NATIONAL CRIME VICTIM LAW INSTITUTE

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LAW ENFORCEMENT-ASSOCIATED VICTIM ADVOCATES AND *BRADY* DISCLOSURES: LEGAL BACKGROUND AND CONSIDERATIONS

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The Legal Background for Brady Disclosures

The United States Constitution requires the prosecution to disclose certain information in its possession to the criminal defendant when that information could be beneficial to the defense. The United States Supreme Court articulated this rule in a case called *Brady v. Maryland*, in which it held that prosecutors are constitutionally obligated to disclose "evidence favorable to an accused . . . [that] is material either to guilt or to punishment."[1] This rule became known as the *Brady* rule, and it imposes an affirmative duty on prosecutors "to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, and . . . the duty encompasses impeachment evidence as well as exculpatory evidence."[2] This duty extends to exculpatory and impeachment evidence in the possession of the prosecutor and "others acting on the government's behalf in th[e] case, including the police."[3] Put more simply, the *Brady* rule obligates prosecutors to automatically disclose information in its possession to criminal defendants when that information could be helpful in defending against the criminal charges because it is relevant to the determination of guilt or to the credibility of witnesses.

Disclosures made pursuant to the *Brady* rule are part of the general "discovery" obligations that govern the exchange of information between the "parties" in a criminal case; the parties are the prosecutor and defendant. Sometimes the term "discovery" is used to describe the parties' requests for information and records from nonparties, including victims, but this is an imprecise use of the word. The decision in the *Brady* case did not create a broad constitutional right to discovery, meaning that defendants have no general right to obtain information that a nonparty possesses.[4]

Even though the *Brady* rule requires that prosecutors automatically disclose certain information to defendants, it does not require the prosecution to adopt an "open file" policy or "deliver [their] entire file to defense counsel"; rather, it imposes a constitutional duty to disclose

only favorable evidence "that, if suppressed, would deprive the defendant of a fair trial."[5] Some prosecutors' offices may choose to adopt a liberal disclosure policy, while others may adopt a policy of only disclosing exactly what is required by the *Brady* rule or by other, related disclosure rules.[6]

Under the *Brady* rule, the duty to disclose this information to defendants includes information possessed by others acting on behalf of the prosecution in connection with the criminal case.[7] A number of federal and state courts have addressed whether information possessed by advocates is subject to the rule and have generally concluded that prosecution-based advocates are part of the prosecution team for purposes of the *Brady* rule and its required disclosures.[8] When it comes to information in the possession of law enforcement, prosecutors' *Brady* disclosure obligations apply to information in the possession of members of law enforcement who are assisting with the investigation of the case.[9] This is required because the United States Supreme Court has clarified that an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" and has observed that "procedures and regulations can be established . . . to insure communication on each case" to the prosecution.[10]

Outside the clear context that information known to law enforcement is considered to be known to the prosecution and therefore subject to the *Brady* disclosure obligation, a case-by-case analysis guides the determination of whether another entity or individual is considered to be a part of the prosecution team or acting on behalf of the prosecution for *Brady* disclosure purposes.[11] Factors considered by courts include: whether the prosecution has control over the entity with the information;[12] whether the individual or entity has assumed any of the roles or duties of the prosecution or is merely cooperating with the prosecution;[13] whether the prosecutor has a right to access the entity's or individual's files;[14] the level of involvement with the prosecution team and whether there was a joint investigation involving another government agency;[15] and whether the individual or entity qualifies as an "agent" under agency theory.[16]

In summary, the prosecution is constitutionally required to disclose information to the defense if it is known by the prosecution or if it is in its possession or control—either directly or through law enforcement or another entity working on behalf of the prosecution, as determined on a case-by-case basis—and if the information is relevant to the determination of guilt or to the credibility of witnesses.

Considerations for Assessing Law Enforcement-Associated Victim Advocates' Brady Disclosures

When structuring and operating programs where victim advocates are associated with law enforcement agencies, it is important to analyze factors that can help determine whether advocates may possess information subject to *Brady* disclosure obligations. In some jurisdictions, law enforcement agencies directly hire victim advocacy personnel; in others, law enforcement agencies refer victims to outside providers without providing any in-house advocacy; and in others, victim advocacy services are provided in a hybrid model that combines the efforts of law enforcement agencies and outside entities. Agencies who provide services using a hybrid model may have victim advocates physically co-located with law enforcement, or they may be housed externally. Law enforcement-associated victim advocates should understand their own privacy obligations, as well as other advocacy providers' ability to protect victims' communications from disclosure so that they can explain these to victims at the earliest moments and provide appropriate referrals.

A non-exhaustive list of considerations to assess *Brady* and other disclosure obligations follows. While no one consideration may be dispositive, affirmative answers to the any one of these may each make it more likely that *Brady* disclosure obligations will apply. A legal analysis of the specific advocacy structure used in a jurisdiction is recommended.

- ☐ Is the advocate an employee of the law enforcement agency?
- ☐ Is the advocate subject to supervision by a member of law enforcement?
- ☐ Does the law enforcement agency contribute funding for the advocate's position?
- ☐ Does the advocate have any investigatory responsibilities or participate in investigatory or prosecution team meetings?
- ☐ Is the advocate physically located on the same premises as law enforcement?
- ☐ Are any office resources (printer, fax machine, email server, etc.) shared by the advocate and members of law enforcement or the prosecutor's office?
- ☐ Is information held by the advocate readily accessible by others?
  - Can the prosecution compel production of advocate files without issuing a subpoena?
  - Can individuals from law enforcement or the prosecution readily access the area (physically or technologically) where victim information is stored?
  - Can individuals besides the advocate readily access the area where the advocate meets with victims of crime during the time of the meeting?
- ☐ Is the advocate required to collect or report any information to law enforcement or to the prosecutor's office? If so, is that information identifiable to a specific victim?
- ☐ Is the advocate solely or partially responsible for carrying out duties assigned to law enforcement or to the prosecutor's office by law? Such as:
  - Providing victims with information about their rights
  - Notifying victims of upcoming criminal justice proceedings
  - Providing survivors with information about state compensation programs

Once advocates' disclosure obligations are determined, policies and procedures—including training—should be developed and deployed. In addition, agencies should consider:

- ☐ A written Memorandum of Understanding between law enforcement and any outside advocacy entity documenting the division of duties, responsibilities, supervision structures and access to information.
- ☐ Written policies and procedures governing:
  - Interactions between the advocate and members of law enforcement and the prosecutor's office
  - The privacy of the advocate's files and communications with victims
- ☐ Joint training of advocates, law enforcement (including records personnel) and prosecutors on *Brady* disclosure obligations and the advocate's role.

In most jurisdictions, *Brady* disclosures obligations are not the only laws relevant to privacy. Other legal considerations that may impact the privacy of the advocate's files and communications with victims may vary across jurisdictions, but all relevant privacy-related laws should be analyzed and may include the following:

- Privilege protections
- Confidentiality obligations
- Requirements regarding releases of information
- Address confidentiality programs
- Identity protection programs
- Exemptions from public records disclosure requirements

[1] 373 U.S. 83, 87 (1963).
[2] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).
[3] *Id.* at 280-81 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).
[4] *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (observing that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").
[5] *Bagley* 473 U.S. at 675; *see also United States v. Ruiz*, 536 U.S. 622, 629 (2002) (observing that *Brady* does not require prosecutors to "share all useful information with the defendant").
[6] Beyond that material to which a defendant is constitutionally entitled under *Brady*, state statutes or procedural rules may entitle a criminal defendant to additional discovery materials. It is important to identify and know these local rules and how they function, as they may require the disclosure of certain information in the possession of law enforcement.
[7] *See, e.g., United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (observing that the prosecution "has no obligation to produce information which it does not possess or of which it is unaware," but noting that its obligation does extend to information held by other government agencies if the prosecutor can be deemed to have possession or control over those records) (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) ("*Brady* clearly does not impose an affirmative duty upon the government to discover information which it does not possess.") (quoting *United States v. Beaver,* 524 F.2d 963, 966 (5th Cir.1975)).
[8] *See, e.g., Eakes v. Sexton*, 592 F. App'x. 422, 429 (6th Cir. 2014) (finding that a prosecution-based victim advocate's report fell within the scope of the state prosecutor's *Brady* obligations even through the advocate was "located 'in a separate part of the District Attorney's office'"); *United States v. Drayer*, 499 F. App'x 120, 123 (2d Cir. 2012) (assuming, without discussion, that a document in the file of a victim coordinator working for the United States Attorney's Office implicates *Brady* disclosure obligations); *Commonwealth v. Liang*, 747 N.E.2d 112, 116 (Mass. 2001) (concluding that "the work of [prosecution-based] advocates is subject to the same legal discovery obligations as that of prosecutors and their notes are subject to the same discovery rules"); *Commonwealth v. Kozakiewicz*, 107 N.E.3d 1255, at *4 (Mass. App. Ct. 2018) (unpublished) (stating that the "prosecution team includes victim-witness advocates"); *State ex rel. Brandenburg v. Blackmer*, 110 P.3d 66, 71 (N.M. 2005) (concluding that "victim advocates are part of the prosecution team" where they are employed by the district attorney's office and "perform many tasks similar to those other members of the prosecution team"); *State v. Lynch*, 885 N.W.2d 89, 108-109 (Wis. 2016) (plurality opinion) (distinguishing circumstances where *Brady* obligations are implicated, such as with the records of prosecution-based advocates in *Liang*, from records held by private mental health facilities, where *Brady* obligations do not apply; and stating that "a defendant has a constitutional right, under *Brady*, to material information but only when that information is held by the prosecutor, including others acting on the prosecutor's behalf"); *State v. Blonda*, 899 N.W.2d 737, at *7 (Wis. Ct. App. 2017) (unpublished) (finding that defendant was entitled to a new trial where the prosecution conceded a *Brady* violation in connection with its failure to timely disclose both a statement made by the victim to a victim advocate from the district attorney's office and a written victim impact statement, both of which were exculpatory); *cf. State v. Young*, No. 1 CA-CR 17-0413, 2018 WL 6241449, at *2-4 (Ariz. Ct. App. Nov. 29, 2018) (unpublished) (holding, in a case where the facts were unclear regarding whether the advocate was a system-based or community-based advocate, that Arizona's crime victim advocate privilege is constitutional and observing that "[c]ommunications between the victim and victim's advocate may not be in the State's possession [where the privilege statute provides that] the State can only access those communications with the victim's consent"). Law enforcement-based victim advocacy is a relatively new profession, and courts do not yet appear to have considered whether advocates employed by law enforcement agencies are part of the prosecution team for purposes of *Brady* disclosures. The analysis employed in the cases addressing prosecution-based advocates suggests that law enforcement-based advocates, much like other members of the police force, will be considered part of the prosecution team and the information they hold potentially subject to disclosure under *Brady.*

[9] *Cf., Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992) (observing, in the context of a § 1983 lawsuit, that "the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors" and collecting cases).

[10] *Kyles*, 514 U.S. at 437-38 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) (reiterating that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'") (quoting *Kyles*, 514 U.S. at 438)); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation."). This may extend beyond law enforcement information to information held by other government agencies, in some circumstances. The Ninth Circuit, in the context of a federal criminal prosecution, has held that "[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating *in the same investigation of the defendant*." *Cano*, 934 F.3d at 1025 (quoting *United States v. Bryan*¸ 868 F.2d 1032, 1033 (9th Cir. 1989)).

[11] *See, e.g., United States v. Meregildo*, 920 F. Supp. 2d 434, 440-44 (S.D.N.Y. 2013) (observing that "[c]ourts disagree about when an individual's knowledge should be imputed to the prosecutor," as "[t]here is no clear test to determine when an individual is a member of the prosecution team" and collecting cases).

[12] *See, e.g., Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (recognizing prior case law defining the "'prosecution team' as 'the prosecutor or anyone over whom he has authority'").

[13] *See, e.g., Pitonyak v. Stephens*, 732 F.3d 525, 531-33 (5th Cir. 2013) (affirming as reasonable, in the context of a federal habeas petition, the state court's conclusion that a counselor at the jail who heard defendant confess while in custody was not a member of the prosecution team or a member of the law enforcement investigatory team, where the counselor was "not involved in investigating or preparing the case against [defendant]," where jail mental health professionals did not communicate "to police any information learned within the scope of mental health services," and where the counselor's file notation referenced potentially communicating with defense counsel – not the prosecutor – regarding self-incriminating statements made by defendant); *Avila v. Quarterman*, 560 F.3d 299, 309 (5th Cir. 2009) (refusing to impute information in the possession of a pathologist to the prosecution because the court was "not persuaded that [the pathologist] became part of the prosecution team"); *United States v. Josleyn*, 206 F.3d 144, 154 (1st Cir. 2000) ("While prosecutors may be held accountable for information known to police investigators . . . we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests.") (citing *Kyles,* 514 U.S. at 437–38); *United States v. Lujan*, 530 F. Supp. 2d 1224, 1231 (D.N.M. 2008) ("[T]here is no affirmative duty to discover information in possession of independent, cooperating witness[es] and not in government's possession[.]") (citing *Graham*, 484 F.3d at 415-18).

[14] *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002) (clarifying that the court held in *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991), that the United States Attorney did not violate *Brady* when it failed to turn over California State Department of Corrections files that were under the exclusive control of California officials); *State v. Pinder*, 678 So. 2d 410, 414 (Fla. Dist. Ct. App. 1996) (rejecting the application of *Brady* in the context of a defense motion to compel disclosure of privileged communications between the victim and sexual assault counselors under circumstances where "the counselors . . . do not investigate potential criminal conduct" and "[t]here was no showing that they assist the prosecution by providing information or offering suggestions"; and concluding that "[t]he counselors are not agents of the state within the contemplation of *Brady* and that aspect of due process does not compel disclosure of records or information which are shielded from all eyes, state and defense").

[15] *See, e.g., United States v. Ellison*, --- F. Supp. 3d ---, No. 19-541 (FAB), 2021 WL 1043991, at *4-5 (D.P.R. Mar. 18, 2021) (analyzing whether other government entities were part of the prosecution team for purposes of *Brady* by considering the level of involvement by another government agency and whether a joint investigation occurred—specifically, whether one agency was acting on behalf or under the control of another, the extent to which the entities were working as a team and sharing resources, and whether the agencies had ready access to each other's files; citing cases; and concluding that members of other government agencies being interviewed by investigators, providing information and advice in interviews, providing documents to investigators, or conducting independent investigations of defendant that are unrelated to the criminal prosecution were insufficient to transform these agencies into members of the prosecution team for purposes of *Brady* disclosure obligations); *see also United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006) (reiterating that "prosecutors are not required to undertake a 'fishing expedition' in other jurisdictions to discover impeachment evidence" and "are not obligated to learn of all

information 'possessed by other government agencies that have no involvement in the investigation or prosecution at issue'" (quoting *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003)); *United States v. Collins*, 409 F. Supp. 3d 228, 241-42 (S.D.N.Y. 2019) (finding no joint investigation for purposes of *Brady* where the federal prosecutor and the Securities and Exchange Commission conducted "parallel but separate investigations" and where "personnel, information and documents were not shared in any material way between the USAO and SEC, and each agency made charging decisions independently of each other").

[16] *See, e.g., Moon*, 285 F.3d at 1310 (refusing to impute the knowledge of an investigator for the Tennessee Bureau of Investigation ("TBI"), who was also the case agent for a separate homicide by defendant, to the Georgia prosecutor because, "the Georgia and Tennessee agencies shared no resources or labor; they did not work together to investigate the separate murders. Nor is there evidence that anyone at the TBI was acting as an agent of the Georgia prosecutor. The Tennessee investigator was not under the direction or supervision of the Georgia officials, and, had he chosen to do so, could have refused to share any information with the Georgia prosecutor. At most, the Georgia prosecutor utilized the Tennessee investigator as a witness to provide background information to the Georgia courts. This is insufficient to establish him as part of the Georgia 'prosecution team.").

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