, 405 U.S. 150 (1972). The obligation to disclose favorable evidence to the accused is that of the government and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence. *United States v. Auten*, 632 F. 2d 478 (5th Cir. 1980); *Rhinebart v. Rhay*, 440 F. 2d 725 (9th Cir 1971), cert. den. 404 U.S. 825. The State's suppression of

exculpatory evidence violates due process if the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Brady* at 87. "The duty of disclosure affects not only the prosecutor, but the government as a whole, including its investigative agencies." *United States v. Bryant*, 439 F. 2d 642, 658 (D.C. Cir. 1971). Disclosure is also required under the Due Course of Law provisions of Article I, Sections 13 and 19 of the Texas Constitution.

The general obligation to disclose exculpatory information continues during the trial, giving rise to a duty to disclose information whose significance comes apparent as the case progresses. *See United States v. Keogh*, 391 F.2d 138, 147 (CA2 1968).

II.
ERR ON THE SIDE OF DISCLOSURE

In many cases exculpatory information in the possession of the prosecutor may be unknown to defense counsel. Further, the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of trial. The prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the Respondent, erring on the side of disclosure. *United States v. Bagley*, 473 U.S. 667 (1985).

III.
SPECIFIC REQUESTS

When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Id.* The Respondent specifically requests the prosecution to provide defense counsel with any information or material that is exculpatory, favorable to the accused or which acts to impeach any witness for the State, including but not limited to the following:

EXCULPATORY EVIDENCE

1. Any evidence or statement which would tend to show that the Respondent did not commit the offense alleged in this cause;

2. The existence of a witness who would provide testimony favorable to the defense, even if learned from the witness during trial. *Flores v. State*, 940 S.W.2d 189, 191-92 (Tex.App. - San Antonio, 1996, no. pet.);

3. Any evidence or statement which is inconsistent with another witnesses' statement;

4. Any evidence that an eyewitness did not identify the Respondent or identified somebody other than Respondent;

5. Any evidence or statement which would support the defense of necessity, provocation, or duress;

6. Any evidence of Respondent's voluntary intoxication;

7. Any scientific evidence or forensic evidence that has been collected but has not been tested, or any scientific or forensic evidence that has been tested and does not tie Respondent to the crime;

8. A list of other suspects who were also under investigation for the present offense;

9. Whether or not law enforcement continued to investigate after Respondent was arrested;

10. Any evidence or statement which would indicate that a person other than the Respondent committed or is criminally responsible for the offense alleged;

11. All statements made by any party or witness to this alleged offense in the possession of or within the knowledge of the District Attorney or any of his agents, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to the innocence of the Respondent or to the punishment, if any, to be set in this case;

12. Any evidence in the possession of the State or its agents, including any law enforcement agency, or within their knowledge that Respondent has ever been adjudicated or subject to a Chapter 55 hearing or been found incompetent to stand trial;

POTENTIAL BIAS OF GOVERNMENT WITNESSES

13. Any other information tending to show a State's witness's bias in favor of the government or against the Respondent or which otherwise impeaches a witness's testimony (including pending complaints against police officers and closed administrative or civil cases, whether resolved for or against the officer, that involve facts similar to those of this case). *See United States v. Bagley*, 473 U.S. 667 (1985);

14. All "consideration" or promises of "consideration" given to or on behalf of all State's witnesses or expected or hoped for by said State witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972). By "consideration," the Respondent refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness, including, but not limited to, formal or informal, direct or indirect; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal action, parole, probation, commutation of sentence, pardon, clemency, civil or administrative dispute; criminal, civil, or tax immunity grants of letters of non-prosecution; relief from forfeitures; payments of money, rewards or fees, witness fees and special witness fees; provision of food, clothing, shelter, or housing arrangements, transportation, legal services, employment or other benefits; placement in a "witness protection program"; informer status of the witness; and anything else which arguably could reveal an interest, motive, or bias in the witness in favor of the State or against the defense or act as an inducement to testify or to color testimony;

15. All documents, records, memoranda and notes reflecting "consideration" as set forth in Paragraph 14 above;

16. Any and all threats, express or implied, direct or indirect, or other coercion made or directed against any witness, criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any witness, any probationary, parole, deferred prosecution or custodial status of any witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the State of Texas or over which the State of Texas has real, apparent or perceived influence;

17. All information in the possession of the government (including the Office of the District Attorney and any employees thereof and any State law enforcement agency) indicating that any government witness has had a pending juvenile or criminal case on or since the offense in this case; any government witness has had an arrest, guilty plea, trial, or sentencing on or since the date of the offense in the present case; any government witness has been on juvenile or criminal parole or probation on or since the date of the offense; and any government witness now has or has had any other liberty interest which the witness could believe or could have believed might be favorably affected by government action. With respect to this information, I request cause numbers, dates and jurisdiction for all such cases. *See Davis v. Alaska*, 415 U.S. 508 (1974);

PRIOR STATEMENTS & TESTIMONY OF GOVERNMENT WITNESSES

18. Prior statements by a witness that are inconsistent with later statements, non-corroborative, or other witness statements that the witness's trial testimony will not reflect; *Levin v. Clark*, 408 F. 2d. 1209 (D.C. Cir. 1967);

19. Perjury by any government witness at any time, whether or not adjudicated and whether or not in connection with this case. *See Mooney v. Holohan*, 294 U.S. 103 (1935);

20. The existence and identification of each occasion on which the witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to the Respondent, the investigation, or the facts of this case;

21. The existence and identification of each occasion on which each witness who has been or is now an informer, accomplice, co-conspirator, or expert that has testified before any court, grand jury, or other tribunal or body;

UNRELIABILITY OF GOVERNMENT WITNESSES

22. Facts or evidence indicating the unreliability of any State's witness; *See Mesarosh v. United States*, 352 U.S. 1 (1956);

23. All information indicating that the mental state of any witness for the State is below normal or in any way abnormal;

24. All information that any witness for the State was under the influence of alcohol, narcotics, or any other drug, prescription or otherwise, at the time of the observations about which the witness will testify, or that the witness' faculties or observations were impaired in any way;

25. Evidence or information indicating the untruthfulness of a State's witness; *Napue v. Illinois*, 360 U.S. 264 (1959);

26. Evidence regarding any prior false accusations made by the complaining witness in this case, if any, on behalf of the complaining witness against the Respondent that the Respondent or some other person had made threats against the complaining witness or engaged in assaultive conduct against the Complainant. *Thomas v. State*, 669 S.W.2d 420 (Tex. App. 1 Dist. 1984, p.d.r.ref'd.); *Rushton v. State*, 695 S.W.2d 591(Tex. App. 13 Dist. 1985,); *Polvado v. State*, 689 S.W.2d 945 (Tex. App. 14 Dist. 1985, p.d.r. ref'd.); *Davis v. Alaska*, 415 U.S. 308, 318 (1984); Rule 412(b) Tex. R. Ev.;

UNRELIABILITY OF GOVERNMENT TESTING

27. Evidence or information indicating the unreliability of any of the State's testing equipment, methods, procedures used for forensic evidence;

PRIOR CRIMINAL HISTORY AND/OR BAD ACTS BY GOVERNMENT WITNESSES

28. All prior convictions and juvenile adjudications of all State witnesses and all persons identified in the offense report who could likely be called as a witness for the State. These records should include all arrests and convictions, whether as a juvenile or as an adult, including, but not limited to: all felony convictions and all misdemeanor convictions involving moral turpitude which have occurred in the last ten (10) years; all felony convictions and all misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; all pleas of guilty or nolo contendere which resulted in dispositions of "deferred adjudication" or "deferred prosecution" or "deferred disposition"; all felony and misdemeanor cases that have resulted in the witness being placed on probation, wherein the period of probation has not expired; all pending felony and misdemeanor offenses alleged to have been committed by the witness. The Respondent requests that the State be ordered to request the proper law enforcement authorities to obtain a full and complete criminal record of all such witnesses and reveal same to the Respondent, and the State should not be permitted to respond to this motion by advising the Court that the prosecutor does not have any indication in his file of any prior criminal record of such witnesses;

29. All records and information revealing prior misconduct or bad acts attributed to all State's witnesses;

30. All handle-by's for all State's witnesses;

31. Any information on any pending or closed internal disciplinary investigation of police officers involved in the case, including, but not limited to, information regarding any administrative suspensions or civilian complaints;

GREGORY VIOLATION

32. Instructions to a State's witness by the police, a prosecutor, a victim-witness coordinator, or any agent of the State to not speak with defense counsel or to do so only in the presence of the State's counsel; *Gregory v. United States*, 369 F. 2d 185 (D.C. Cir. 1966).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that this Court ORDER the Attorney for the State of Texas to provide the Respondent with all relevant material as specified in this request.

Respectfully submitted,
SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv
vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Respondent's Motion for Production of Exculpatory, Mitigating, & Impeachment Evidence has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

O R D E R

On _____, came on to be considered Respondent's Motion for Production of Exculpatory, Mitigating, & Impeachment Information, and the Court, having heard the evidence and argument of counsel, and said Motion is hereby:

(GRANTED);

(DENIED), to which the defense objects.

SIGNED on _____.

_____
JUDGE PRESIDING

Template:
Privilege Log

Purpose

For the prosecutor to itemize any information that was redacted or documents that were withheld. Without making a request for this information you are unable to conduct a hearing as to whether work-product privilege was properly claimed.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of:		
☐ Written		
☐ Video		
☐ Audio Only		

DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____
Prosecuting Attorney

Template:
Discovery Log

Purpose

You must document the discovery you received well in advance of trial. Ideally, this log is filed before pretrial litigation. At the resolution of your case you will update this log to document all discovery received.

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S WRITTEN DISCOVERY LOG

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14(j) of the Texas Code of Criminal Procedure provides this acknowledgement of all documents, items and information provided to the Respondent.

I.
COPIES OF DOCUMENTS & EVIDENCE PROVIDED TO DEFENSE COUNSEL

I have received copies of the following:

OFFENSE REPORTS

☐ Offense Report(s):

Offense Report Number: _____
Number of pages: _____
Date printed: _____

☐ CAD report:
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit:
☐ Complaint / Information
☐ Indictment
☐ Search Warrant(s):
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Written
☐ Video
☐ Audio Only

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio Only
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio Only

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ Other

PHOTOS

☐ Collision (No. of photos:___)
☐ Injuries (No. of photos ____)
☐ Crime Scene (No. of photos ____)
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER EVIDENCE

☐ Other

II.
DOCUMENTS & EVIDENCE REVIEWED BUT NOT PROVIDED TO DEFENSE COUNSEL

I have reviewed and inspected the following:

☐ Criminal History (viewed only)
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video (viewed only)

☐ Article 39.15 materials (viewed only)

☐ Physical evidence: _____ (viewed only)

☐ Other: _____

_____

III.
EXCULPATORY, IMPEACHMENT & MITIGATING INFORMATION PROVIDED TO DEFENSE COUNSEL

☐ I have not received any exculpatory, impeachment or mitigation information from the state.

☐ I have received the following exculpatory, impeachment, or mitigating information:

_____

_____

_____

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

Mail Merge Table

Purpose

To use the templates with Microsoft Word Mail Merge or via the "find & replace" command.

FIND & REPLACE / MAIL MERGE TABLE FOR DISCOVERY TEMPLATES

Field in Template	Description	Your Data
vvSTYLELINE1Avv	"In the Interest of:"	
vvSTYLELINE2Avv	Your client's name	
vvSTYLELINE3Avv	"DOB:" (Your client's DOB)	
vvSTYLELINE1Bvv	"In the _____"	
vvSTYLELINE2Bvv	District Court	
vvSTYLELINE3Bvv	Your County, Texas	
vvCAUSENOvv	Cause number	
vvCLIENTFIRSTNAMEvv	Your client's first name	
vvCLIENTLASTNAMEvv	Your client's last name	
vvATTYFIRSTNAMEvv	Your first name	
vvATTYLASTNAMEvv	Your last name	
vvATTYSBNvv	Your bar number	
vvATTYEMAILvv	Your email address	
vvTODAYDATEvv	Today's date (for certificate of service)	
vvTODAYMONTHvv	This month (for certificate of service)	
vvTODAYYEARvv	This year (for certificate of service)	
vvCOUNTYvv	Your County	

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
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LAB TESTS		
☐ Breath		
☐ Blood		
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☐ Other:		
OTHER EVIDENCE		
☐ Other		

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By:_____
Prosecuting Attorney

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
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	§	
	§	
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2. The existence of a witness who would provide testimony favorable to the defense, even if learned from the witness during trial. *Flores v. State*, 940 S.W.2d 189, 191-92 (Tex.App. - San Antonio, 1996, no. pet.);

3. Any evidence or statement which is inconsistent with another witnesses' statement;

4. Any evidence that an eyewitness did not identify the Respondent or identified somebody other than Respondent;

5. Any evidence or statement which would support the defense of necessity, provocation, or duress;

6. Any evidence of Respondent's voluntary intoxication;

7. Any scientific evidence or forensic evidence that has been collected but has not been tested, or any scientific or forensic evidence that has been tested and does not tie Respondent to the crime;

8. A list of other suspects who were also under investigation for the present offense;

9. Whether or not law enforcement continued to investigate after Respondent was arrested;

10. Any evidence or statement which would indicate that a person other than the Respondent committed or is criminally responsible for the offense alleged;

11. All statements made by any party or witness to this alleged offense in the possession of or within the knowledge of the District Attorney or any of his agents, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to the innocence of the Respondent or to the punishment, if any, to be set in this case;

12. Any evidence in the possession of the State or its agents, including any law enforcement agency, or within their knowledge that Respondent has ever been adjudicated or subject to a Chapter 55 hearing or been found incompetent to stand trial;

POTENTIAL BIAS OF GOVERNMENT WITNESSES

13. Any other information tending to show a State's witness's bias in favor of the government or against the Respondent or which otherwise impeaches a witness's testimony (including pending complaints against police officers and closed administrative or civil cases, whether resolved for or against the officer, that involve facts similar to those of this case). *See United States v. Bagley*, 473 U.S. 667 (1985);

14. All "consideration" or promises of "consideration" given to or on behalf of all State's witnesses or expected or hoped for by said State witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972). By "consideration," the Respondent refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness, including, but not limited to, formal or informal, direct or indirect; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal action, parole, probation, commutation of sentence, pardon, clemency, civil or administrative dispute; criminal, civil, or tax immunity grants of letters of non-prosecution; relief from forfeitures; payments of money, rewards or fees, witness fees and special witness fees; provision of food, clothing, shelter, or housing arrangements, transportation, legal services, employment or other benefits; placement in a "witness protection program"; informer status of the witness; and anything else which arguably could reveal an interest, motive, or bias in the witness in favor of the State or against the defense or act as an inducement to testify or to color testimony;

15. All documents, records, memoranda and notes reflecting "consideration" as set forth in Paragraph 14 above;

16. Any and all threats, express or implied, direct or indirect, or other coercion made or directed against any witness, criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any witness, any probationary, parole, deferred prosecution or custodial status of any witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the State of Texas or over which the State of Texas has real, apparent or perceived influence;

17. All information in the possession of the government (including the Office of the District Attorney and any employees thereof and any State law enforcement agency) indicating that any government witness has had a pending juvenile or criminal case on or since the offense in this case; any government witness has had an arrest, guilty plea, trial, or sentencing on or since the date of the offense in the present case; any government witness has been on juvenile or criminal parole or probation on or since the date of the offense; and any government witness now has or has had any other liberty interest which the witness could believe or could have believed might be favorably affected by government action. With respect to this information, I request cause numbers, dates and jurisdiction for all such cases. *See Davis v. Alaska*, 415 U.S. 508 (1974);

PRIOR STATEMENTS & TESTIMONY OF GOVERNMENT WITNESSES

18. Prior statements by a witness that are inconsistent with later statements, non-corroborative, or other witness statements that the witness's trial testimony will not reflect; *Levin v. Clark*, 408 F. 2d. 1209 (D.C. Cir. 1967);

19. Perjury by any government witness at any time, whether or not adjudicated and whether or not in connection with this case. *See Mooney v. Holohan*, 294 U.S. 103 (1935);

20. The existence and identification of each occasion on which the witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to the Respondent, the investigation, or the facts of this case;

21. The existence and identification of each occasion on which each witness who has been or is now an informer, accomplice, co-conspirator, or expert that has testified before any court, grand jury, or other tribunal or body;

UNRELIABILITY OF GOVERNMENT WITNESSES

22. Facts or evidence indicating the unreliability of any State's witness; *See Mesarosh v. United States*, 352 U.S. 1 (1956);

23. All information indicating that the mental state of any witness for the State is below normal or in any way abnormal;

24. All information that any witness for the State was under the influence of alcohol, narcotics, or any other drug, prescription or otherwise, at the time of the observations about which the witness will testify, or that the witness' faculties or observations were impaired in any way;

25. Evidence or information indicating the untruthfulness of a State's witness; *Napue v. Illinois*, 360 U.S. 264 (1959);

26. Evidence regarding any prior false accusations made by the complaining witness in this case, if any, on behalf of the complaining witness against the Respondent that the Respondent or some other person had made threats against the complaining witness or engaged in assaultive conduct against the Complainant. *Thomas v. State*, 669 S.W.2d 420 (Tex. App. 1 Dist. 1984, p.d.r.ref'd.); *Rushton v. State*, 695 S.W.2d 591(Tex. App. 13 Dist. 1985,); *Polvado v. State*, 689 S.W.2d 945 (Tex. App. 14 Dist. 1985, p.d.r. ref'd.); *Davis v. Alaska*, 415 U.S. 308, 318 (1984); Rule 412(b) Tex. R. Ev.;

UNRELIABILITY OF GOVERNMENT TESTING

27. Evidence or information indicating the unreliability of any of the State's testing equipment, methods, procedures used for forensic evidence;

PRIOR CRIMINAL HISTORY AND/OR BAD ACTS BY GOVERNMENT WITNESSES

28. All prior convictions and juvenile adjudications of all State witnesses and all persons identified in the offense report who could likely be called as a witness for the State. These records should include all arrests and convictions, whether as a juvenile or as an adult, including, but not limited to: all felony convictions and all misdemeanor convictions involving moral turpitude which have occurred in the last ten (10) years; all felony convictions and all misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; all pleas of guilty or nolo contendere which resulted in dispositions of "deferred adjudication" or "deferred prosecution" or "deferred disposition"; all felony and misdemeanor cases that have resulted in the witness being placed on probation, wherein the period of probation has not expired; all pending felony and misdemeanor offenses alleged to have been committed by the witness. The Respondent requests that the State be ordered to request the proper law enforcement authorities to obtain a full and complete criminal record of all such witnesses and reveal same to the Respondent, and the State should not be permitted to respond to this motion by advising the Court that the prosecutor does not have any indication in his file of any prior criminal record of such witnesses;

29. All records and information revealing prior misconduct or bad acts attributed to all State's witnesses;

30. All handle-by's for all State's witnesses;

31. Any information on any pending or closed internal disciplinary investigation of police officers involved in the case, including, but not limited to, information regarding any administrative suspensions or civilian complaints;

GREGORY VIOLATION

32. Instructions to a State's witness by the police, a prosecutor, a victim-witness coordinator, or any agent of the State to not speak with defense counsel or to do so only in the presence of the State's counsel; *Gregory v. United States,* 369 F. 2d 185 (D.C. Cir. 1966).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that this Court ORDER the Attorney for the State of Texas to provide the Respondent with all relevant material as specified in this request.

Respectfully submitted,
SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv
vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Respondent's Motion for Production of Exculpatory, Mitigating, & Impeachment Evidence has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

O R D E R

On _____, came on to be considered Respondent's Motion for Production of Exculpatory, Mitigating, & Impeachment Information, and the Court, having heard the evidence and argument of counsel, and said Motion is hereby:

(GRANTED);

(DENIED), to which the defense objects.

SIGNED on _____.

_____
JUDGE PRESIDING

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUEST TO INSPECT DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure makes this self-executing request to the attorney for the State of Texas to give access to the Respondent the following:

I.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection (checked boxes only):

- ☐ Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;
- ☐ All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;
- ☐ All written or recorded statements of the Respondent;
- ☐ All written or recorded statements of any witness;
- ☐ All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and
- ☐ All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

- ☐ All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

- ☐ Review of Respondent's criminal history through NCIC and TCIC;

- ☐ Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

- ☐ Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code; and/or

- ☐ Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request to Inspect Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUEST TO INSPECT DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

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I.
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INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection (checked boxes only):

OFFENSE REPORTS

☐ Offense Reports & Supplements
☐ CAD report
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit
☐ Complaint / Information
☐ Indictment
☐ Search Warrant

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order

☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER INFORMATION

☐ Criminal History
  ☐ Respondent
  ☐ Co-Respondent
  ☐ Victim
  ☐ Witness:
  _____
  ☐ Other:

☐ Child Advocacy Video
☐ Article 39.15 materials
☐ Physical evidence:
_____

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request to Inspect Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of:

1. Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;

2. All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;

3. All written or recorded statements of the Respondent;

4. All written or recorded statements of any witness;

5. All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and

6. All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

1. Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

2. Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code;

3. Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure.

III.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com ; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of the following checked items:

OFFENSE REPORTS

- ☐ Offense Reports & Supplements
- ☐ CAD report
- ☐ Collision Report
- ☐ Use of Force Report

COURT FILINGS

- ☐ Probable Cause Affidavit
- ☐ Complaint / Information
- ☐ Indictment
- ☐ Search Warrant
- ☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

☐ Toxicology
☐ Fingerprints:

LAB TESTS

☐ Breath
☐ Blood

OTHER EVIDENCE

☐ Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

_____

III.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of

the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com ; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S WRITTEN DISCOVERY LOG

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14(j) of the Texas Code of Criminal Procedure provides this acknowledgement of all documents, items and information provided to the Respondent.

I.
COPIES OF DOCUMENTS & EVIDENCE PROVIDED TO DEFENSE COUNSEL

I have received copies of the following:

OFFENSE REPORTS

☐ Offense Report(s):

Offense Report Number: _____
Number of pages: _____
Date printed: _____

☐ CAD report:
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit:
☐ Complaint / Information
☐ Indictment
☐ Search Warrant(s):
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Written
☐ Video
☐ Audio Only

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio Only
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio Only

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ Other

PHOTOS

☐ Collision (No. of photos:___)
☐ Injuries (No. of photos ____)
☐ Crime Scene (No. of photos ____)
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER EVIDENCE

☐ Other

II.
DOCUMENTS & EVIDENCE REVIEWED BUT NOT PROVIDED TO DEFENSE COUNSEL

I have reviewed and inspected the following:

☐ Criminal History (viewed only)
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video (viewed only)

☐ Article 39.15 materials (viewed only)

☐ Physical evidence: _____ (viewed only)

☐ Other: _____

_____

III.
EXCULPATORY, IMPEACHMENT & MITIGATING INFORMATION PROVIDED TO DEFENSE COUNSEL

☐ I have not received any exculpatory, impeachment or mitigation information from the state.

☐ I have received the following exculpatory, impeachment, or mitigating information:

_____

_____

_____

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

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☐ Offense Reports & Supplements
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☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

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  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

LAB TESTS

☐ Breath
☐ Blood
☐ Toxicology
☐ Fingerprints:

OTHER EVIDENCE

☐ Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF WITHHELD OR REDACTED DISCOVERY (PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

V.
TRE RULE 404

Pursuant to Rule 404(a) of the Texas Rules of Evidence, Respondent requests the State to give reasonable notice in advance of trial of its intent to introduce evidence of a pertinent character trait of the accused. *See Stitt v. State*, 102 S.W.3d 845, 849 (Tex.App. - Texarkana 2003, pet.ref'd) ("A pertinent character trait is one that relates to a trait involved in the offense charged or a defense raised."); *see also Santellan v. State*, 939 S.W.2d 155, 167 (Tex.Crim.App.1997).

Pursuant to Rule 404(b) of the Texas Rules of Evidence, Respondent requests the state to give reasonable notice in advance of trial of its intent to introduce evidence of other crimes, wrongs, or acts in an attempt to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. *Ex Parte Varelas*, 45 S.W.3d 627, 631 (Tex.Crim.App.2001) (jury cannot consider extraneous act evidence unless they believe beyond a reasonable doubt that the Respondent committed that act); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (all the facts which must exist in order to subject the Respondent to a legally prescribed punishment must be found by the jury); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (reaffirming a Respondent's Sixth Amendment rights regarding burden of proving sentencing allegations).

Specifically, Respondent requests that the notice include the following:

-dates;
-locations;
-types or nature of the alleged crimes, wrongs, or acts involved;
-names of the individuals involved; and
-names of any courts involved.

Rodgers v. State, 111 S.W.3d 236 (Tex.App.- Texarkana, 2003).

VI.
TRE RULE 609

Pursuant to Rule 609(f) of the Texas Rules of Evidence, Respondent requests that the State give sufficient advance written notice of its intent to use evidence of a conviction to impeach the credibility of the following witness:

_____

_____

_____

This request includes providing the discovery of any supporting documentation regarding such prior convictions.

VII.
ARTICLE 37.07

Pursuant to Article 37.07, Section 3(g) of the Texas Code of Criminal Procedure, Respondent requests that the State give reasonable notice of intent to introduce against the Respondent evidence of an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated suspended sentence as provided for in Article 37.07 Section 3(a) of the Code of Criminal Procedure. Respondent further requests written notice of the State's intent to introduce evidence of the prior criminal record of the Respondent, their general reputation, their character, an opinion regarding their character, and the circumstances of the offense for which they are being tried. Respondent also requests written notice of any evidence pertaining to an adjudication of delinquency of the grade of a felony or a misdemeanor punishable by confinement in jail.

Specifically, Respondent requests that the notice include the following: dates; locations; types or nature of the alleged crimes, wrongs, or acts involved; names of the individuals involved; and names of any courts involved. Notice of that intent is reasonable only if the notice includes the date on which and the county in which each alleged crime or bad act occurred and the name of each alleged victim of the crime or bad act.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. This request includes providing the discovery of any supporting documentation regarding any prior convictions.

VIII.
WITNESS LIST

Respondent requests that at least thirty (30) days before the commencement of trial the State provide the name, address and telephone number of each person whom the State intends to call as a witness at any stage of the trial. Notice of the State's witnesses shall be given upon request. *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977); *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993), cert. denied, 512 U.S. 1246 (1994) ("It is established that notice of the State's intended witnesses should be given upon proper request.").

This request encompasses those persons whom the State reasonably anticipates may testify during its case-in-chief, case-in-rebuttal, or, in the event of a conviction, at the punishment stage.

IX.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com ; and

discovery@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County Prosecuting Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

EXHIBIT A:
PRIVILEGE LOG

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of: _____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____

Prosecuting Attorney

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the state to produce and provide an electronic duplicate of:

1. Any and all offense reports regarding the incident that forms the basis for this prosecution of the Respondent;

2. All documents and papers, including but not limited to electronic communications, that constitute or contain evidence material to any matter involved in this action;

3. All written or recorded statements of the Respondent;

4. All written or recorded statements of any witness;

5. All books, accounts, letters (including electronic mail and text messages) which constitute or contain evidence material to any matter involved in this action; and

6. All photographs, videos, and recordings which constitute or contain evidence material to any matter involved in this action;

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

1. Any and all objects or other tangible things which constitute or contain evidence material to any matter involved in the action;

2. Any evidence subject to the restrictions provided by Section 264.408 of the Texas Family Code;

3. Any evidence subject to the restrictions provided by Article 39.15 of the Code of Criminal Procedure; and

4. Review of Respondent's criminal history through NCIC and TCIC.

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF WITHHELD OR REDACTED DISCOVERY (PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: State's Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

A. SPECIFIC REQUESTS FOR THE PROSECUTOR TO INQUIRE ABOUT EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

The obligation to disclose favorable evidence to the accused is that of the government and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence. *United States v. Auten*, 632 F. 2d 478 (5th Cir. 1980); *Rhinebart v. Rhay*, 440 F. 2d 725 (9th Cir 1971), cert. den. 404 U.S. 825. The State's suppression of exculpatory evidence violates due process if the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Brady* at 87. "The duty of disclosure affects not only the prosecutor, but the government as a whole, including its investigative agencies." *United States v. Bryant*, 439 F. 2d 642, 658 (D.C. Cir. 1971).

In many cases exculpatory information in the possession of the prosecution team may be unknown to the prosecutor that handles the case at trial. In order to prevent an inadvertent or unintentional *Brady* violation, counsel requests the prosecutor to do the following:

1. Speak to all members of the "prosecution team." It is likely that many other people have worked on the case, either in your office or in an investigative capacity. I am requesting that you speak with anyone who has worked on the case and determine whether they possess any information or have made any promises that constitute *Brady* or *Giglio* material. People you would speak to include:

• **All employees of the [INSERT NAME OF PROSECUTOR'S OFFICE] office involved with the case**. If any attorney in your office has knowledge of *Brady* or *Giglio* material, that knowledge will be attributed to the entire office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")

• A**ll investigators who handled the case**. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1568 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" (citing *Giglio*))

• **All federal, state and local law enforcement agents who worked on the case.** If the Texas State Securities Board, the Austin Police Department, Homeland Security, ICE, TSA, airport police, FBI, ATF, or any other law enforcement agencies participated in the investigation of this case, those agents are part of the prosecution team. *See United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) ("extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [witness]'s lawyer was paid from state funds must be imputed to the federal team."); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[J]oint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team."); *United States v. Safavian 233 F.R.D. 12*, 15 (D.D.C. 2005) ("In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the Justice Department remains available for disclosure.") ; *United States v. Jennings*, 960 F.2d. 1488, 1490 (9th Cir. 1992) ("There is no question that the AUSA prosecuting a case is responsible for compliance with the dictates of *Brady* and its progeny. This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies."(citations omitted)).

2. Review all case files maintained by your office and any law enforcement agencies to ensure that all *Brady* material is disclosed to the defense. Sometimes police officers or law enforcement agents will not provide the prosecution with all of the information collected during their investigation. Nonetheless, you are responsible for reviewing all of the information in their investigative files, and you must make sure that all exculpatory material is turned over to the defense. *See, e.g., Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002).

3. Investigate your witnesses. Material that impeaches a government witness must be disclosed to the defense, and any impeachment material that you possess or can access easily. There are a few things you must do to guarantee that you meet your *Brady* and *Giglio* obligations:

• **Examine the personnel files of all investigating agents who may testify at trial.** If there is impeachment evidence regarding any officers involved with the investigation of the case, especially those who may testify at hearings or at trial, it must be disclosed to the defense. *See, e.g., Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000); *United States v. Muse*, 708 F.2d 513 10th Cir. 1983); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). Thus, you should search the personnel files of all officers involved with the case for such evidence.

• **Examine the personnel files of all prosecution witnesses who work for the government.** If any prosecution witnesses work for other branches of the government, you should search their personnel files for impeachment evidence, as with the files of law enforcement officers. *See, e.g., United States v. Deutsch,* 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (holding that contents of postal worker's personnel file, if they could be used for impeachment, would constitute *Brady* material).

Further, pursuant to *United States v. Bagley*, 473 U.S. 667, 676 (1985), any evidence that can be used to impeach a prosecution witness's credibility should be disclosed to the defense. This type of evidence includes but is not limited to the following:

- Contrary, conflicting statements;
- False Reports;
- Inaccurate statements and reports;
- Other evidence contradicting prosecution witness statements and/or reports;
- Promises or offers of leniency, or other inducements, express or implied;
- Felony convictions;
- Misconduct involving moral turpitude;
- Misdemeanor convictions involving moral turpitude;
- Pending criminal charges;
- Parole or Probation status;
- Reputation for untruthfulness;
- Alcohol and/or drug use;
- Gang membership;
- Bias toward the Respondent.

• **Search all criminal record databases to which you have access for criminal records of potential prosecution witnesses.** I presume that you have checked both local and national databases for any criminal convictions of government witnesses. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that failure to search a local criminal database for informant's criminal convictions is *Brady* violation); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding that failure to run FBI or NCIC checks on a prosecution witness constitutes a *Brady* violation).

• **Ask the TRAVIS COUNTY SHERIFF'S DEPARTMENT, AUSTIN police department and other region law enforcement agencies if they have files on any of your witnesses.** Even if you are unaware of deals that your witnesses have made with law enforcement agencies, such deals are *Brady* material and must be disclosed to the defense. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999). I presume that you have spoken with all of these agencies to ensure that they have not made any deals with or payments to any of your witnesses.

• **Examine the school and disciplinary records of all witnesses.**

• **Examine the pre-sentence reports and probation files of all witnesses.**

o Exculpatory information in a witness's probation file, including the witness's criminal record or personal information that could be used for impeachment, should be released to the defense. *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988).

o Pre-sentence reports (PSIs) of any government witnesses should be provided to the trial court for *in camera* examination to determine whether they contain *Brady* or *Giglio* material. *See, e.g., United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993).

• **If any government witnesses have been incarcerated, examine their department of corrections and/or bureau of prisons files.** *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*) ("The state had an obligation, before putting [a career burglar and six-time felon] on the
stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.")

4. Speak with the victim witness coordinator involved with the case. *Commonwealth v. Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001).

5. If another government agency investigated the alleged offense, examine the files from that investigation or have the court examine them. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60. (holding that Respondent was entitled to have court conduct *in camera* examination of Child and Youth Services (CYS) file investigating Respondent's alleged rape of his daughter to determine if it contained *Brady* material).

B. SPECIFIC REQUESTS: EXCULPATORY INFORMATION

When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *See Bagley, supra*. The Respondent specifically requests the prosecution to provide defense counsel with any information or material that is exculpatory, favorable to the accused or which acts to impeach any witness for the State, including but not limited to the following:

1. Any evidence or statement which would tend to show that the Respondent did not commit the offense alleged in this cause.

2. The existence of a witness who would provide testimony favorable to the defense, even if learned from the witness during trial.

3. Any evidence or statement which is inconsistent with another witnesses' statement.

4. Any evidence or statement which would support the defense of necessity, provocation, or duress.

5. A list of other suspects and unindicted co-conspirators who were also under investigation for the present offense.

6. Any evidence or statement which would indicate that a person other than the Respondent committed or is criminally responsible for the offense alleged.

7. All statements made by any party or witness to this alleged offense in the possession of or within the knowledge of the State or any of his agents, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to the innocence of the Respondent or to the punishment, if any, to be set in this case.

C. SPECIFIC REQUESTS: IMPEACHMENT INFORMATION

1. <u>Information regarding State witnesses</u>

    a. **Any information tending to show a State's witness's bias in favor of the State or against the Respondent or which otherwise impeaches a witness's testimony**

(including pending complaints against police officers and closed administrative or civil cases, whether resolved for or against the officer, that involve facts similar to those of this case). *See United States v. Bagley*, 473 U.S. 667 (1985);

b. **Any information indicating a witness's hostility towards or dislike of the Respondent.** *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004) (witness's dislike of Respondent); *United States v. Sperling*, 726 F.2d 69 (2nd Cir. 1984) (tape of pre-trial conversation indicating that government witness was motivated by revenge).

c. All "consideration" or promises of "consideration" given to or on behalf of **all State's witnesses or expected or hoped for by said State witnesses**. *See Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 668 (2004). Respondent requests all documents, records, memoranda, notes, or other records in any form reflecting "consideration" as set forth below. By "consideration," the Respondent refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness, including, but not limited to, formal or informal, direct or indirect; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal action, parole, probation, commutation of sentence, pardon, clemency, civil or administrative dispute; criminal, civil, or tax immunity grants of letters of non-prosecution; relief from forfeitures; payments of money, rewards or fees, witness fees and special witness fees; provision of food, clothing, shelter, or housing arrangements, transportation, legal services, employment or other benefits; placement in a "witness protection program"; informer status of the witness; and anything else which arguably could reveal an interest, motive, or bias in the witness in favor of the State or against the defense or act as an inducement to testify or to color testimony. **This consideration also includes:**

    i. **Favors from prosecution such as telephone calls, conjugal visits, etc.** *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009)(witnesses' involvement in uncharged murder should have been disclosed as motive to testify to avoid murder charges); *See* El Rukn cases, *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Boyd*, 883 F. Supp. 1227 (N.D. Ill. 1993).

    ii. **Promises as to witness' civil tax or administrative liability.** *United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986); *United States v. Wolfson*, 437 F.2d (2d Cir. 1970); *United States v. Dawes*, 1990 US Dist. LEXIS (D. Kan. Oct. 15).

    iii. **Help in forfeiture proceedings.** *United States v. Parness*, 408 F. Supp. 440 (S.D.N.Y. 1975).

d. **Any and all threats, express or implied, direct or indirect, or other coercion** made or directed against any witness, criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any witness, any

probationary, parole, deferred prosecution or custodial status of any witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the State or over which the State has real, apparent or perceived influence.

e. All information in the possession of the government indicating that any State witness has had a **pending juvenile or criminal case** on or since the offense in this case; any State witness has had an arrest, guilty plea, trial, or sentencing on or since the date of the offense in the present case; any State witness has been on juvenile or criminal parole or probation on or since the date of the offense; and any State witness now has or has had any other liberty interest which the witness could believe or could have believed might be favorably affected by State action. With respect to this information, I request cause numbers, dates and jurisdiction for all such cases. *See Davis v. Alaska*, 415 U.S. 508 (1974);

f. **Exculpatory and/or impeachment Grand Jury Testimony.** *See Sykes v. United States*, --A.2d.-- 2006 WL 564050 (D.C. 2006).

g. **Agreements/Deals with State witnesses**. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose promise of immunity in exchange for testimony violates *Brady*); *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985) (failure to disclose payment of $300 to two key State witnesses violates *Brady*); *Singh v. Prunty*, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (failure to disclose that star witness had a very favorable deal with State to avoid a very serious charge is *Brady* violation); *United States v. Smith*, 77 F.3d 511, 513-16 (D.C. Cir. 1996) (failure to disclose a deal in which state charges were dismissed as part of a federal plea is *Brady* violation); *In Re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 891, 896 (D.C. Cir. 1999) (remand to determine *Brady* information with instruction to district court to require the U.S. Attorney's Office to review the records in the possession of the prosecution team for evidence indicating that a government informant who provided information leading to the Respondent's arrest had a deal with the prosecution, the D.C. Circuit observed that it is "irrelevant . . . that the requested records may have been in the possession of the Metropolitan Police Department, of the FBI or DEA, rather than the U.S. Attorney's Office.").

h. **Payments to investors and potential State witnesses**: *See, e.g., Mastracchio v. Vose*, 274 F.3d 590, 602-03 (1st Cir. 2001) (knowledge of Witness payments or favors made by the Witness Protection team is *Brady*); *In re Sealed Case (Brady Obligations)*, 185 F.3d 887, 894 (D.C. Cir. 1999) (failure to disclose a cooperation agreement that included payments to a witness is *Brady* information).

i. **Witness's tax returns - especially for informant**. See Internal Revenue Code § 6103(i)(1)(2). *United States v. Lloyd*, 992 F.3d 348 (D.C. Cir. 1993)(remanded for hearing); *United States v. Wigoda*, 521 F.2d 1221 (7th Cir. 1975)(in camera inspection); *Johnson v. Sawyer*, 640 F. Supp. 1126 (D. Tex. 1986)(tax returns may be disclosed).

j. **Criminal history of investors and potential government witnesses**: All prior convictions and juvenile adjudications of all State witnesses and all persons identified in the offense report who could likely be called as a witness for the State. These records should include all arrests and convictions, whether as a juvenile or as an adult, including, but not limited to: all felony convictions and all misdemeanor convictions involving moral turpitude which have occurred in the last ten (10) years; all felony convictions and all misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; all pleas of guilty or nolo contendere which resulted in dispositions of "deferred adjudication" or "deferred prosecution" or "deferred disposition"; all felony and misdemeanor cases that have resulted in the witness being placed on probation, wherein the period of probation has not expired; all pending felony and misdemeanor offenses alleged to have been committed by the witness. The Respondent requests that the State be ordered to request the proper law enforcement authorities to obtain a full and complete criminal record of all such witnesses and reveal same to the Respondent, and the State should not be permitted to respond to this motion by advising the Court that the prosecutor does not have any indication in his file of any prior criminal record of such witnesses. *See, e.g., Crivens v. Roth*, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by State witness is *Brady* even when government witness used aliases); *Carriger v. Stewart*, 132 F.3d 463, 480-82 (9th Cir. 1997) (failure to obtain or disclose Department of Corrections file that would have showed lengthy criminal history, and history of lying to police and blaming others for his own crimes is *Brady*).

k. **Misconduct by potential State witnesses**: All records and information revealing prior misconduct or bad acts attributed to any State witness. *See, e.g., United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness, and "continuous stream of unlawful favors" including phone privileges, presents, special visitors, provided by prosecution to witnesses is considered *Brady* material).

l. **All handle-bys for all potential State witnesses**: A report called a "handle-by" is created whenever a person contacts the police or when the police respond to a person's address. Handle-bys typically do not result in an arrest, but often include a police narrative. These are hidden records only available to law enforcement officers and are often used to gather information on suspects. The defense asks for handle-bys to be run on potential State witnesses as it may reveal why certain investors are not being called as witnesses at trial.

m. **Bias of State witnesses**: *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (*Brady* obligation for government to reveal witness portrayed as neutral and disinterested expert actually had been investigating Respondent for years); *United States v. Abel*, 469 U.S. 45 (1984); *United States v. O'Connor*, 64 F.3d 355, 359-60 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence

testimony of another government witness is *Brady*); *Reutter v. Solem*, 888 F.2d 578, 581-82 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days is a *Brady* violation).

n. **Pecuniary or other interest of State witness**: *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006)(disclosure required where, although no express agreement between prosecution and witness, prosecution knew of witness' expectation for deal and fulfilled that expectation); *United States v. Blanco*, 391 F.3d 382 (9th Cir. 2004)(fact that investigating agency kept evidence of informant's immigration benefits from prosecution did not justify nondisclosure); *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988)(information contained in witness' probation file should have been disclosed because it related to his motives for informing as well as his tendency to overcompensate for problems and to lie).

o. **Kinship with person adverse to client.**

p. **Character of witness**. *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of key government informant); *United States v. Bernal-Obeso, 989 F.2d 331* (9th Cir. 1993) (remand to determine whether government witness lied to DEA about his prior criminal record).

q. **Witness's use of alcohol or drugs**. *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009)(CI's drug use was Brady based on CI's centrality to case); *King v. Ponte*, 717 F.2d 635 (1st Cir. 1983)(witness under heavy medication as treatment for unstable mental condition); *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991)(sole eyewitness had been to methadone clinic within 2 hours of crime).

2. <u>Inconsistent Statements</u>

a. **The existence and identification of each occasion on which a State witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to the Respondent, the investigation, or the facts of this case.**

b. **The existence and identification of each occasion on which each witness who has been or is now an informer, accomplice, co-conspirator, or expert that has testified before any court, grand jury, or other tribunal or body.**

c. **Statements of potential witnesses not called to testify**: *See, e.g., United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of potentially exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).

d. **Contradictory or inconsistent statements**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to turn over statement by co-Respondent that he had planned the killing, and that co-Respondent had performed actual killing is violation of due process); *Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles' car in supermarket parking lot); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995)(discrepancies between law enforcement officers and reports and grand jury testimony); *United States v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989).

e. **Inconsistent notes**: Prosecutor and law enforcement notes from interviews with State witness: *See, e.g., United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998) (*Brady* obligation to turn over original notes from witness interview that contained three key pieces of impeachment information that showed that story had changed, change may have been brought about by threats of imprisonment, and witness had claimed to have suffered a stroke); *United States v. Pelullo*, 105 F.3d 117, 122-23 (3d Cir. 1997) (failure to disclose rough notes of FBI and IRS agents corroborating Respondent's version of events and impeaching testimony of government agents).

f. **Expert reports inconsistent with the State case or tends to support the defense case**: *See, e.g., United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (*Brady* violation when government failed to disclose ballistics worksheet that showed gun Respondent was accused of firing was inoperable).

3. Information regarding law enforcement and prosecution

a. **Instructions to a State's witness by the police, a prosecutor, a victim-witness coordinator, or any agent of the State to not speak with defense counsel or to do so only in the presence of the State's counsel.** *See, e.g., Gregory v. United States*, 369 F. 2d 185 (D.C. Cir. 1966).

b. Instructions to a State's witness by law enforcement, a prosecutor, or any agent of the State to inquire about privileged communications between the Respondent and his lawyer.

c. **Personnel files, especially of testifying officers**: Any information on any pending or closed internal disciplinary investigation of police officers involved in the case, including, but not limited to, information regarding any administrative suspensions or civilian complaints. *See, e.g., United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (if specific request is made, prosecutor must search personnel records of police officer/witnesses to fulfill *Brady* obligations); *United States v. Muse*, 708 F.2d 513, 516 (10th Cir. 1983) (recognizing that prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.).

d. **Presentence Reports of testifying witnesses**: *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (information in probation file relevant to government witness credibility must be disclosed, and could not be deemed privileged by making it part of probation file); *United States v. Carreon*, 11 F.3d 1225, 1238 (5th Cir. 1994) (prosecution should allow trial court to conduct in camera review of presentence reports of government witnesses to determine whether they contain *Brady/Giglio* material).

e. **Police perjury in motions hearings**: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding is considered material *Brady* evidence relevant to impeachment).

f. **Knowledge of police intimidation of witnesses**: *See, e.g., Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting is considered *Brady*).

g. **Facts or evidence indicating the unreliability of any State's witness.** *See, e.g. Mesarosh v. United States*, 352 U.S. 1 (1956);

h. **All information indicating that the mental state of any witness for the State is below normal or in any way abnormal.**

i. **All information that any witness for the State was under the influence of alcohol, narcotics, or any other drug, prescription or otherwise, at the time of the observations about which the witness will testify, or that the witness' faculties or observations were impaired in any way.**

j. **Evidence or information indicating the untruthfulness of a State's witness.** *See, e.g. Napue v. Illinois*, 360 U.S. 264 (1959);

k. **Evidence regarding any prior false accusations made by any State witness in this case, if any, on behalf of the complaining witness against the Respondent**. *See, e.g. Davis v. Alaska*, 415 U.S. 308, 318 (1984).

l. **Perjury by any State witness at any time, whether or not adjudicated and whether or not in connection with this case.** *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935);

D. SPECIFIC REQUESTS: IMPEACHMENT INFORMATION

1. **All information from victims or complainants who do not want to prosecute the Respondent or who have asked for leniency.**

2. **Mitigating evidence in aid of sentencing**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, § 3-6.2 (b) (3d Ed. 1993) Information Relevant to Sentencing ("The prosecutor should disclose to the defense and to the court at or prior to the sentencing all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

E. REQUEST FOR IMMEDIATE DISCLOSURE

The Respondent requests the State to disclose any and all impeachment, exculpatory, and mitigating information as soon as the prosecutor learns of its existence. The Texas State Bar Rules also require a prosecutor in a criminal case to "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 mitigate the offense, and, in connection with sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor...." Rule 3.09(d), Article 10, Section 9, State Bar Rules (emphasis added).

V.
TRE RULE 404

Pursuant to Rule 404(a) of the Texas Rules of Evidence, Respondent requests the State to give reasonable notice in advance of trial of its intent to introduce evidence of a pertinent character trait of the accused. *See Stitt v. State*, 102 S.W.3d 845, 849 (Tex.App. - Texarkana 2003, pet.ref'd) ("A pertinent character trait is one that relates to a trait involved in the offense charged or a defense raised."); *see also Santellan v. State*, 939 S.W.2d 155, 167 (Tex.Crim.App.1997).

Pursuant to Rule 404(b) of the Texas Rules of Evidence, Respondent requests the state to give reasonable notice in advance of trial of its intent to introduce evidence of other crimes, wrongs, or acts in an attempt to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. *Ex Parte Varelas*, 45 S.W.3d 627, 631 (Tex.Crim.App.2001) (jury cannot consider extraneous act evidence unless they believe beyond a reasonable doubt that the Respondent committed that act); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (all the facts which must exist in order to subject the Respondent to a legally prescribed punishment must be found by the jury); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (reaffirming a Respondent's Sixth Amendment rights regarding burden of proving sentencing allegations).

Specifically, Respondent requests that the notice include the following:

-dates;
-locations;
-types or nature of the alleged crimes, wrongs, or acts involved;
-names of the individuals involved; and
-names of any courts involved.

Rodgers v. State, 111 S.W.3d 236 (Tex.App.- Texarkana, 2003).

VI.
TRE RULE 609

Pursuant to Rule 609(f) of the Texas Rules of Evidence, Respondent requests that the State give sufficient advance written notice of its intent to use evidence of a conviction to impeach the credibility of the following witness:

_____

_____

_____

This request includes providing the discovery of any supporting documentation regarding such prior convictions.

VII.
ARTICLE 37.07

Pursuant to Article 37.07, Section 3(g) of the Texas Code of Criminal Procedure, Respondent requests that the State give reasonable notice of intent to introduce against the Respondent evidence of an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated suspended sentence as provided for in Article 37.07 Section 3(a) of the Code of Criminal Procedure. Respondent further requests written notice of the State's intent to introduce evidence of the prior criminal record of the Respondent, their general reputation, their character, an opinion regarding their character, and the circumstances of the offense for which they are being tried. Respondent also requests written notice of any evidence pertaining to an adjudication of delinquency of the grade of a felony or a misdemeanor punishable by confinement in jail.

Specifically, Respondent requests that the notice include the following: dates; locations; types or nature of the alleged crimes, wrongs, or acts involved; names of the individuals involved; and names of any courts involved. Notice of that intent is reasonable only if the notice includes the date on which and the county in which each alleged crime or bad act occurred and the name of each alleged victim of the crime or bad act.

The request for notice includes the discovery of all items that the State would be required to produce for the trial of each prior crime, wrong, or act in order to prove the Respondent committed the act beyond a reasonable doubt. This request includes providing the discovery of any supporting documentation regarding any prior convictions.

VIII.
WITNESS LIST

Respondent requests that at least thirty (30) days before the commencement of trial the State provide the name, address and telephone number of each person whom the State intends to call as a witness at any stage of the trial. Notice of the State's witnesses shall be given upon request. *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977); *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993), cert. denied, 512 U.S. 1246 (1994) ("It is established that notice of the State's intended witnesses should be given upon proper request.").

This request encompasses those persons whom the State reasonably anticipates may testify during its case-in-chief, case-in-rebuttal, or, in the event of a conviction, at the punishment stage.

IX.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

The request is made for the State to provide written notice and discovery to counsel for the Respondent via electronic mail to:

david@sg-llp.com; and

gavila@sg-llp.com

If at any time before, during or after trial the State discovers any additional document, item, or information required to be disclosed pursuant to Article 39.14(h), Respondent requests that the State promptly disclose the existence of the document, item or information to undersigned counsel.

Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

CERTIFICATE OF TIMELY REQUEST

I hereby certify that a copy of the above and foregoing Respondent's Request for Production of Discovery has been served upon the vvCOUNTYvv County District Attorney, via hand delivery, this the _____ vvTODAYDATEvv day of vvTODAYMONTHvv, vvTODAYYEARvv.

_____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

EXHIBIT A:
PRIVILEGE LOG

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

STATE'S PRIVILEGE LOG

COMES NOW, the State of Texas, by and through the County/District Attorney of Travis County, Texas, and pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure would inform the Respondent that a portion of the document, item, or information has been withheld or redacted:

ITEM	INFORMATION REDACTED	INFORMATION WITHHELD
OFFENSE REPORTS		
☐ Offense Report(s):		
Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of: _____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____
Prosecuting Attorney

CAUSE NO. vvCAUSENOvv

vvSTYLELINE1Avv	**§**	**vvSTYLELINE1Bvv**
	§	
	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

RESPONDENT'S TIMELY REQUESTS FOR PRODUCTION OF DISCOVERY, NOTICE, AND INVESTIGATION OF BRADY INFORMATION

TO THE PROSECUTING ATTORNEY FOR THE STATE OF TEXAS:

COMES NOW vvCLIENTFIRSTNAMEvv vvCLIENTLASTNAMEvv, the Respondent in the above styled and numbered cause, by and through undersigned counsel, and pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Texas Rules of Evidence, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) makes this self-executing request to the attorney for the State of Texas to give, in proper form, to Respondent the following:

I.
ARTICLE 39.14(a):
ELECTRONIC DUPLICATES OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and provide an electronic duplicate of the following checked items:

OFFENSE REPORTS

☐ Offense Reports & Supplements
☐ CAD report
☐ Collision Report
☐ Use of Force Report

COURT FILINGS

☐ Probable Cause Affidavit
☐ Complaint / Information
☐ Indictment
☐ Search Warrant
☐ 404(b) Notice

STATEMENTS

Respondent's Statement
☐ Any written statement
☐ Any recorded statement on video
☐ Any recorded statement on audio
☐ Any res gestae statement
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Complaining Witness Statement
☐ Written
☐ Video
☐ Audio
☐ Assault Victim Statement Form
☐ Affidavit for Protective Order
☐ Affidavit for Emergency Protective Order
☐ Affidavit of Non-Prosecution
☐ Application for Protective Order
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

Witness Statement of:

_____

☐ Written
☐ Video
☐ Audio
☐ Any statement the State contends is admissible under TRE 803 or TRE 804

PIMS Notes
☐ Respondent
☐ Witness
☐ Complainant
☐ Other

IMPEACHMENT

☐ Handle-by's for Respondent
☐ Handle-by's for Complainant
☐ Handle-by's for _____
☐ Internal Affairs investigation materials

DOCUMENTS

☐ Medical Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ EMS Records
  ☐ Respondent's
  ☐ Complainant's
  ☐ Other
☐ Business Record(s)
☐ Maintenance Record(s)
☐ Phone Record(s)
☐ Text Message(s)
☐ Restitution Documentation
☐ Billing Statement
☐ Receipt(s)
☐ School Records of _____
☐ Other

PHOTOS

☐ Collision
☐ Injuries
☐ Crime Scene
☐ Line Up
☐ Other:

AUDIO RECORDINGS

☐ 911 Call(s):
☐ Jail Recordings of _____
☐ Other:

VIDEOS

☐ In-Car
☐ Surveillance
☐ Other:

☐ Toxicology

LAB TESTS

OTHER EVIDENCE

☐ Breath
☐ Blood
☐ Fingerprints:

☐Other

II.
ARTICLE 39.14(a):
INSPECTION OF DISCOVERY

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the Respondent requests the State to produce and permit for inspection:

☐ Criminal History
- ☐ Respondent
- ☐ Co-Respondent
- ☐ Victim
- ☐ Witness: _____
- ☐ Other:

☐ Child Advocacy Video

☐ Article 39.15 materials

☐ Physical evidence: _____

☐ Other: _____

_____

_____

III.
ARTICLE 39.14(c):
REQUEST FOR NOTICE OF
WITHHELD OR REDACTED DISCOVERY
(PRIVILEGE LOG)

Pursuant to Article 39.14(c) of the Texas Code of Criminal Procedure, the Respondent requests that the State provide written notice of any portion of any document, item or information

has been withheld from discovery or redacted. The State's notice should include the description of the document, item or information has been withheld or redacted and the legal justification for why the information is being withheld or redacted. *See* Exhibit A: State's Privilege Log.

IV.
ARTICLE 39.14(h):
REQUEST FOR EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION

Pursuant to Article 39.14(h) of the Texas Code of Criminal Procedure, the Respondent requests the disclosure of any exculpatory, impeachment or mitigating document or item in the possession, custody, or control of the state that tends to negate the guilt of the Respondent, impeach a witnesses' credibility, or would tend to reduce the punishment for the offense charged. The Respondent also requests the disclosure of any exculpatory, impeachment, or mitigating *information* known by the State or any member of the prosecution team. A prosecutor has an affirmative duty to turn over to the accused all material, exculpatory evidence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

V.
TIME AND MANNER FOR DISCLOSURE

Respondent makes these requests alleging that notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of

the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The request is made and "as soon as practicable" is defined for the State to produce the requested notice and information no later than thirty (30) days upon receipt of this request. Respondent requests that if any above-referenced materials cannot be produced within thirty (30) days because it is not "practicable," the State should provide a description of the item and the anticipated date of production.

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david@sg-llp.com; and

discovery@sg-llp.com

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Respectfully submitted,

SUMPTER & GONZÁLEZ, L.L.P.
206 East 9th Street, Suite 1511
Austin, Texas 78701
Telephone: (512) 381-9955
Facsimile: (512) 485-3121

By: _____
vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv
State Bar No. vvATTYSBNvv
vvATTYEMAILvv

ATTORNEY FOR RESPONDENT
vvCLIENTFIRSTNAMEvv
vvCLIENTLASTNAMEvv

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_____

vvATTYFIRSTNAMEvv vvATTYLASTNAMEvv

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	§	
vvSTYLELINE2Avv	**§**	**vvSTYLELINE2Bvv**
	§	
	§	
vvSTYLELINE3Avv	**§**	**vvSTYLELINE3Bvv**

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Offense Report Number:		
Number of pages:		
Date printed:		
☐ CAD report:		
☐ Search Warrant(s):		
☐ Collision Report		
STATEMENTS		
Respondent's Statement		
☐ Written		
☐ Video		
☐ Audio Only		
Witness Statement of: _____		
☐ Written		

☐ Video		
☐ Audio Only		
DOCUMENTS		
☐ Medical Records		
☐ Respondent's		
☐ Victim(s')		
☐ Other		
☐ Business Record(s)		
☐ Maintenance Record(s)		
☐ Phone Record(s)		
☐ Text Message(s)		
☐ Restitution Documentation		
☐ Billing Statement		
☐ Receipt(s)		
☐ Other		
AUDIO RECORDINGS		
☐ 911 Call(s):		
☐ Jail Calls		
☐ Other:		
VIDEOS		
☐ In-Car		
☐ Surveillance		
☐ Other:		
LAB TESTS		
☐ Breath		
☐ Blood		
☐ Toxicology		
☐ Prints:		
☐ Other:		
OTHER EVIDENCE		
☐ Other		

Respectfully submitted,

By:_____

Prosecuting Attorney

SUMPTER &GONZÁLEZ L.L.P.
ATTORNEYS AND COUNSELORS AT LAW

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SUITE 1511
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Today's Date

VIA ELECTRONIC MAIL

Prosecutor's Name
Assistant County / District Attorney
Name of Office
Street Address
City, Texas Zip Code
Email Address

Re: *Case Style;*
Cause No.

Dear Mr. / Ms. Prosecutor:

I write for three reasons:

(1) To follow up regarding plea negotiations;
(2) To make specific requests for you to investigate information that may be discoverable under *Brady*, *Giglio*, and *Bagley*; and
(3) To make specific discovery requests.

I.
STATUS OF PLEA NEGOTIATIONS

The Supreme Court has devoted much attention in recent decisions regarding Mr. ClientLastName's right to effective assistance of counsel during plea negotiations. This pertains to my obligations as defense counsel both when an offer is accepted (s*ee Padilla v. Kentucky*, 559 U.S. 356 (2010)) as well as when an offer is rejected (*see Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012)).

I write to confirm that the current plea offer in this matter is as follows:

[*insert terms and conditions of plea offer*]

[*insert specific issues regarding counter-offers*]

[*insert specific issues why client is unable to accept or reject offer at this time*]

In order for me to intelligently and effectively engage in plea negotiations I am writing to request additional information so that I can adequately advise my client and so that he can make an informed decision to accept or reject the plea offer.

II.
BRADY, GIGLIO, & BAGLEY INFORMATION

The second reason I have a difficult time advising my client on what an appropriate plea agreement would be in this case is that I have not received any *Brady*, *Giglio or Bagley* information. While it may not exist, my concern is that there has been no effort to search for its existence.

During our conversation on [*insert date of conversation with prosecutor about Brady*], you suggested that you were aware of your obligations under *Brady* and you would comply with your *Brady* obligations the before trial. I write with the following specific requests pursuant to the "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the United States Attorney's Manual, and 2010 memo "Guidance for Prosecutors Regarding Criminal Discovery" codified at Section 165 of the United States Attorney's Criminal Resource Manual, and the ABA Standards for Criminal Justice, Prosecution Function, § 3-3.11(a)(c) (3d Ed. 1993) DISCLOSURE OF EVIDENCE BY THE PROSECUTOR.

WHAT TO DO & WHERE TO LOOK

1. SPEAK TO ALL MEMBERS OF THE "PROSECUTION TEAM." It is likely that many other people have worked on the case, either in your office or in an investigative capacity. I am requesting that you speak with anyone who has worked on the case and determine whether they possess any information or have made any promises that constitute *Brady* or *Giglio* material. People you would speak to include:

> • **ALL EMPLOYEES OF THE [INSERT APPROPRIATE NAME – DISTRICT OR COUNTY OR U.S. ATTORNEY] ATTORNEY'S OFFICE INVOLVED WITH THE CASE.** If any attorney in your office has knowledge of *Brady* or *Giglio* material, that knowledge will be attributed to the entire office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")
>
> • **ALL INVESTIGATORS WHO HANDLED THE CASE**. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1568 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" (citing *Giglio*))

• **ALL FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENTS WHO WORKED ON THE CASE.** If the Texas State Securities Board, the Austin Police Department, Homeland Security, ICE, TSA, airport police, FBI, ATF, or any other law enforcement agencies participated in the investigation of this case, those agents are part of the prosecution team. *See United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) ("extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [witness]'s lawyer was paid from state funds must be imputed to the federal team."); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[J]oint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team."); *United States v. Safavian 233 F.R.D. 12,* 15 (D.D.C. 2005) ("In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the Justice Department remains available for disclosure.") ; *United States v. Jennings*, 960 F.2d. 1488, 1490 (9th Cir. 1992) ("There is no question that the AUSA prosecuting a case is responsible for compliance with the dictates of *Brady* and its progeny. This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies."(citations omitted)).

2. REVIEW ALL CASE FILES MAINTAINED BY YOUR OFFICE AND ANY LAW ENFORCEMENT AGENCIES TO ENSURE THAT ALL *BRADY* MATERIAL IS DISCLOSED TO THE DEFENSE. Sometimes police officers or law enforcement agents will not provide the prosecution with all of the information collected during their investigation. Nonetheless, you are responsible for reviewing all of the information in their investigative files, and you must make sure that all exculpatory material is turned over to the defense. *See, e.g., Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002).

3. INVESTIGATE YOUR WITNESSES. Material that impeaches a government witness must be disclosed to the defense, and any impeachment material that you possess or can access easily. There are a few things you must do to guarantee that you meet your *Brady* and *Giglio* obligations:

• **EXAMINE THE PERSONNEL FILES OF ALL INVESTIGATING AGENTS WHO MAY TESTIFY AT TRIAL.** If there is impeachment evidence regarding any officers involved with the investigation of the case, especially those who may testify at hearings or at trial, it must be disclosed to the defense. *See, e.g., Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000); *United States v. Muse*, 708 F.2d 513 10th Cir. 1983); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). Thus, you should search the personnel files of all officers involved with the case for such evidence.

• **EXAMINE THE PERSONNEL FILES OF ALL PROSECUTION WITNESSES WHO WORK FOR THE GOVERNMENT.** If any prosecution witnesses work for other branches of the government, you should search their personnel files for impeachment evidence, as with the files of law enforcement officers. *See, e.g., United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (holding that contents of postal worker's personnel file, if they could be used for impeachment, would constitute *Brady* material).

Further, pursuant to *United States v. Bagley*, 473 U.S. 667, 676 (1985), any evidence that can be used to impeach a prosecution witness's credibility should be disclosed to the defense. This type of evidence includes but is not limited to the following:

- **Contrary, conflicting statements**;
- False Reports;
- **Inaccurate statements and reports**;
- **Other evidence contradicting prosecution witness statements and/or reports**;
- Promises or offers of leniency, or other inducements, express or implied;
- Felony convictions;
- Misconduct involving moral turpitude;
- Misdemeanor convictions involving moral turpitude;
- Pending criminal charges;
- Parole or Probation status;
- Reputation for untruthfulness;
- **Alcohol and/or drug use**;
- Gang membership;
- **Bias toward the Respondent**.

Given the facts of this case, I have specific concerns about the items in boldface delineated above. I also have specific concerns about _____ and would request that you obtain copies of his confidential employment records from the two previous law enforcement agencies where he was employed.

• **SEARCH ALL CRIMINAL RECORD DATABASES TO WHICH YOU HAVE ACCESS FOR CRIMINAL RECORDS OF POTENTIAL PROSECUTION WITNESSES.** I presume that you have checked both local and national databases for any criminal convictions of government witnesses. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that failure to search a local criminal database for informant's criminal convictions is *Brady* violation); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding that failure to run FBI or NCIC checks on a prosecution witness constitutes a *Brady* violation).

• **ASK THE TRAVIS COUNTY SHERIFF'S DEPARTMENT, AUSTIN POLICE DEPARTMENT AND OTHER REGION LAW ENFORCEMENT AGENCIES IF THEY HAVE FILES ON ANY OF YOUR WITNESSES.** Even if you are unaware of deals that your witnesses have made with law enforcement agencies, such deals are *Brady* material and must be disclosed to the defense. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999). I presume that you have spoken with all of these agencies to ensure that they have not made any deals with or payments to any of your witnesses.

• **EXAMINE THE PRE-SENTENCE REPORTS AND PROBATION FILES OF ALL WITNESSES.**

o Exculpatory information in a witness's probation file, including the witness's criminal record or personal information that could be used for impeachment, should be released to the defense. *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988).

o Pre-sentence reports (PSIs) of any government witnesses should be provided to the trial court for *in camera* examination to determine whether they contain *Brady* or *Giglio* material. *See, e.g., United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993).

• **EXAMINE THE SCHOOL AND DISCIPLINARY RECORDS AND FILES OF ALL WITNESSES.**

• **IF ANY GOVERNMENT WITNESSES HAVE BEEN INCARCERATED, EXAMINE THEIR DEPARTMENT OF CORRECTIONS AND/OR BUREAU OF PRISONS FILES.** *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*) ("The state had an obligation, before putting [a career burglar and six-time felon] on the stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.")

4. SPEAK WITH THE VICTIM WITNESS COORDINATOR INVOLVED WITH THE CASE. *Commonwealth v. Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001).

5. IF ANOTHER GOVERNMENT AGENCY INVESTIGATED THE ALLEGED OFFENSE, EXAMINE THE FILES FROM THAT INVESTIGATION OR HAVE THE COURT EXAMINE THEM. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60. (holding that Respondent was entitled to have court conduct *in camera* examination of Child and Youth Services (CYS) file investigating Respondent's alleged rape of his daughter to determine if it contained *Brady* material). I am specifically asking for you to inquire about all school investigations that may have occurred.

WHEN TO DISCLOSE INFORMATION

As is recommended by the ABA Standards, I respectfully request the material be turned over as soon as you learn of it. *See* ABA Standards for Criminal Justice, Prosecution Function, § 3-3.11(a) (c) (3d Ed. 1993) DISCLOSURE OF EVIDENCE BY THE PROSECUTOR ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused. … A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused"); s*ee also Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (The duty of disclosure is not limited to evidence in the actual possession of the prosecutor. Rather, it extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies.); *see also Strickler v. Greene*, 527 U.S. 263 275, n. 12 (1999) (Prosecutor has constructive knowledge of all favorable evidence known to those acting on the government's behalf, even if no actual knowledge of materials, and even if materials are in the file of another jurisdiction's prosecutor); *United States v. Safavian*, 233 F.R.D. 205, 207 (D.D.C. 2006) (Prosecutor has a duty to search and disclose *Brady* evidence, within reason, in the possession of all Executive Branch agencies and departments, rather than solely the agencies "closely aligned" with the prosecution.)

The federal courts have repeatedly emphasized the requirement of prompt pre-trial disclosure. *See Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993) ("It is now well settled that the prosecution must disclose [*Brady*] material at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." (citations and internal quotation marks omitted). In *United States v. Sykes*, the court overturned a murder conviction due to the government's late disclosure of *Brady* material:

> We conclude that the government's late disclosure of *Brady* information, and the consequent inability of the government or the defense to locate two potential defense witnesses who had given grand jury testimony that was favorable and potentially exculpatory, impinged on Mr. Sykes' constitutional due process right to a fair opportunity to defend himself. Furthermore, on the record in this case, we hold that there was a reasonable probability that the outcome would have been different had the defense been able to present at trial one or both of the witnesses whose grand jury testimony rebutted that of a key government witness.

Sykes v. United States, --A.2d.-- 2006 WL 564050, at *1 (D.C. March 9, 2006).

In *Sykes*, the Prosecutor failed to disclose favorable grand jury testimony of two witnesses until two days prior to trial. Once the information was revealed to the defense, the witnesses could no longer be located. The Court stated "the grand jury testimony of Mr. Parrott and Mr. Sellers should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence." *Id.* at *8. The Court went on to state that the time for disclosure was as soon as the information was known to the prosecution because "[h]ad the government apprised the defense about the Parrott/Sellers' testimony shortly after their

May 2, 1996, grand jury appearance, they would have had the opportunity to speak with both men long before the commencement of appellant's trial on April 9, 1997." *Id*.

The *Sykes* decision reaffirmed the Court's earlier position in *Ebron v. United States*, where the Court emphasized that:

> prosecutors are expected to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of *prompt* disclosure . . . When the government fails to make prompt disclosure, as required, the opportunity for use of the material by the defense may be impaired, and the administration of justice may be impeded by the necessity for a continuance to allow the defense to make use of the material or by the need for reversal of a conviction.

838 A.2d 1140, 1156 n.13 (D.C. 2003) (internal quotations and citations omitted). "[A] prosecutor's timely disclosure obligation with respect to *Brady* material cannot be overemphasized, and the practice of delayed production must be disapproved and discouraged . . . [D]elay may imperil a Respondent's right to a fair trial, and a conscientious prosecutor will not countenance it." *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995) (internal quotations and citations omitted). Pre-trial disclosure of statements that qualify as both *Jencks* material and *Brady* material should also be disclosed before trial to allow effective use in the preparation of the defense case.

WHAT TO DISCLOSE

I am writing to ensure the disclosure of all information to which I am entitled under *Brady v. Maryland*, 373 U.S. 83 (1963) in the above captioned case. The requested information includes all information material to guilt, punishment, and the credibility of government witnesses, including potential impeachment material for all government witnesses. Failure to disclose impeachment information is the same, under *Brady*, as the failure to disclose exculpatory information. This request includes impeachment material that may also fall under the Jencks Act.

The requested information includes all information that you or any part of the prosecution team know or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. Under *Brady* and its progeny, this request extends to all information known by all law enforcement or other government agencies involved in this case, whether or not personally known to the individual prosecutor.

Our definition of *Brady* is the same as Judge Friedman's definition as stated in *Safavian*:

> "It is any information in the possession of the government -- broadly defined to include all Executive Branch agencies -- that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses. It covers both exculpatory and impeachment evidence. The government is obligated to disclose all evidence relating to guilt or

punishment which might be reasonably considered favorable to the Respondent's case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness. Where doubt exists as to the usefulness of the evidence to the Respondent, the government must resolve all such doubts in favor of full disclosure." *Id.*

However, if there is any ambiguity, the following are examples of evidence other courts have construed as *Brady*:

INFORMATION REGARDING GOVERNMENT WITNESSES

• **Exculpatory and/or impeachment Grand Jury Testimony.** *See Sykes v. United States*, --A.2d.-- 2006 WL 564050 (D.C. 2006).

• **Agreements/Deals with government witnesses**. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose promise of immunity in exchange for testimony violates *Brady*); *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985) (failure to disclose payment of $300 to two key government witnesses violates *Brady*); *Singh v. Prunty*, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (failure to disclose that star witness had a very favorable deal with government to avoid a very serious charge is *Brady* violation); *United States v. Smith*, 77 F.3d 511, 513-16 (D.C. Cir. 1996) (failure to disclose a deal in which state charges were dismissed as part of a federal plea is *Brady* violation); *In Re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 891, 896 (D.C. Cir. 1999) (remand to determine *Brady* information with instruction to district court to require the U.S. Attorney's Office to review the records in the possession of the prosecution team for evidence indicating that a government informant who provided information leading to the Respondent's arrest had a deal with the prosecution, the D.C. Circuit observed that it is "irrelevant . . . that the requested records may have been in the possession of the Metropolitan Police Department, of the FBI or DEA, rather than the U.S. Attorney's Office.").

• **Payments to witnesses**: *See, e.g., Mastracchio v. Vose*, 274 F.3d 590, 602-03 (1st Cir. 2001) (knowledge of Witness payments or favors made by the Witness Protection team is *Brady*); *In re Sealed Case (Brady Obligations)*, 185 F.3d 887, 894 (D.C. Cir. 1999) (failure to disclose a cooperation agreement that included payments to a witness is *Brady* information).

• **Criminal history of informants**: *See, e.g., Crivens v. Roth*, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by government witness is *Brady* even when government witness used aliases); *Carriger v. Stewart*, 132 F.3d 463, 480-82 (9th Cir. 1997) (failure to obtain or disclose Department of Corrections file that would have showed lengthy criminal history, and history of lying to police and blaming others for his own crimes is *Brady*).

• **Bias of government witnesses**: *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (*Brady* obligation for government to reveal witness portrayed as neutral and disinterested expert actually had been investigating Respondent for years); *United States v. O'Connor*, 64 F.3d 355, 359-60 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence testimony of another government witness is *Brady*); *Reutter v. Solem*, 888 F.2d 578, 581-82 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days is a *Brady* violation).

• **Personnel files, especially of testifying officers**: *See, e.g., United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (if specific request is made, prosecutor must search personnel records of police officer/witnesses to fulfill *Brady* obligations); *United States v. Muse*, 708 F.2d 513, 516 (10th Cir. 1983) (recognizing that prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.).

• **Presentence Reports of testifying witnesses**: *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (information in probation file relevant to government witness credibility must be disclosed, and could not be deemed privileged by making it part of probation file); *United States v. Carreon*, 11 F.3d 1225, 1238 (5th Cir. 1994) (prosecution should allow trial court to conduct in camera review of presentence reports of government witnesses to determine whether they contain *Brady/Giglio* material).

• **Misconduct by government witnesses**: *See, e.g., United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness, and "continuous stream of unlawful favors" including phone privileges, presents, special visitors, provided by prosecution to witnesses is considered *Brady* material).

• **Police perjury in motions hearings**: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding is considered material *Brady* evidence relevant to impeachment).

• **Knowledge of police intimidation of witnesses**: *See, e.g., Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting is considered *Brady*).

OTHER SUSPECT INFORMATION

• **Contradictory eyewitness testimony**: *See, e.g., Clemmons v. Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997) (failure to disclose internal government memo

generated on day of prison killing which indicated that eyewitness saw someone else commit murder is *Brady*).

• **Prior identifications of other suspects**: *See, e.g., White v. Helling*, 194 F.3d 937, 944-46 (8th Cir. 1999) (habeas relief granted in 27 year old robbery/murder case because of failure to disclose that government's chief eyewitness had originally identified someone else and had identified Respondent only after several meetings with police); *Hudson v. Whitley*, 979 F.2d 1058, 1065 (5th Cir. 1992) (remand on *Brady* grounds because of failure to disclose that the only eyewitness had originally identified third party, and that third party had originally been arrested).

• **Prior statements that eyewitness could not identify anyone:** *See, e.g., Spicer v. Roxbury*, 194 F.3d 547, 557-60 (4th Cir. 1999) (failure to disclose witness' prior inconsistent statement that he did not see Respondent is *Brady*); *Lindsey v. King*, 769 F.2d 1034, 1041-43 (5th Cir. 1985) (failure to disclose initial statement of eyewitness that he could not make an ID because he never saw murderer's face is *Brady*).

• **Arrests/investigation of other suspects**. *See, e.g., Banks v. Reynolds*, 54 F.3d 1508, 1517, 1520 (10th Cir. 1995) (failure to reveal that another individual or individuals had been arrested for same crime was a *Brady* violation); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 829-835 (10th Cir. 1995) (failure to disclose information indicating that uncharged third party had committed the offense was a *Brady* violation); *Miller v. Angliker*, 848 F.2d 1312, 1321-23 (2d Cir. 1988) (failure to disclose information that would suggest another person committed offense is *Brady*); *Bowen v. Maynard*, 799 F.2d 593, 610-12 (10th Cir. 1986) (*Brady* violation where prosecution failed to disclose that police considered another man a suspect when the other man better fit the description of eyewitnesses; he was suspected by law enforcement in another state of being a hit man, and carried same weapon used in murders).

INCONSISTENT STATEMENTS

• **Contradictory or inconsistent statements**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to turn over statement by co-Respondent that he had planned the killing, and that co-Respondent had performed actual killing is violation of due process); *Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles' car in supermarket parking lot).

• **Inconsistent notes**: Prosecutor and law enforcement notes from interviews with government witness: *See, e.g., United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998) (*Brady* obligation to turn over original notes from witness interview that contained three key pieces of impeachment information that showed that story had changed, change may have been brought about by threats of

imprisonment, and witness had claimed to have suffered a stroke); *United States v. Pelullo*, 105 F.3d 117, 122-23 (3d Cir. 1997) (failure to disclose rough notes of FBI and IRS agents corroborating Respondent's version of events and impeaching testimony of government agents).

• **Statements of potential witnesses not called to testify**: *See, e.g., United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of potentially exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).

• **Expert reports inconsistent with the government case or tends to support the defense case**: *See, e.g., Ex parte Mowbray*, 943 S.W.2d 461, 466 (Tex. Crim. App. 1996) (*Brady* violation when State failed to disclose exculpatory expert report); *United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (*Brady* violation when government failed to disclose ballistics worksheet that showed gun Respondent was accused of firing was inoperable); *State v. DelReal*, 593 N.W. 2d 461, 464, 466 (Wis. App. 1999) (*Brady* violation when government failed to disclose fact that a swab for gunshot residue had taken place, which would have provided Respondent the opportunity to have swabs tested and also would have allowed Respondent to challenge reliability/credibility of police investigation and testimony).

• **Mitigating evidence in aid of sentencing**: *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, § 3-6.2 (b) (3d Ed. 1993) Information Relevant to Sentencing ("The prosecutor should disclose to the defense and to the court at or prior to the sentencing all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

MATERIALITY

I hereby request disclosure of all evidence in the government's possession that might reasonably be considered favorable to the defense, regardless of your determination of its materiality. In a pretrial posture, the government's duty to disclose all favorable evidence must be complied with without regard to the government's opinion of its materiality.

Recently, Judge Friedman ruled in *United States v. Safavian* that a materiality requirement is simply inapplicable to pretrial disclosure. As Judge Friedman explained, a materiality requirement is unsuitable to pretrial discovery:

> Because the definition of "materiality" discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery

> phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

233 F.R.D. at 16; *See United States v. Sudikoff*, 36 F.Supp.2d 1196, 1198 (C.D. Cal. 1999); *United States v. Carter*, 313 F.Supp.2d 921, 925 (E.D. Wis. April 12, 2004) ("[I]n the pre-trial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."); *see also Monroe v. Angelone*, 323 F.3d 286, 301 (4th Cir. 2003) (although the apparent redundancy of *Brady* information that comes to light post-trial may avert a finding of a constitutional violation, it "does not excuse disclosure obligations" pre-trial).

Although a lack of "materiality" may be a defense post-conviction to suppression of *Brady* information, a determination of materiality pre-trial is simply not appropriate. *See Lewis v. United States*, 408 A.2d 303, 306-07 (D.C. 1979) (although "the constitutional question commonly comes up retrospectively, the due process underpinning of *Brady-Agurs* is a command for disclosure Before an accused has to defend himself"). As explained in *Sudikoff*,

> This [materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighted against the presumed effect of the undisclosed *Brady* material. … This analysis obviously cannot be applied by a trial court facing a pretrial discovery request.

36 F.Supp.2d at 1198-99; *see also Carter*, 313 F.Supp.2d at 924 ("[T]he materiality prong presumes that the trial has already occurred and requires the court to determine whether the result could have been different had the evidence been disclosed. But a court deciding whether materiality should be disclosed prior to trial does not have the luxury of reviewing the trial record."); *Lewis*, 408 A.2d at 307 (requiring pre-trial disclosure of impeachable convictions of government witnesses "because there can be no objective, ad hoc way to evaluate before trial whether an impeachable conviction of a particular government witness will be material to the outcome. No one has that gift of prophecy.")

Just as a trial court cannot determine materiality before trial, neither can the United States Attorney's Office substitute its judgment of pretrial materiality. Accordingly, the United States Attorney's Office must disclose all information "favorable to an accused," *Brady*, 373 U.S. at 87, including all evidence relating to guilt or punishment and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses. *See Giglio*, 405 U.S. at 154-55; *Sykes*, --A.2d.--2006 WL 564050, at *8 ; *Safavian*, 233 F.R.D. at 15-16.

MEANS OF COMPLIANCE

Recognizing your heavy caseload, and the seriousness with which you take your prosecutorial responsibilities, I understand that this request places additional affirmative burdens on you to investigate and determine potential difficulties in the prosecution case. However, I do not believe that providing access to portions of your file while under supervision in your office under the time constraints and scheduling imposed by your investigators allows us to adequately defend the case at trial. I would ask that if you discover any evidence that qualifies as *Brady, Giglio, or Bagley* that you provide this notice to me in writing the same as you would a notice under Rule 404(b).

If your understanding of your *Brady* obligations diverges from the parameters of this letter, please let me know so that I can determine whether litigation of this issue is necessary.

III.
DISCOVERY

The amount of discovery in this case is voluminous. I would imagine that a significant amount of discovery has been scanned or is available in digital format. From the information that has been provided to date, there are still a number of documents that are referred to in the offense report but have not been produced:

[*insert specific discovery requests*]

Thank you for your time and attention to this matter.

Sincerely,

David M. González
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