BRADY V. MARYLAND

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Updated by Rebecca Henderson as of February 16, 2015

I. Florida Rule of Criminal Procedure 3.113

A. Before an attorney may participate as counsel of record in the circuit court for any adult felony case, including post-conviction proceedings before the trial court, the attorney must complete a course ... of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements of rule 3.220, and the principles established in Brady v. Maryland, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963) and Giglio v. United States, 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed.2d 104] (1972). Trial judges, based upon their inherent authority to uphold the rules of procedure, are authorized to give effect to the rule by not appointing counsel, or removing counsel, in the event that counsel is not in compliance with the rule. Additionally, to ensure that qualified counsel will be available at the time this rule goes into effect, we provide that the rule will take effect two years from the date of this opinion.

B. Effective May 16, 2016.

II. What is Brady evidence?

A. Failure to turn over to the defense all exculpatory evidence in the prosecution's actual or constructive possession is a violation of Due Process of the Fifth and Fourteenth Amendments.

B. The prosecution must disclose any information or material that is:
   1. Material (and)
   2. Relevant to guilt or punishment (and)
   3. Favorable to the accused (and)
   4. Within the actual or constructive knowledge of state (which would include in the possession of anyone acting on behalf of the State).

III. The march to Brady:

A. **Berger v. U.S.**, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). The premise of this case is that the job of the prosecutor is to seek justice, not to obtain a conviction by any means.
   1. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the

twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

B. **Mooney v. Holohan**, 294 U.S. 103, 112-13, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935). This case involved the deliberate deception of a court and jurors by the presentation of known false evidence. The court noted that perjured testimony that was deliberately elicited by the prosecution was a due process violation.
    1. "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment."

C. **Napue v. Illinois**, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This case involved uncorrected false testimony (not elicited by the prosecution)… In this case, the principal state witness in a murder trial was asked by an Assistant District Attorney whether he had received consideration in exchange for his testimony. The witness said that he had not. The ADA knew this to be false but did not reveal it…
    1. "'(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'"
    2. In this case, the court took Mooney one step further and put the burden on the State to correct false testimony, even if the State did not solicit it.

D. **Brady v. Maryland**: 373 U.S. 83, 87 (1963):
    1. Summary: Defendants Brady and Boblit were both charged with first degree murder. Prior to trial, Brady's lawyer requested the prosecution to show him Boblit's prior statements. Many of these statements were disclosed, but the statement by Boblit where he admitted to the actual killing was not revealed. Both Brady and Boblit were convicted of first-degree murder at separate trials and sentenced to death. At trial Brady admitted he participated, but stated that Boblit did the actual killing. On appeal, Brady's conviction was vacated, with the court finding that the suppression of Boblit's statement violated due process. The Court held that suppression of evidence favorable to the accused by the prosecution (irrespective of the good faith or bad faith of the prosecution) violates due process where the evidence is material to ***either to guilt or to punishment***.
        a. "We now hold that the 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." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963).

2. The failure to disclose such material is a "Brady violation," which is a violation of the U.S. Constitution. Through Brady and its progeny, the Supreme Court has made clear that "Brady material" must be turned over to the defense in a timely manner, *whether the defense requests it or not*, and that a prosecutor's good faith efforts to comply do not shield the state from a "Brady violation." The Supreme Court has also held that "Brady material" includes not only affirmatively exculpatory evidence but also impeachment evidence and any consideration a witness may receive; it also includes evidence in the possession of law enforcement, even if prosecutors themselves do not possess it or even know about it.
3. The Defense should never lose sight of the fact that Brady is the furthest thing from a technicality. It is a ***"rule of fairness."*** 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." Brady, 373 U.S. at 87. The Court affirmed that a prosecutor should not be the "architect of a proceeding that does not comport with standards of justice." Id. at 88.

E. **Kyles v. Whitley**, 514 U.S. 419 (1995).
   1. Kyles was convicted of first-degree murder and sentenced to death. Prior to trial, police had collected eyewitness statements containing physical descriptions of the attacker which were inconsistent with characteristics of the petitioner. These statements were not disclosed to the defense. Post-trial petitioner argued that this evidence had been suppressed in violation of Brady. The U.S. Supreme Court agreed…
   2. The U.S. Supreme Court explicitly said that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to the other people and agencies acting on the government's behalf on the case, including the police.
   3. "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 worth of confidence. A 'reasonable probability' of a different result is accordingly shown when the Governments evidentiary suppression 'undermines confidence in the outcome of the trial'"

F. Practical application of Kyles, supra, to refute common incorrect arguments made by prosecutors:
   1. State argues that the withholding material would not have resulted in an acquittal…
      a. Kyles: "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 worth of confidence. A 'reasonable probability' of a different result is accordingly

shown when the Governments evidentiary suppression 'undermines confidence in the outcome of the trial'"

2. State argues that even though there was a Brady Violation, it was "harmless error"…
   a. Kyles: "Once a reviewing court has found constitutional Brady error, there is no need for further harmless-error review…[a Brady error] could not be treated as harmless."
3. The Prosecutor says, "I didn't know about the information—the Police never told me."…
   a. Kyles: "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

G. Summary of things that have been held to be Brady material:

1. Inconsistent descriptions by different witnesses of the criminal.
2. Inconsistent descriptions by different witnesses of the crime.
3. The fact that some of the witness's descriptions of the criminal matched the police informant.
4. That there were pending charges against the police informant
5. That there was an ongoing investigation of the police informant concerning other crimes.
6. That the police informant made inconsistent statements to the police about the crime and about his accusation of the defendant
7. That the police had other leads and information that they failed to follow up on or investigate, that could have pointed the finger at someone other than the defendant.
8. That before accusing the defendant, one of the witnesses previously said that she had not actually seen the crime
9. That a witness's description of the crime and/or the criminal became more "accurate" and more certain after the witness met with police and/or prosecutors, or after the witness testified at a first hearing or trial.
10. That a witness's prior statements omit significant details or facts that the witness "remembered" at trial.
11. That a witness's trial testimony omitted significant details or facts that the witness mentioned in prior statements.
12. That a witness or informant made statements that incriminated himself in the crime charged against the defendant.

IV. Breaking down the Brady analysis:

A. **Relevant to guilt or punishment**:

1. Relevant evidence is evidence tending to prove or disprove a material fact. Fla. Stat. Ann. § 90.401.
2. Guilt or sentencing phase of a case. Example: Assume that a robbery victim identified the defendant as one of two people who robbed him, but also told police

that the defendant prevented the other robber from injuring him. This would be Brady material because it is relevant to mitigating punishment—even though it actually helps establish the defendant's guilt.

B. **Material**:

1. "Material matter" means any subject, regardless of its admissibility under the rules of evidence, which could affect the course or outcome of the proceeding. Whether a matter is material in a given factual situation is a question of law. Fla. Stat. Ann. § 837.011.
2. White v. State, 664 So.2d 242 (Fla. 1995), 'material' means: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."
3. Material exculpatory evidence is anything which individually or collectively "undermines confidence" in the prosecutor's case (i.e. additional witness statements that may contain inconsistencies or uncertainty; or in the Bagley case it was a list of the vehicles parked near the scene…) U.S. v. Bagley, 473 U.S. 667, 682 (1985).
    a. Bagley was indicted on firearms and narcotics charges. Prior to trial, he requested that the prosecution disclose any "deals, promises, or inducements" made to witnesses in exchange for their testimony. The prosecution did not disclose that its two principal witnesses worked with the Bureau of Alcohol, Tobacco, and Firearms (ATF) in an undercover investigation of respondent. Respondent sought a new trial under Brady. The U.S. Supreme Court again held that Brady requires disclosure of impeachment evidence. It also clarified the "materiality" prong of Brady.
    b. "[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," United States v. Agurs, 427 U.S., at 112, 96 S.Ct., at 2401, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. ... But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."
4. To establish the materiality element of Brady, the defendant must demonstrate "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003)(quoting United States v. Bagley, 473 U.S. 667, 682, (1985)).
    a. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Guzman, at 506 (quoting Bagley, 473 U.S. at 682). See also Wright v. State, 857 So. 2d 861 (Fla. 2003).
5. Floyd v. State, 902 So. 2d 775 (Fla. 2005): The Court examined two areas of suppressed evidence in this case – (1) information from a neighbor who gave a description of two other white men who were acting "very suspiciously" at the

location of the murder within the timeframe of the murder, and (2) letters from the jailhouse informant that revealed that he may have been even less credible than what was presented to the jury. The Court stated "After collectively examining the evidence suppressed by the State, it is apparent that it could have provided a basis for reasonable doubt in the minds of some jurors. The case against the defendant was, from the beginning, a circumstantial one. While at the time of trial, those circumstances may have seemed to point in the direction of guilt, the circumstances have been changed considerably by the suppressed evidence, which "put[s] the whole case in ... a different light." Strickler, 527 U.S. at 290, 119 S.Ct. 1936 (quoting Kyles, 514 U.S. at 435), but also raises additional concerns about whether the defendant truly confessed to the crime. It therefore undermines our confidence in the defendant's conviction." Floyd, at 787.

6. Admissibility does <u>not</u> affect materiality!

a. Floyd, at 782: "[W]ithheld information, even if not itself admissible, can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence."

b. Rogers v. State, 782 So.2d 373, 383 n. 11 (2001). In Rogers the court held "that the contents of certain police reports, some of which were not even from the agency investigating the crime, should have been disclosed."

7. **Intent to use at trial does <u>not</u> affect disclosure!**

a. State v. Fernandez, 141 So. 3d 1211,1222 (Fla. 2nd DCA 2014). "The State does not cite any authority in support of the proposition that its discovery obligation is limited to witnesses and evidentiary materials that it intends to present at trial. … Kidder v. State, 117 So.3d 1166, 1170–71 (Fla. 2d DCA 2013). The principle that we followed at the State's urging in Kidder applies no less to the State's reciprocal discovery obligation in this case."

C. **Favorable to the accused**:

1. Exculpatory, mitigates sentence, impeaches a state witness, or otherwise casts doubt on the prosecution case (offensively or defensively).
2. Favorable information encompasses "**Exculpatory**" and "**Impeaching**" information:

a. "**Exculpatory" information is information of any kind that would suggest to any prosecutor that the defense would want to know about it.** 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. (for example: a homicide victim's prior record that circumstantially helps establish self-defense; an eyewitness' prior mistaken identification; a ballistic report showing that the weapon found on the defendant was not the murder weapon, etc.).

b. **"Impeachment" information typically refers to information that tends negatively to impact the credibility or reliability of a State witness.** Impeaching information may be case-related (for example: promise of

leniency to witness made in exchange for testimony; prior false testimony suggesting a character of untruthfulness; prior inconsistent statements, etc.).

3. Exculpatory and Impeaching information are *not* strictly distinct categories. There is often little conceptual distinction between the two: evidence that casts a doubt on the reliability of evidence against a defendant may be 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, supra at 676.
4. Subsequent U.S. Supreme Court decisions have referred to the duty to disclose exculpatory and impeaching information. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Strickler focused more on impeachment evidence. In that case, a witness testified that the incident was a very traumatic event, but prior interviews/the initial statement to the officers made it appear that it was more of a trivial episode. The Court ultimately ruled that a Brady violation was not established, but the case does have a good Brady analysis.
5. Can include "neutral" evidence: Patler v. Slayton, 503 F. 2d 472, 478-79 (4th Cir. 1974) – scientific tests that fail to connect a defendant with items of clothing worn by the murderer are 'favorable evidence' in that they point to a number of factors that could have linked the defendant to the crime and did not.

D. **Within the actual or constructive knowledge of the State**:

1. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995): the U.S. Supreme Court explicitly said that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to the other people and agencies acting on the government's behalf on the case, including the police.
2. Hasty v. State, 599 So. 2d 186 (Fla. 5th DCA 1992): information in possession of police officers is in constructive possession of prosecutor.
3. Carriger v. Stewart, 132 F. 3d 463 (9th Cir. 1997): a prosecutor has the obligation to learn about the background, criminal record, and other relevant information of their key witnesses. (i.e. witness known to be a career criminal, and would include prison records on file with corrections agencies.)
4. Johnson v. State, 2014 WL 68134, 39 F.L.W. S5 (January 2014): The state violates Brady when it fails to disclose a letter from codefendant's counsel offering to use his client to set up a confession from the defendant after defendant had counsel.
5. See also: Hurst v. State, 18 So. 3d 975 (Fla. 2009)(obligation to disclose extends also to evidence known only to police investigators and not to the prosecutor); Archer v. State, 934 So. 2d 1187 (Fla. 2006)(prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, and to disclose the evidence if it is material).
6. There is no Brady violation when the allegedly suppressed evidence is not in the possession of the state. Maharaj v. State, 778 So. 2d 944 (Fla. 2000).
7. A Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it. Maharaj, supra; *See also* U.S. v. LeRoy, 687 F. 2d 610 (2d Cir. 1982).

a. U.S. v. Bhutani, 175 F. 3d 572 (7th Cir. 1999) noted that even if the defendant has no actual knowledge of the suppressed information, Brady is not violated if the defendant, *with reasonable diligence*, could have obtained such evidence.
   (i) "Reasonable diligence standard" – for example would encompass conducting a deposition of a SWIT, and learning that she had been previously arrested twice – follow up on this information. Wickham v. State, 124 So. 3d 841, 853 (Fla. 2013), as revised on reh'g (Oct. 17, 2013). In Wickham, the Court ruled that there was no Brady violation because the defense had the information concerning the SWIT's prior arrests.
b. See also: Thompson v. State, 994 So. 2d 1176 (Fla. 3d DCA 2008)(Thompson's claim that the State committed a Brady violation by suppressing favorable DNA evidence was facially insufficient because the record reflected that Thompson knew of the evidence allegedly withheld.); Floyd v. State, 18 So. 3d 432 (Fla. 2009)(the record showed that Floyd was aware of the existence and content of the taped interview, and the police report provided to the defendant referred to the tape.).
c. Other cases that rule no "suppression" where the defense knew of the existence of the evidence: Green v. State, 975 So. 2d 1090 (Fla. 2008); Peede v. State, 955 So. 2d 480 (Fla. 2007); Occione v. State, 768 So. 2d 1037 (Fla. 2000).

8. The State is required to disclose any exculpatory document within its possession or to which it has access even if such document is not subject to public record laws.
   a. Walton v. Dugger, 634 So.2d 1059 (Fla. 1994)
   b. Guillen v. State, 589 So. 2d 345 (Fla. 1st DCA 1991): the failure to provide the FDLE report regarding whether the pistol met the statutory definition of a firearm… was "clearly required to be disclosed pursuant to the discovery rules and the Due Process Clause…"
9. However, a prosecutor is not charged with knowledge of evidence in possession of government agencies that are not investigative arms or participated in the investigation of the case…
   a. See U.S. v. Beers, 189 F. 3d 1297 (10th Cir. 1999), which refused to charge federal prosecutors with knowledge of materials in the possession of state police departments.
   b. See Moreno-Morales v. U.S., 334 F. 3d 140 (1st Cir. 2003), which noted that the prosecutor is not responsible for evidence possessed by investigative agencies of other jurisdictions, even though such agencies might be part of a joint task force investigating the same criminal activity.
10. Additionally see: Jones v. McNeil, 4:09CV54-RH/WCS, 2013 WL 5504371 (N.D. Fla. Oct. 1, 2013): A prosecutor has no reason, on the eve of sentencing, to go back and look for new impeaching information about a witness who testified during the trial.
    a. The Court in Jones stated: "Any suggestion that information about Mr. Prim's arrest should have found its way to the prosecutor is wholly unrealistic. And the suggestion that providing this information to the defense on the day before

sentencing would have made a difference—would or even might have affected the judge's decision to impose the death penalty—is even further afield. Mr. Prim was thoroughly cross-examined at the trial about his five prior convictions and his pending grand-theft charge. One more arrest, or an indication that at some point Mr. Prim smoked crack, would not have mattered to the sentencing judge. The Florida Supreme Court's rejection of this claim was not contrary to or an unreasonable application of federal law as determined by the United States Supreme Court. Mr. Jones is not entitled to relief on this claim." Jones, supra.

11. But see: Sargent v. Sec'y, Florida Dep't of Corr., 480 F. Appx 523, 530 (11th Cir. 2012) cert. denied, 133 S. Ct. 585, 184 L. Ed. 2d 384 (U.S. 2012): Because the Supreme Court has never addressed whether a toxicologist is a member of the prosecution's team, the state court's decision that Zeller's knowledge could not be imputed to the prosecutor in this case was not unreasonable. *See, e.g., Smith v. Massey*, 235 F.3d 1259, 1272 (10th Cir.2000) (denying § 2254 petition in a case involving false testimony by a crime-lab chemist because there was no clearly established law addressing what information could be imputed to the prosecutor), *overruled on other grounds by Neill v. Gibson*, 278 F.3d 1044 (10th Cir.2001). Because there is no clearly established law holding that a state laboratory toxicologist is a member of the prosecution team such that her knowledge can be imputed to the state prosecutor, we must defer to the state court's decision. The district court's denial of habeas relief is affirmed.

V. How to Demand Brady Material.

A. A standard Brady motion is fine, but it is better practice to tailor the Brady Demand to the factual needs of the case. This makes it more difficult for the State to claim that they did not know something existed, or the Court to say it did not know the information was relevant.

B. **United States v. Agurs**, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This case dealt with the various types of discovery demands (general versus specific Brady demands).
   1. Agurs was convicted of murder after a trial in which he argued he had acted in self-defense. Subsequently Agurs sought a new trial because the State had failed to disclose the victim's criminal record. The U.S. Supreme Court held that there was little difference between a general request by defense counsel for Brady material and the absence of a request altogether, and it found that prosecutors are obligated to turn over exculpatory evidence whether or not defense counsel asks for it.
   2. "Indeed, this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made. Before addressing that question, a brief comment on the function of the request is appropriate. …The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that

might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the **"sporting theory of justice" which the Court expressly rejected in Brady.** Whether or not procedural rules authorizing such broad discovery might be desirable, **the Constitution surely does not demand that much."**

C. **U.S. v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This is the premier case that everyone should read and cite to, not just Brady. This case got rid of the general/specific Brady demands that was set up by the Court in Agurs.
    1. Florida cases use and apply the Federal definition of materiality – which comes from Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
    2. The Bagley court found that the Strickland test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." Bagley, at 682.

D. Keep in mind: General requests are insufficient because it allows the State to decide what is 'exculpatory' and thus disclosed, not the defense. Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996); Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

E. Examples:
    1. Witness information: "Any and all information bearing on the truthfulness, bad character, or bad reputation of State's witness [John Doe], including but not limited to: complete adult criminal record; complete juvenile record; any contempt citations issued against the witness; any past instances of dishonesty, fraud, lying or violence on the part of the witness that is known to the State or its agents; any history of mental illness…"
        a. "The prosecuting attorney may be required to disclose to defense counsel any record of prior criminal convictions of defendant or of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, if such material and information is within his possession." State v. Crawford, 257 So. 2d 898 (Fla. 1972). *See also* State v. Coney, 294 So. 2d 82 (Fla. 1973).
        b. "We find no authority within the criminal discovery rule that requires the state to disclose the criminal histories of all listed witnesses, including those who will not be called to testify." State v. Wright, 803 So. 2d 793 (4th DCA 2001).
    2. "The name, address, and telephone number of any witness who at any time identified someone other than the defendant as the person who committed the [robbery] charged in this case;…."
    3. Specific evidence: "Any medical or scientific records (including but not limited to the results of any tests and the complete raw data upon which those test results were based) that indicate that the defendant was not the person who committed the crimes charged. This request is intended to encompass, but not limited to all

blood testing, DNA testing, serology testing, fingerprint testing, hair sample testing."

B. "The State has no duty to actively assist the defense in investigating the case." "The defense has the initial burden of trying to discover impeachment evidence, and the state is not required to prepare the defense's case. This is especially true when the evidence is as accessible to the defense as to the state." Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987).

C. Follow up on what you learn. When you get some Brady material, investigate it, and then make demands for additional material on anything your follow-up investigations turns up.

D. The Brady process is not just for pre-trial. The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it. Imbler v. Pachtman, 424 U.S. 409, 427 (1976), held that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."

VI. Preserving the Record:

A. In pre-trial motions and prior to sentencing, make the motion in writing and get the State's response and the court's decision, if any, in writing.

B. When you make Brady applications during trial, be sure to make them on the record and to the get the State's response and the court's ruling on the record. This is essential if there is to be a remedy for the defendant when evidence is later discovered months later if the State lied about something.

VII. Brady Post- Conviction

A. **A Brady violation is an Appellate Issue:** If the violation is discovered at or before the trial, *there is no "outcome" that has been undermined*. Therefore, regular discovery rules should normally apply. Conduct a Richardson hearing to determine whether the violation was willful/inadvertent/prejudicial/if there is a less restrictive alternative to excluding evidence, etc.

B. When Brady material turns up after a defendant has been convicted and sentenced, a state post-conviction or habeas corpus petition is usually the appropriate way to raise the issue.

C. In order to establish a Brady violation, 4 elements must be shown:
   1. The evidence at issue was favorable to the defendant, either because it is exculpatory or is impeaching;
   2. The evidence was suppressed, willfully or inadvertently, by the State; and
   3. Because the evidence was material, its suppression resulted in prejudice.

a. *See* Strickler, supra; Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005); Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001), Carrol v. State, 815 So. 2d 601 (Fla. 2002).

4. Fourth Prong: U.S. Supreme Court added a fourth prong to the Brady Analysis. "that the Defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence. Floyd v. State, 18 So. 3d (Fla. 2009), U.S. v. Agurs, 427 U.S. 97 (1976).

D. Standard of Review:
   1. When addressing Brady claims, this Court utilizes a mixed standard of review, "'defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.'" Lightbourne v. State, 841 So. 2d 431, 437-38 (Fla. 2003).
   2. A criminal defendant alleging a Brady violation bears the burden to show prejudice, to show a reasonable probability that the undisclosed evidence would have produced a different verdict. See Strickler v. Greene, 527 U.S. 263, 281 (1999); Mordenti v. State, 894 So. 2d 161 (Fla. 2004), Wright v. State, 857 So. 2d 861 (Fla. 2003).

E. Burden:
   1. A criminal defendant alleging a Brady violation bears the burden to show prejudice, to show a reasonable probability that the undisclosed evidence would have produced a different verdict. See Strickler, supra; Mordenti v. State, 894 So. 2d 161 (Fla. 2004), Wright v. State, 857 So. 2d 861 (Fla. 2003).
   2. Beware: Strickler, supra at 1950-51: "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support."

F. What can be done when the Brady material is discovered after the defendant has not only been convicted, but lost his or her appeal and lost a post-conviction case?
   1. The defendant must show cause why he didn't raise the claim in his first petition, and actual prejudice from the violation.
   2. In Strickler, the U.S. Supreme Court held that when a defendant files a successor habeas under Brady, if he proves that the State withheld evidence, that will constitute cause for not presenting the claim earlier.

VIII. When does Brady end?

A. R. 3.220(j) Continuing Duty to Disclose
   1. "If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose

or produce the witnesses or material in the same manner as required under these rules for initial discovery."

B. The Brady process is not just for pre-trial. The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it. Imbler v. Pachtman, 424 U.S. 409, 427,n.25, 96 S.Ct. 984 (1976), held that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."

IX. Role of the Prosecutor.

A. Florida Rules of Professional Conduct: Rule 403.8 Special Responsibilities of a prosecutor.
   1. The prosecutor in a criminal case shall: (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

B. Florida Rules of Criminal Procedure 3.220.
   1. The defendant may elect to participate in discovery (by demand or deed—e.g., Chapter 119 public records request, taking of deposition)
   2. Due Process: A Defendant's right to discovery of exculpatory evidence is constitutional in nature, grounded in the Due Process Clauses of the 5th and 14th amendments. Therefore, a Defendant has the right to Brady material independent of the terms and conditions of Fla. R. Crim. P. 3.220, including discovery demand.
   3. The Supreme Court made an important point by deciding Brady issues solely in a due process context.

C. "The prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97 (1976).

D. But see: Adler v. State, 666 So. 2d 998 (5th DCA 1996): The state is under no legal obligation to advise the Court or Defense that a witness has died prior to the plea.

E. But see: Marsh v. Butterworth, No. 07-23197-CIV, 2008 WL 2782757, at *6 (S.D. Fla. July 16, 2008): The fact that the victim has been deported would not have rendered Marsh's plea involuntary or changed the outcome of his various proceedings.

F. But see: Elghomari v. State, 66 So. 3d 416 (4th DCA 2011): While the state is not obligated to provide defense with non-exculpatory unrecorded oral statements made by a

witness, if those statements materially differ from written or recorded statements previously given, they must be disclosed.

X. Giglio claims:

A. A Giglio violation occurs where the undisclosed evidence reveals that the prosecution knowingly made false statements, or introduced or allowed trial testimony that it knew or should have known was false. Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1333-34 (11th Cir. 2009); *citing* Giglio v. United States, 405 U.S. 150, 153 (1972) (noting that the same rule applies when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears."); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

1. In Giglio a key witness against Petitioner testified at trial that he had not received a promise for leniency from the state in return for his testimony. Unbeknownst to the trial prosecutor, the witness had in fact received a promise for leniency from another prosecutor in the office. Petitioner discovered this and filed a motion for a new trial. The U.S. Supreme Court held that the prosecution was obligated to disclose to the defense any promise or expectation of leniency it offered to a witness. It clarified that the state's Brady obligation extends to all prosecutors in the office, and that it is up to such offices to create systems to ensure that such information is disclosed. Further, the Court clarified that impeachment evidence – evidence affecting the credibility of a witness – is Brady material and must be disclosed.
2. "Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Id., at 153-55.

B. Three elements for a successful *Giglio* claim:

1. The testimony was false,
2. The State knew it was false, and
3. The testimony was material.

C. Under this category of Brady violation, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Smith, supra, *citing* Agurs, at 103.

D. The "could have" standard requires a new trial unless the prosecution persuades the court that the false testimony was "harmless beyond a reasonable doubt." Smith, supra, *citing* Ford v. Hall, 546 F.3d 1326, 1332 (11th Cir.2008) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

E. This standard favors granting relief. It is shaped by the realization that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Smith, supra, *citing* Giglio at 153.

XI. Prosecutorial misconduct/other:

A. Napue v. Illinois, 360 U.S. 264 (1959): The principal state witness in a murder trial was asked by an assistant district attorney whether he had received consideration in exchange for his testimony. The witness said that he had not. The ADA knew this to be false but did not reveal it. The U.S. Supreme Court held that the due process clause of the Fourteenth Amendment bars prosecutors from presenting false testimony and requires them to correct false testimony when it occurs.

B. United States v. Agurs, 427 U.S. 97 (1976): Petitioner was convicted of murder after a trial in which he argued he had acted in self-defense. Subsequently petitioner sought a new trial because the state had failed to disclose the victim's criminal record. The U.S. Supreme Court held that there was little difference between a general request by defense counsel for Brady material and the absence of a request altogether, and it found that prosecutors are obligated to turn over exculpatory evidence whether or not defense counsel asks for it.

C. United States v. Bagley, 473 U.S. 667 (1985): Respondent was indicted on firearms and narcotics charges. Prior to trial, he requested that the prosecution disclose any "deals, promises, or inducements" made to witnesses in exchange for their testimony. The prosecution did not disclose that its two principal witnesses worked with the Bureau of Alcohol, Tobacco, and Firearms (ATF) in an undercover investigation of respondent. Respondent sought a new trial under Brady. The U.S. Supreme Court again held that Brady requires disclosure of impeachment evidence.

D. Kyles v. Whitley, 514 U.S. 419 (1995): Petitioner was convicted of first-degree murder and sentenced to death. Prior to trial, police had collected eyewitness statements containing physical descriptions of the attacker which were inconsistent with characteristics of the petitioner. These statements were not disclosed to the defense. Post-trial petitioner argued that this evidence had been suppressed in violation of Brady. The U.S. Supreme Court agreed. It imposed an affirmative duty on prosecutors to become aware of and disclose any favorable evidence held by others acting on the government's behalf, including the police.

E. Banks v. Dretke**,** 540 U.S. 1143 (2004): Petitioner was convicted of murder and sentenced to death. The state represented that it had disclosed all Brady material, but it nevertheless failed to disclose the fact that a key witness was a paid government informant and that another witness's testimony had been coached. Furthermore, prosecutors failed to correct the record when these witnesses testified falsely. Petitioner sought relief because of the apparent Brady violation but lost in the U.S. Court of Appeals for the 5th Circuit. The U.S. Supreme Court held that the lower court had erred in dismissing Petitioner's Brady claim. It placed the onus for Brady compliance clearly on prosecutors. It said defendants need not "scavenge for hints of undisclosed Brady material" and "[a] rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable." When police or prosecutors conceal exculpatory material in the state's possession, it is incumbent on the state to set the record straight.

F. U.S. v. Dollar, 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998): the court dismissed charges with prejudice as a sanction for conduct by a prosecutor that "has trampled on [defendant's] constitutional right to Brady material.

G. U.S. v. Wilson, 149 F. 3d 1298, 1304 (11th Cir. 1998): the court imposed sanctions against a prosecutor for the purpose of deterring future misconduct.

H. Former Texas prosecutor and judge Ken Anderson pled guilty to criminal contempt for intentionally failing to disclose evidence in a case that sent an innocent man, Michael Morton, to prison. Per the plea agreement, he will have to give up his law license, perform 500 hours of community service, and spend 10 days in jail. See the article by Mark Godsey, http://huff.to/1bevuZ5.