Fifty Shades of *Brady*

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I. Leading *Brady* cases.

A. *Brady v. Maryland*, 373 U.S. 83, 87 (1963): "[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." Evidence at issue: Felony-murder codefendant's confession to the actual killing. Holding: Evidence was material to punishment but not to guilt; conviction affirmed.

B. *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 promise made by one attorney must be attributed, for [*Brady*] purposes, to the Government . . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Evidence at issue: One Assistant U.S. Attorney's promises to a key witness. Holding: Evidence was material to guilt; new trial ordered.

C. *United States. v. Agurs*, 427 U.S. 97, 107 (1976): A prosecutor's *Brady* duty arises even absent a request by defense counsel. Evidence at issue: Homicide victim's criminal record (in self-defense case). Holding: Evidence was not material; conviction affirmed.

D. *United States v. Bagley*, 473 U.S. 667, 676 (1985): "Impeachment evidence . . . as well as exculpatory evidence, falls within the

Brady rule." Evidence at issue: Informant contracts with government witnesses in drug case. Holding: Remanded for reconsideration of materiality by Ninth Circuit (conviction reversed on remand).

E. *Kyles v. Whitely*, 514 U.S. 419, 437 (1995): A prosecutor's *Brady* duty encompasses evidence "known only to police investigators and not to the prosecutor"; therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Evidence at issue: A host of clearly favorable evidence. Holding: Evidence was material; conviction reversed.

II. To what proceedings does *Brady* apply? *Brady* itself speaks of evidence "material either to guilt or to punishment." But what about evidence material to pretrial motions?

The Tenth Circuit has questioned "[w]hether *Brady's* disclosure requirements even apply at the motion to suppress stage," calling this "an open question." *United States v. Lee Vang Lor*, 706 F.3d 1252, 1256 n.2 (10th Cir. 2013), *citing United States v. Stott*, 245 F.3d 890, 902 (7th Cir. 2001) (discussing cases from various circuits). *But see* D. Mass. Local R. 116.2(a)(2) ("Exculpatory information is information that is material and favorable to the accused and includes, but is not necessarily limited to, information that tends to . . . cast doubt on the admissibility of evidence that the government anticipates using in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731.").

Facts relevant to motions to suppress and other pretrial motions are often, if not always, equally relevant at trial. As the *Kyles* Court recognized, *Brady* evidence includes evidence that would raise opportunities for attacking "the thoroughness and even the good faith of the investigation." *Kyles*, 514 U.S. at 445.

The question may come down to one of timing: *When* must the government disclose *Brady* evidence that is material to pretrial motions as well as to the trial itself? *See* Section VIII, below.

III. Your wish is *Brady's* command.

A. Be specific in making *Brady* requests to put the prosecutor on notice that, yes, *Brady* does encompass all of these categories of evidence. For instance:

1. In a sex case or other case heavily dependent on the complainant or another witness:

a. ***Inconsistent statements***, regardless of form or to whom they were made. *Love v. Freeman*, 1999 WL 671939 at *5-7 (4th Cir. 1999) (unpublished) (granting federal habeas relief and reversing state child-sex convictions on *Brady* grounds where prosecution suppressed, among other evidence, inconsistencies in details of child's various accounts); *State v. Carroll*, 2007 WL 2874353 at *10-13 (Ohio App. 6 Dist. 2007) (unpublished) (reversing convictions on seven counts of child-sex crimes on *Brady* grounds where prosecutor suppressed police report containing summary of complainant's statements, which were inconsistent with complainant's trial testimony); *State v. Scheidel*, 844 N.E.2d 1248, 1250-53 (Ohio App. 11 Dist. 2006) (reversing child-rape and other convictions on *Brady* grounds where prosecutor suppressed deputy's notes of child's statements that were inconsistent with child's other statements); *State v. Gonzalez*, 624 N.W.2d 836, 839-40 (S.D. 2001) (reversing attempted statutory-rape convictions where prosecutor violated *Brady* by refusing to disclose complainant's counselor's notes, which revealed inconsistencies in complainant's accounts of alleged assaults), abrogated on other grounds by *State v. Leisinger*, 670 N.W.2d 371 (S.D. 2003); *State v. Youngblood*, 650 S.E.2d 119, 129-33 (W. Va. 2007) (reversing sexual-assault convictions on *Brady* grounds where State failed to turn over note found by police that suggested that complainant told witness that she engaged in

consensual sex act with defendant), *on remand from Youngblood v. West Virginia*, 547 U.S. 867 (2006).

b. Statements indicating ***denials, recantations, vacillation, or uncertainty***, regardless of form or to whom they were made. *Norton v. Spencer*, 351 F.3d 1, 6-9 (1st Cir. 2003) (affirming federal habeas order reversing state child-sex convictions on *Brady* grounds where prosecution failed to disclose evidence that co-complainant told prosecutor that he and complainant had fabricated their allegations); *Brownlow v. Schofield*, 587 S.E.2d 647, 649-50 (Ga. 2003) (reversing child-sex convictions on *Brady* grounds where prosecutor did not reveal to defense counsel that, when prosecutor interviewed child ten days before trial and asked him whether defendant put his mouth on child's penis, child "responded by shaking his head negatively"); *Commonwealth v. Baran*, 905 N.E.2d 1122, 1155 (Mass. App. 2009) (affirming grant of new trial in child-sex case where children's "significant vacillation and uncertainty," revealed in unedited versions of taped interviews, should have been disclosed under *Brady*); *Ex parte Johnson*, 2009 WL 1396807 at *1-3 (Tex. Crim. App. 2009) (unpublished) (setting aside guilty plea entered on morning of trial to charge of aggravated sexual assault of a child; prosecutor violated *Brady* by failing to disclose child's recantation on day before scheduled trial, and fact that child did not show up for trial); *Spray v. State*, 2001 WL 522004 at *1-2 (Tex. App. 2001) (unpublished) (reversing child-sex conviction on *Brady* grounds where prosecutor failed to disclose that complainant's sister—who testified that defendant had victimized both complainant and her—had denied any abuse to Child Protective Services); *State v. Farris*, 656 S.E.2d 121, 126-28 (W. Va. 2007) (reversing child-sex convictions on Brady grounds where prosecution failed to disclose child witness's statements during forensic psychological

exam that abuse did not occur).

c. Evidence that might support an inference that the complainant or witness was ***sexually abused by another***. *Love*, 1999 WL 671939 at *13 (granting federal habeas relief and reversing state child-sex convictions on *Brady* grounds where prosecution suppressed, among other evidence, evidence of mother's statement that child had previously been raped; evidence would have provided alternative explanation for medical evidence); *Baran*, 905 N.E.2d at 1155 (noting that such evidence might be used "either for impeachment or to rebut allegations of age-inappropriate sexual knowledge").

d. Evidence indicating a witness's or complainant's ***bias or motive*** to testify against the defendant. *State v. Sells*, 844 A.2d 235, 244-46 (Conn. App. 2004) (psychological report containing evidence of complainant's bias and motive was exculpatory under *Brady*, and should have been provided to defendant), *overruled on other grounds by State v. Kemah*, 957 A.2d 852 (Conn. 2008); *People v. Stein*, 10 A.D.3d 406, 407 (N.Y.A.D. 2 Dept. 2004) (reversing child-sex convictions on *Brady* grounds where prosecutor did not disclose fact that complainants were pursuing civil suit against defendant's school-district employer); *Farris*, 656 S.E.2d at 127-28 (reversing child-sex convictions on *Brady* grounds where prosecution failed to disclose forensic psychological report containing child's statement that she was threatened by mother of co-complainants to "go along with the [abuse] story").

e. Evidence raising questions about a witness's or complainant's ***capacity to observe, recollect, or narrate*** an occurrence. *East v. Johnson*, 123 F.3d 235, 237-40 (5th Cir. 1997) (granting federal habeas relief and reversing state death sentence on *Brady*

grounds where state suppressed evidence that would have led to discovery that witness who testified that defendant raped her "experienced bizarre sexual hallucinations" and "was incapable of distinguishing between reality and the fantasies"); *United States v. Gray*, 52 Fed. Appx. 945, 946-48 (9th Cir. 2002) (reversing child-rape conviction on *Brady* grounds where government tardily disclosed medical records that revealed complainant as emotionally disturbed and suffering from distorted perceptions); *Browning v. Trammell*, 717 F.3d 1092, 1105-08 (10th Cir. 2013) (affirming grant of federal habeas relief and reversing state murder convictions where state violated *Brady* by suppressing witness's mental-health records indicating that witness "blurred reality and fantasy, suffered from memory deficits, tended to project blame onto others, and had an assaultive, combative, and even potentially homicidal disposition"); *Sells*, 844 A.2d at 246-48 (psychological report containing evidence that complainant's cognitive functioning was impaired constituted *Brady* evidence subject to disclosure).

f. Evidence that a complainant or accusing witness has made apparently ***false accusations*** in the past. *Mathis v. Berghuis*, 202 F.Supp.2d 715, 718-24 (E.D. Mich. 2002) (granting federal habeas relief and reversing state sexual-conduct convictions on *Brady* grounds where prosecutor failed to discover and disclose evidence that complainant had previously made unsupported reports to police about being the victim of violent crime), *aff'd*, 90 Fed. Appx. 101 (6th Cir. 2004); *State v. Smith*, 2008 WL 5272480 at *10 (Tenn. Crim. App. 2008) (unpublished) (reversing child-rape convictions where prosecutor violated *Brady* by suppressing, among other things, evidence that complainant had previously made abuse claims that a state agency had found "not credible").

g. ***Exculpatory opinions about and observations of the complainant or witness by others***. *Love*, 1999 WL 671939 at *8-9 (granting federal habeas relief and reversing state child-sex convictions on *Brady* grounds where prosecution suppressed, among other evidence, opinion of multiple witnesses that child frequently lied and suffered from emotional problems); *People v. Ramos*, 201 A.D.2d 78, 83-90 (N.Y.A.D. 1 Dept. 1994) (reversing child-rape conviction on *Brady* grounds where prosecution withheld evidence demonstrating that child complainant was streetwise and sexually knowledgeable, masturbated openly in class, and was suspected by teachers of making false accusations before she ever met defendant); *Ex parte Johnson*, 2009 WL 1396807 at *2-3 (setting aside guilty plea to charge of aggravated sexual assault of a child on *Brady* grounds where prosecutor failed to disclose fact that school officials described complainant as "a great liar").

h. Evidence that the complainant's or witness's accusations may have resulted from ***suggestion or influence***. *Jean v. Rice*, 945 F.2d 82, 84-87 (4th Cir. 1991) (granting federal habeas relief and reversing rape and sexual-assault convictions on *Brady* grounds where prosecutor failed to disclose recordings and reports of hypnosis of both complainant and investigating officer); *People v. Kazakevicius*, 2003 WL 21190612 at *1-2 (Mich. App. 2003) (unpublished) (reversing sexual-conduct convictions on *Brady* grounds where prosecutor refused to disclose counseling records that indicated "that the victim had suppressed her memories of the alleged sexual abuse for several years; that it was through counseling that these memories resurfaced; that the victim still did not have a complete memory of what allegedly happened; and that the victim's memories may have been triggered by a form of hypnosis during

counseling"); *State v. Aldridge*, 697 N.E.2d 228, 242-45 (Ohio App. 2 Dist. 1997) (affirming grant of new trial in child-sex case; prosecutor violated *Brady* by hiding, among other things, evidence that children were threatened and coached by police into accusing defendants and lying at trial).

2. In a case relying on physical evidence and/or expert testimony:

   a. ***Written*** reports. *Bailey v. Rae*, 339 F.3d 1107, 1114-19 (9th Cir. 2003) (state prosecutor violated Brady by failing to disclose exculpatory therapy reports indicating rape complainant's capacity to consent).

   b. ***Oral*** reports. *Willis v. Cockrell*, No. P-01-CA-20, 2004 WL 1812698 (W.D. Tex. Aug. 2004) (failure to disclose expert's oral and written conclusions that capital defendant was not a future danger violated *Brady*); *People v. Jackson*, 198 A.D.2d 301 (N.Y.A.D. 2 Dept. 1993) (prosecutor violated *Brady* by not disclosing to defense that expert had told several prosecutors that fire at issue in arson case was accident, and had been improperly investigated); *Ham v. State*, 760 S.W.2d 55 (Tex. App. 1988) (failure to disclose expert's oral report that undermined State's shaken-baby case against defendant was *Brady* violation).

   c. ***Follow-up*** reports. *Carroll v. State*, 474 S.E.2d 737 (Ga. App. 1996) (prosecutor violated *Brady* by failing to disclose expert's exculpatory reassessment of speed calculation and accident cause in vehicular homicide case).

   d. ***Photos and videos***. *Love*, 1999 WL 671939 at *11 (granting federal habeas relief and reversing state child-sex convictions on *Brady* grounds where prosecution suppressed, among other evidence, colposcopic slides); *People v. Uribe*, 162 Cal. App. 4th

1457, 1474-82 (Cal. App. 6 Dist. 2008) (reversing child-sex convictions on *Brady* grounds where prosecution suppressed SART video that corroborated defense expert's testimony and impeached prosecution expert).

B. Ask (fish) for what you don't even know exists, for instance, disclosure of all "methods and standards of surveillance, testing, and recording of persons, communications, and physical evidence, as well as the fruits of such surveillance, testing, and recording."

1. GPS and other physical ***tracking*** devices.

2. Digital ***snooping*** programs and devices.

3. Google Glass, taser cameras, and other ***recording*** devices.

4. *Drones and other robots?*

C. A *Brady* order will allow the court to issue contempt citations to deliberately recalcitrant prosecutors. *See* Barry Scheck & Judge Nancy Gertner, *Combating Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, 37-MAY CHAMPION 40, 41 (2013).

D. Be suspicious, trust your gut, and follow up.

1. When a prosecutor says "you have everything we have," question whether the government has fulfilled its obligation to actively seek evidence from the police and other government agencies.

2. Do not count on the prosecutor's "open file" policy as a substitute for *Brady*. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999) (defense counsel did not file *Brady* motion given prosecutor's "open file" policy, and did not learn until postconviction proceedings that prosecutor's file did not include exculpatory evidence that remained in possession of police).

3. Never "admit" in a pretrial conference order or journal entry after a discovery hearing that you have received everything to which your client is entitled. How can you know?

E. Ask repeatedly. Ira Mickenberg of the National Defender Training Project suggests that counsel make *Brady* requests:

1. In pre-trial motions.

2. Just before trial begins—to make sure that nothing has come up that the prosecutor has neglected to mention.

3. After the prosecutor's opening—to make sure there is nothing that may be in conflict with what the prosecutor has just told the jury.

4. After the direct examination of every State's witness—to make sure the prosecutor doesn't possess something that contradicts the testimony the witness just gave.

5. After the prosecutor's closing—for the same reason you ask for it after his or her opening.

6. Before sentencing—to make sure the State is not withholding anything that would mitigate sentence.

Ira Mickenberg, A PRACTICAL GUIDE TO BRADY MOTIONS (2008), available at http://www.ncids.org/Defender%20Training/2008%20New%20Felony%20Defender%20Training/BradyHandout.pdf.

IV. Standards? What standards?

A. The "materiality" standard is meaningless before trial. If evidence is "favorable," it must be disclosed. Only *after* trial—when an appellate court is weighing the harm from a prosecutor's failure to disclose favorable evidence—is the materiality of the evidence relevant. *See United States v. Danielczyk*, 2013 WL 142460, *2 (E.D. Va. Jan. 10, 2013) (noting that "materiality . . . is a

standard articulated in the post-conviction context for appellate review. In this pretrial setting, such a standard is far less useful, and courts have held that circumstances necessitate a somewhat different inquiry. . . . Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial.") (citations omitted). *See also* JaneAnne Murray, *The Brady Battle*, 37-MAY CHAMPION 72, 73 (2013) ("A key component of an effective defense *Brady* strategy is challenging the prosecutor's pretrial reliance on the appellate materiality standard."); Ellen Yaroshefsky, *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, 37-MAY CHAMPION 12, 14 (2013) (noting that "prosecutors often reflexively used [*Brady's*] *appellate* standard of materiality to define their pretrial obligation"); *but see* Alafair Burke, *Commentary, Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576 (2007) (arguing that *Brady's* materiality prong forces prosecutors to ask, before trial, "Do I think this piece of evidence is sufficient to undermine my confidence in a guilty verdict I haven't yet achieved?").

B. Who decides what evidence is favorable, and how?

1. The prosecutor? "[B]ecause the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). In other words, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles v. Whitely*, 514 U.S. 419, 439 (1995).

   No matter how many reams of paper (or gigabytes of digital files) are involved, "the prosecution has the duty to affirmatively scour those records of the agencies considered the 'government' for purposes of the criminal case in order to determine and acquire those materials which would be considered *Brady* exculpatory and *Giglio* impeaching. "

United States v. Salyer, 2010 WL 3036444 at *3 (E.D. Cal. 2010) (unpublished).

The mixed significance of evidence does not relieve a prosecutor of the obligation to disclose the evidence. For instance, a witness's mental condition might be viewed either as having resulted from victimization, or as having contributed to a false report of victimization. This ambiguity "is not enough to undermine the materiality" of such evidence. *Browning v. Trammell*, 717 F.3d 1092, 1107-08 (10th Cir. 2013). The evidence is subject to disclosure even if the jury could view it as incriminating. *Id.*, *citing Smith v. Cain*, ___ U.S. ___, 132 S.Ct. 627, 630 (2012).

Thus, a prosecutor may not "cherry-pick[] isolated references" in a report or statement in order to characterize it as inculpatory and therefore not subject to *Brady* disclosure. *Bailey v. Rae*, 339 F.3d 1107, 1115 (9th Cir. 2003). "To say that evidence is 'exculpatory' does not mean that it benefits the defense in every regard or that the evidence will result in the defendant's acquittal. Rather, the preliminary inquiry in a *Brady* claim has always been whether the evidence in question is 'favorable' to the accused." *Id.* Thus, if the "overall character" of a report or statement is favorable, it must be disclosed "even though it also contain[s] unfavorable information." *Willis v. Cockrell*, No. P-01-CA-20, 2004 WL 1812698 at *20 (W.D. Tex. Aug. 2004) (unpublished).

2. The judge? The Tenth Circuit allows for *in camera* review of government files for *Brady* material only upon a "plausible showing" that inspection will reveal material evidence. *United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987).

V. How far must the government dig?

A. In federal court.

1. ***Federal agencies***. "Defining the 'government' is important in criminal discovery matters because the prosecution does not have to scour the files of every governmental agency on the chance that some pertinent information, or information that the defendant deems pertinent, may be disclosed . . . . The prosecution does not become the FOIA (Freedom of Information Act) agent for the defense. However, '[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.'" *United States v. Salyer*, 271 F.R.D. 148, 156 (E.D. Cal. 2010). "A prosecutor may have a duty to search files maintained by other 'governmental agencies closely aligned with the prosecution' when there is 'some reasonable prospect or notice of finding exculpatory evidence.' " *United States v. Padilla*, 2011 WL 1103876, at *7 (D. N.M. March 14, 2011) (citation omitted).

2. ***Stage agencies***. The Tenth Circuit has declined to impute a state agency's knowledge and possession of exculpatory evidence to the federal government. *See United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). However, the Circuit has left open the possibility that such imputation might be made in a case involving a joint federal-state investigation. *Id*. at 1304 n.2.

3. ***Foreign governments***. *See United States v. Roueche*, 2009 WL 1011634, at *3 (W.D. Wash. April 15, 2009) ("While the Court expects the government to do everything within its means to clarify its request and convey to Canadian officials the significance of the *Brady* principle to the U.S. justice system, it cannot order the government to do any more than request the information from Canadian authorities.").

4. Note the Tenth Circuit's reluctance to push the prosecutor in this regard: "We do not think prosecutors have a duty to investigate officers' actions in entirely unrelated cases just in case some impeaching evidence may show up." *United*

States v. Lee Vang Lor, 706 F.3d 1252, 1259 (10th Cir. 2013).

B. In state court.

SART personnel were "part of the 'prosecution team' for *Brady* purposes," and their knowledge of the existence of a SART video would be "imputed to the prosecution." *People v. Uribe*, 162 Cal. App. 4th 1457, 1481 (Cal. App. 6 Dist. 2008).

VI. Must defense counsel exercise due diligence to discovery *Brady* evidence without the government's help?

A. Any such requirement seems contrary to *Brady*, which doesn't include it, and seems to suggest the opposite. Kate Weisburd, *Prosecutors Hide, Defendants Seek: the Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2012).

B. What if your client "should know" the *Brady* evidence you want disclosed? *See Carter v. Bell*, 218 F.3d 581, 601, 603 (6th Cir. 2000) (holding that there is "no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question," and that "[i]t cannot be error for the prosecution to fail to disclose [the defendant's] own knowing actions"). *But see Rompilla v. Beard*, 545 U.S. 374 (2005) (lawyer who failed to review defendant's prior-conviction file was ineffective: "No reasonable lawyer would forgo examination of the file *thinking he could do as well by asking the defendant* or family relations whether they recalled anything helpful or damaging in the prior victim's testimony.") (emphasis added); *Yoon v. United States*, 594 A.2d 1056, 1063 (D.C. 1991) (observing that "[d]iscovery of the government's evidence of relevant and incriminating statements made by a defendant to police is of the utmost importance to the preparation of the defense as it must be kept in mind that given the traumatic circumstances of arrest the memory of a defendant as to exactly what occurred may well be hazy and defective. Even where a defendant's memory is crystal clear, it is not every defendant who chooses to tell his own attorney all that he remembers"; reversing

conviction where government delayed disclosure of discoverable defendant's statement); *State v. Harrington*, 534 S.W.2d 44, 47 (Mo. 1976) (reversing murder conviction, in part because State refused counsel's requests for pretrial discovery of defendant's statements).

C. The Tenth Circuit has pointed out that, while what defense counsel "should have known" may be relevant on appeal when deciding whether suppressed evidence was material, it makes no difference at the trial level:

> Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation. Obviously, if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material . . . .
>
> However, the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, "[i]f the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made." . . . . In this case, the fact that defense counsel "knew or should have known" about the Dean/Hicks information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

United States v. Banks, 54 F.3d 1508, 1517 (10th Cir. 1995) (internal citations omitted.

VII. "We want to—we really do!—but we can't."

A. National security is at stake! *See United States v. Lindh*, 198 F.Supp. 2d 739, 741 n.3 (E.D. Va. 2002) (district court reviewed sensitive materials *in camera* to determine whether redactions contained any *Brady* material); *In re Guantanamo Detainee Cases*, 344 F.Supp. 2d 174 (D.D.C. 2004) (granting defense counsel conditional limited access to "classified national security information").

B. But . . . but: HIPAA! *See State v. Cote*, 2010 WL 3760637, at *12 (Tenn. Crim. App. Sept. 28, 2010) (unpublished) (noting HIPAA's provisions for disclosure pursuant to a court order and concluding that "the public policy concerns surrounding confidentiality do not outweigh a criminal defendant's right to due process. Upon the defendants' threshold showing of plausibility that the information sought is material and favorable to their defense, the trial court is vested with the authority to order an in camera review"); *United States v. James*, 2007 WL 914242, at *30 (E.D.N.Y. March 21, 2007) (unpublished) (rejecting government's HIPAA objection to disclosing records). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (discussing *in camera Brady* review of evidence subject to state privilege statute).

C. It's protected work product! *See United States v. Salyer*, 2010 WL 3036444 at *2 (E.D. Cal. 2010) (unpublished) ("when a court compels the government to identify and/or disclose *Brady/Giglio* material from documents acquired from third parties or entities, that identification, much like every other compelled identification or disclosure in the Rules, is not the revelation of protected work product").

VIII. It's all in the timing. *See, generally, United States v. Harry*, 2013 WL 684671, at *5 (D.N.M. Feb. 6, 2013) (unpublished); JaneAnne Murray, *The Brady Battle*, 37-MAY CHAMPION 72, 73 (2013).

A. Must *Brady* evidence be disclosed before a plea? Generally speaking, "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002). *But see United States v. Ohiri*, 133 Fed.

Appx. 555 (10th Cir. 2005) (distinguishing *Ruiz* in case where evidence was exculpatory, not merely impeaching, and plea was entered the day before trial, when all discovery should have been completed).

B. Must *Brady* evidence be disclosed before a witness testifies, notwithstanding the Jencks Act? "It is an open question in this [the Tenth] circuit, and there is a conflict among the circuits, as to the timing of disclosure of witness statements subject to the Jencks Act that also meet the *Brady* criteria." *United States v. Lujan*, 530 F.Supp.2d 1224, 1256 (D.N.M. 2008) (discussing cases); *see also United States v. Rittweger*, 524 F.3d 171, 181 n.4 (2d Cir. 2008) (*Brady* is "a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500").

IX. What other tools do we have for demanding exculpatory evidence?

A. The rules of professional conduct:

> The prosecutor in a criminal case 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.

K.R.P.C. 3.8(d). *See* Barry Scheck & Judge Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, 37-MAY CHAMPION 40 (2013).

B. ABA PROSECUTION FUNCTION STANDARD 3-3.11.

C. U.S. ATTY MANUAL §§ 9-5.001, 9-5.100, 9-2.159.

D. Guidance for Prosecutors Regarding Criminal Discovery, Jan. 4, 2010, available at

http://www.justice.gov/dag/discovery-guidance.html.

E. The confrontation clause. *See* Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, 37-MAY CHAMPION 26, 30-31 (2013).

F. The right to counsel. *See* Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, 37-MAY CHAMPION 26, 32 (2013).

X. Enough about exculpatory evidence. What about *inculpatory* evidence?

A. ***In Kansas***: While the prosecutor's federal *Brady* obligations do not extend to purely *inculpatory* evidence, the Kansas appellate courts have held that fundamental fairness calls for the State to promptly disclose such evidence if its suppression until trial would "serve[] to mislead the defense." *State v. Grey*, 46 Kan. App. 2d 988, 1000 (2012) (where prosecutor previously represented that rape complainant could not identify defendant as her attacker, prosecutor improperly hid until mid-trial late-breaking inculpatory fact that complainant would identify defendant at trial); *see also State v. Campbell*, 29 Kan. App. 2d 50, 60-61 (2001) (where prosecutor assured court and defense counsel that no evidence existed to establish victim's time of death, prosecutor improperly withheld inculpatory time-of-death evidence until trial); *State v. Lewis,* 238 Kan. 94, 97 (1985) (prosecutor should not have withheld until mid-trial inculpatory fact that chemist found blood on knife; fact was contrary to the chemist's original, uncorrected report provided in discovery, and "destroyed the defense strategy").

B. ***In federal court***: The Tenth Circuit has noted generally that "*Brady* . . . mandates the disclosure of *exculpatory*, not *inculpatory* evidence." *United States v. Rivera*, 478 Fed. Appx. 509, 510 (10th Cir. 2012). But the Eleventh Circuit has allowed that "under certain circumstances the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process." *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987). The *Lindsey* Court offered the following

example, which jibes with the Kansas cases cited above: "For example, a trial could be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable to effectively counter that evidence upon its subsequent introduction at trial." *Id*.