

	<p>Brady v Maryland: Do you Understand your Obligations?</p> <p>By Steve Rothlein</p> <p>Legal & Liability Risk Management Institute</p>	
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Definitions:

- a. **Duty to Disclose:** The landmark decision of *Brady v Maryland* (1963) places an affirmative constitutional duty on a prosecutor to disclose exculpatory evidence to a defendant. This duty has been extended to police agencies through case law, requiring law enforcement agencies to notify the prosecutor of any potential exculpatory information.
- b. **Exculpatory Evidence/Brady Material:** Evidence in the government’s possession that is favorable to the accused and that is material to either guilt or punishment, including evidence that may impact the credibility of a witness.

The landmark decision of *Brady v Maryland* and¹ its progeny is perhaps one of the most significant Supreme Court decisions to ever impact the criminal justice system. Unfortunately, many law enforcement agencies nationwide have failed to train their officers on their obligations to disclose exculpatory material as a result of the Brady decision.

In 1963, the Supreme Court ruled in the *Brady* case that the government has a duty to disclose material evidence to the defense, which could tend to change the outcome of a trial. This exculpatory evidence, often referred to as “Brady Material,” could tend to prove that the accused party is innocent or cast doubt of their guilt.

What does this mean in realistic terms for law enforcement officers? The following are just a few examples of the types of situations in which investigators could find themselves aware of exculpatory evidence, which should be documented and provided to the prosecuting authorities. It is the prosecutor, under Brady, who must decide if the information is exculpatory and whether it must be disclosed to the defense. The law enforcement officer’s obligation is to inform the prosecutor of the information.

Consider the following hypothetical examples:

- 1. Detective Jones is handling a rape investigation and develops information of a potential suspect who was seen leaving the scene in a white pick-up truck. The

- investigator displays a photo line-up to the victim and she identifies the suspect, who does own a white pick-up. No forensic evidence connecting the suspect to the crime is initially discovered. During the course of the investigation, a witness is located during the area canvass who claims to have seen a beige pick-up truck in the area driven by a dark skinned male in his 30's. The identified suspect is a light skinned male in his 20's. The investigator does not document this information in his report because it contradicts the probable cause he has developed in his case.
2. Detective Smith is handling a murder investigation. He develops a suspect who is of limited intelligence and brings him to the station for questioning. After questioning him over a period of days, he informs the suspect that if he confesses, he will be allowed to go home. The suspect confesses and is taken into custody and charged with murder. Detective Smith fails to document his promise of allowing the suspect to go home in exchange for confessing, and does not inform the prosecutor.
 3. Detective White is handling a robbery investigation in which a victim is shot. He discovers a footprint near the scene, which he has photographed and lifted. He subsequently arrests a suspect who is wearing a size 9 shoe. The foot print is a size 11 sneaker and Detective White discards the footprint evidence believing it is unrelated to the crime. He fails to document this information.
 4. Detective Evans displays photo line-ups to three witnesses. Two of the witnesses identify a suspect; however, the third witness fails to identify anybody. Detective Evans documents the two positive identifications but does not document that the third witness failed to identify the suspect and Detective Evans never informs the prosecutor.
 5. Detective Williams is the lead detective in a homicide case and took a confession from the defendant. His supervisor is aware that five years earlier, Williams received a suspension falsifying a police report. This information is never reported to the prosecutor.

In all of these cases, the suspects are convicted, incarcerated, and later declared innocent as a result of DNA evidence, which was not available at the time of the original investigations. Following their release, all of the individuals file multi-million dollar lawsuits against the investigators, their supervisors, and their agencies for Brady violations. Their attorneys argue successfully that had their defense attorneys been provided with the exculpatory evidence in these cases, the defendant's might not have been wrongfully convicted.

The first question that will be asked during the litigation will be did the investigators receive any training about their duty to disclose exculpatory evidence and, secondly, did the agency have a policy in their departmental regulations requiring officers to disclose exculpatory evidence. If the answer is no training was provided and no policy existed, the

agencies will likely be liable for substantial damages for failing in their duties under *Brady v Maryland* to disclose exculpatory evidence.

In 1972, the *Giglio v United States*ⁱⁱ case expanded the *Brady* decision to require prosecutors to provide information to the defense counsel which could tend to impeach a witness. For example, if a witness is motivated to testify in exchange for a lighter sentence, that information must be disclosed. This includes information about the credibility and veracity of the testimony of police officers. If an officer has a past record of falsifying reports or other conduct which could impact their truthfulness, the *Giglio* Case requires that the prosecutor provide the defense with that information.

Note: It is critical that when an agency sustains charges against an officer for falsification that they ensure they have the required evidence to support that charge. Having a sustained allegation for falsification can effectively destroy an officer's career since he/she will forever be an impeachable witness.

The best defense against the civil litigation filed as a result of *Brady v Maryland* is to ensure the following has been accomplished:

- All officers have been properly trained on their obligations and duty to disclose exculpatory material.
- The agency has a policy which requires that officers document exculpatory information and provide it to the prosecutors.
- The agency has informed investigators via training and policy concerning their obligations as a result of the *Giglio* Case, including informing prosecutors of information which could impeach the testimony of their officers. Law enforcement agencies should reach an agreement with their prosecutors on the best mechanism for handling the *Giglio* issues involving police officers.

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

ⁱⁱ *Giglio v. United States*, 450 U.S. 150 (1972).

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