***Policy of the Lake County State's Attorney's Office***
***Regarding Evidence & Witnesses That Must Disclosed Under Brady***

Because our job is to ensure justice and due process in every single case, it is our moral, ethical, and constitutional duty to disclose information to the defendant that negates the guilt of the defendant, supports suppression of evidence. or mitigates sentence. See Brady v. Maryland, 373 U.S. 83 (1963); Illinois Supreme Court Rule 412(c).

Illinois Rule of Professional Conduct 3.8(d) states:

> Prosecutors shall 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.

Supreme Court Rule 412(c): "the State shall disclose to defense counsel any material or information within its possession or **control** that tends to negate the guilt of the accuse as the offense charged or which tends to reduce punishment."

In 1985, the Court in United States v. Bagley eliminated the requirement that the defendant make a request for the evidence. **This placed a self-executing, affirmative obligation on the prosecution, independent of any defense action**. In 1995, the Supreme Court in Kyles v. Whitley extended Brady even further, announcing that "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." These extensions energized Brady's original due process power while also increasing the complexity of Brady analysis – ***especially with respect to credibility information outside the case at bar***.

For purposes of this policy, "Brady material" shall be defined as: information, whether written or unwritten, which tends to negate the guilt of the defendant, supports a motion to dismiss or suppress, or that mitigates the sentence of the defendant. **Type 1 Brady material** should be disclosed as soon as possible. And shall be disclosed in such a timely way that the information can be effectively used by the defense. **Type 2 Brady material** may be more sensitive and should be disclosed only in consultation with a supervisor. All staff is encouraged to consult with supervisors on Brady issues, but Type 2 disclosures *require* consultation with a supervisor. Below is a list of examples, but is not exhaustive:

**Type 1 Brady Material Requiring Immediate Disclosure *(WITHOUT DEFENSE MOTION):***

- Material that raises doubt to our case (e.g. forensics) or supports affirmative defense (e.g. self defense)
- Material that shows that evidence should be suppressed under statute or the constitution;
- recantations and/or inconsistent statements by victims and/or witnesses;
- the mere fact of whether a government witness is included on the "Brady list;"
- limitations on witnesses' ability to perceive including drug or alcohol use at the time of the incident;
- alternative suspects uncovered through forensic evidence or eyewitness identification
- failures to identify defendant in lineup or show up;
- criminal convictions and delinquent adjudications of witnesses under Rule 609;
- Information regarding biases of witnesses ("Biases" shall include, but not be limited to, any motivation whatsoever that a witness may have to provide false or exaggerated testimony due to: personal animus, financial interest, "deals" with prosecutors or police officers, pending cases with prosecutor's office even if no "deal," an interest in any litigation, and/or preservation of employment or status, animus based on race, gender, sexual orientation, religion, national origin, disability, veteran status.)
- reputation or character evidence about a witness regarding truthfulness under Rule 608;
- in self-defense cases, all Lynch material;

**Type 2 Brady Material Requiring Supervisor Consult and Possible Protective Order:**

- mental health/addiction information about a witness that undermines credibility;
- specific incidents or pattern of dishonesty outside the case that affect credibility or bias of witness
- propensity/other crimes evidence of alternative suspect[1];
- for experts, a pattern of confirmed performance errors that could compromise the expert's conclusions and/or a specific finding by a judge criticizing the expert's methods or conclusions;
- with respect to scientific, laboratory, and/or other potential expert witnesses, failure to pass job-related proficiency tests, exams, or assessments or any failures to obtain certifications or proficiency testing from third party vendors related to skills that may be the subject of testimony as it pertains to the specific case, their expertise, or their training; disagreement in expert field regarding methodology, etc
- for government and police witnesses, "Brady material" also includes: pending criminal charges even if they are not handled by SAO, any criminal conviction, a pattern and practice of ignoring constitutional rights and procedures; a pattern and practice of mishandling evidence; a pattern and practice of violating use-of-force policies; a pattern and practice of disobeying internal policies; lack of candor with a court; specific instances of dishonesty or lack of candor; behavior that compromises the integrity of an investigation; it is the responsibility of the State's Attorney to send letters to each head of every law enforcement agency requesting this information with respect to officers, but ASAs may also learn of this information on their own.
- **any Type 1 or Type 2 Brady material that is contained in a juvenile court file or in juvenile law enforcement records regarding any witness or victim whatsoever – even if the case is in "adult court."**

**General Principles**

Regarding the conduct of non-lawyers, Illinois Rule of Professional Conduct 5.3 provides mandatory direction: (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved. For purposes of the Brady policy and 5.3(b) and 5.3(c)(1), when an ASA and a victim witness coordinator are working together on a case, the ASA shall have "supervisory authority." Investigators, victim witness counselors, and victim witness advocates shall be bound by this policy insofar as they are aware of Brady material tied to a specific case.

Disclosure rules are separate from admissibility rules. It is the philosophy of this office to err on the side of over-disclosure. That is, this office will not engage in a strict materiality analysis **prior** to disclosure. "Materiality" is not the standard for disclosure; it is a test for courts to analyze whether a conviction should be overturned because the defense was not given information. See United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (2005) (recognizing that because it is difficult, if not impossible, to discern before trial what evidence will be deemed "material" after trial, the government should resolve doubts in favor of full disclosure).

Not all misconduct by a witness reflects upon the credibility of that witness. A witness being in a fight (that doesn't lead to a felony conviction) or even committing a DUI (that doesn't lead to a felony conviction) does not mean they lack credibility. Of course, a violent character or a substance abuse disorder *may* be relevant in certain instances.

[1] Other crimes evidence or propensity evidence is not usually admissible *against* a defendant. But the State has an obligation to tender information about alternative suspects who have a propensity to commit the crime at issue. People v. Cruz, 162 Ill. 2d 314, 362 (Ill. 1994).

Under 725 ILCS 5/114-13, police are required to furnish to our office Brady material. That is, police themselves must follow Brady. Under Supreme Court Rule 412(g), our office must expedite the flow of information from law enforcement agencies to defense counsel or to pro se defendants – including Brady material.

Finally, frivolous and false claims against police officers do not implicate Brady obligations. Having said that, our office is the arbiter of whether conduct reflects upon credibility, not the police disciplinary process. Practically, our law enforcement partners may rely upon their disciplinary procedure to determine when information should be sent to our office, but when an ASA, investigator, or VWC observes conduct that implicates Brady, they need not, and should not wait for a disciplinary determination by the agency. Similarly, a consistent pattern of allegations against an officer or an extremely serious allegation may warrant an independent investigation by our office separate from or even despite a disciplinary determination in favor of the officer. In this way, our office acts as a vital "check and balance" with respect to law enforcement. (Special care shall be used to protect confidentiality regarding unfounded allegations unless Brady requires disclosure at some point. (See Rule 5 below.)

This policy is intended to advance and ensure transparent disclosure. We recognize that appellate review may endorse that a prosecutor need not have disclosed information or that a conviction remains despite a failure to disclose. However, these appellate opinions may have taken years to resolve and do not form the basis of this office's transparent disclosure policy. Insofar as caselaw *requires* disclosure, caselaw trumps this policy. Where this policy dictates additional disclosure, this policy prevails with the caveats regarding court intervention described below.

It is the policy of this office to fully comply with all Brady obligations under the applicable law and ethical obligations. Failure to comply with these 15 rules below will result in discipline up to termination.

1) Prosecutors shall as soon as possible disclose to the defense (defense counsel/*pro* se defendants) all **Type 1 Brady material**, including the fact that a witness is on a "Brady list" maintained by the office. (See Rule #3.)

2) Regarding all "Type 2" Brady material, the prosecutor shall meet with the supervisor to discuss what material should be disclosed. This includes determining the level of specificity of material to be disclosed, whether motions by the State are needed, and/or whether a protective order is warranted.

3) Regarding police officers on the "Brady list," when the prosecutor learns a witness-officer is on the "Brady list," the prosecutor shall promptly inform their supervisor. The prosecutor shall also inform the defense of the "mere fact" that the officer is on the list. The supervisor shall then send the defense the formal letter. The supervisor and ASA shall also determine specificity of disclosure, whether a motion is needed, and whether a protective order is needed. It must be emphasized, the "Brady list" is a *disclosure mechanism* **not** bar on the officer testifying.

4) Prosecutors shall not disclose information to defense counsel that is protected by court order or by federal or state law. When the Brady obligation conflicts with a protective order or federal or state law, the prosecutor shall consult a supervisor, the First Assistant, or the State's Attorney with an eye toward resolving the conflict via motion practice and a court's ruling.

5) Brady material shall be confidential with respect to individuals outside of the office except insofar as it is required to be disclosed by Brady, Rule 3.8, and this Policy. Some material could be subject to FOIA, but Brady material must be handled with sensitivity and not discussed with those outside the office. When disclosing personnel records or other sensitive material, prosecutors shall seek a protective order from the court.

6) When a prosecutor is unsure if material falls under Brady, they shall immediately consult with a supervisor. In non-trial situations, the prosecutor shall seek a brief continuance if the proceedings hinge in some way upon a Brady determination. In trial situations or situations where the Court is not allowing a continuance, the information shall be disclosed unless it violates another court order or law. (See Rule #4.)

7) Whether information is "exculpatory" will often turn on the defense theory. Prosecutors should push the defense to file answers in felonies and to assert formal defenses prior to trial in misdemeanors. "[T]he 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 v. United States, 14 A.3d 1094, 1110 (D.C. 2011). **Disclose all Brady material regardless of whether there is an answer on file.**

8) "Brady" is a disclosure rule, not an admissibility rule. Prosecutors should argue against the admissibility of any evidence if it is warranted under Illinois law and good faith. But a prosecutor may not evade their Brady obligations by asserting to themself, to this office, or to the Court that the material was not *admissible*. Prosecutors are not the gatekeepers of admissibility.

9) Even in those cases in which the Supreme Court discovery rules do not apply, prosecutors shall follow Supreme Court Rules 412(f) and 412(g) and shall expedite the flow of evidence (including Brady material) to the defense. if the material is in the possession of the police or any other known governmental entity.

10) Prosecutors are responsible for the information known to the "prosecution team" under Kyles v. Whitney ("The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf.") Prosecutors shall ask law enforcement, expert witnesses, cooperating government entities, and witness advocates/counselors whether they are aware of any information that helps the defense in the specific case. (But see United States v. Joseph, 996 F. 2d 36, 41 (3d Cir. 1993) ([regarding Type 2/other case material, "where a prosecutor has no actual knowledge or cause to know of the existence of Brady material **in a file unrelated to the case under a prosecutio**n, a defendant, in order to trigger an examination of such unrelated files must make a specific request for the information.")

11) Prosecutors shall conduct background checks or "run LEADS" on all non-police and non-laboratory personnel. Prosecutors shall tender convictions and pending cases in a timely manner. If a conviction is disclosed in an untimely manner, the prosecution *shall* stipulate to the necessary facts to secure the impeachment of the witness.

12) Prosecutors should always have a "prover" when they are speaking with a witness. There are many times when this is not practical. If a witness makes an inconsistent statement or a statement that constitutes Brady material, the prosecutor shall write it down and then consult a supervisor. If unable to consult with a supervisor, the prosecutor shall disclose the information to the defense and also stipulate to the foundational facts of the conversation. Prosecutors may argue that the information is not admissible or even that it is too prejudicial, but they may not challenge the authenticity of a statement that they themselves collected. Prosecutors shall not unnecessarily seek a mistrial because they themselves are now a witness under Rule of Professional Conduct 3.7. Prosecutors shall first stipulate to the information with the hopes that the trial court will accept the stipulation. This stipulation makes the information "an uncontested issue" under Rule 3.7(a)(1).

13) When a prosecutor discovers that a witness lacks candor with the tribunal, possesses a bias as defined above, or otherwise engages in dishonest behavior in a professional setting, the prosecutor shall inform his or her supervisor who will take the information to the First Assistant for the witness's possible inclusion on the Brady list. (Pursuant to other policy, prosecutors shall report violations of the constitution to the State's Attorney in writing.)

14) Any employee who observes a failure to comply with this policy by another employee should, if practicable first address the matter with the non-compliant employee. It is understood by the State's Attorney that legal analysis under Brady can be complex (particularly with respect to Type 2 or non-case related materail), and that litigation creates time pressures. If it is not practicable to consult with the non-compliant employee, or if the non-compliant employee insists on failing to comply with this policy, the observing employee must report the situation to a supervisor, the First Assistant, or the State's Attorney.

15) Regarding Brady material being found in juvenile records, a few principles:

a. The State's Attorney's Office is one office, and the ethical obligations flow to all of us equally; no one shall view the Juvenile Division as separate or "walled off" for Brady purposes;

b. Attorneys may believe that the confidentiality of juvenile records as guaranteed by statute trumps Brady. But an Illinois statute does not and cannot overrule Due Process as guaranteed in Brady and its progeny; this policy **mandates that the tension between Brady and confidentiality be resolved**. Brady material shall not remain dormant simply because it is found in a juvenile records. Brady requires affirmative steps – even with juvenile records. (See below.)

c. Under 705 ILCS 405/5-905(1)(b) prosecutors are permitted access to juvenile law enforcement records in order to discharge their duties. Under 705 ILCS 405/5-901(1)(a)(iv), prosecutors are permitted access to a juvenile court records in order to discharge their duties. Under Rule of Professional Conduct 3.8 and Supreme Court Rule 412(c), complying with Brady is an official prosecutor duty. Since these two provisions make no reference to "prosecutors assigned to the juvenile division," no prosecutor working in the juvenile division shall withhold information from any other prosecutor in any division who is seeking to analyze whether Brady material exists in a juvenile record with respect to the adult case.

d. When a prosecutor working anywhere in the office becomes aware of any Brady material (for any defendant) that is located in a juvenile records, they shall promptly notify her supervisor, the First Assistant, or the State's Attorney. Those prosecutors shall then inform the defense of the "mere fact" of the existence of Brady material. The State shall then file a motion (or a joint motion with the defense) seeking Court permission to release the records to the defense under a protective order. No prosecutor shall oppose a motion to seek Brady material simply because it is contained in a juvenile record.

e. For attorneys assigned to the juvenile division, the process laid out in Rule 15(d) is not necessary when the Brady material and the juvenile respondent are in the same case. In other words, when Type 1 Brady material is found in a juvenile record and the information involves the same incident as the Petition for Adjudication, the ASA need not consult a supervisor to release the information. **But there may be Brady material in juvenile records that affect petitions unrelated to the records. In those cases, the juvenile Brady material would be Type 2 Brady material, and Rule 14(d) would apply.**