



FIFTY STATE REVIEW OF DISCOVERY PROVISIONS CONTAINING THE “BRADY DUTY” TO DISCLOSE FAVORABLE EVIDENCE

2013 SB 492-A

SUMMARY

The “Brady duty” provides:

“The suppression by the prosecution of evidence favorable to and requested by an accused 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 US 83 (1963).

“Brady evidence” includes evidence that would impeach a state’s witness, tend to negate the accused’s guilt, undermine the government’s theory of the case, or mitigate the determination of sentence. *Giglio v. United States*, 405 US 150 (1972); *Kyles v. Whitley*, 514 US 419 (1995).

Subsequent case law has clarified that the duty to disclose *Brady* material exists whether or not the defendant makes a specific request. *Strickler v. Greene*, 527 US 263 (1999); *United States v. Agurs*, 427 US 97 (1976).

Twenty-nine (29) states address the “Brady duty” in their discovery provisions (note: Maryland is counted twice):

- **Fifteen (15) states use language “tends to mitigate” or “tends to negate”:** Alaska · Arizona · Arkansas · Colorado · Florida · Hawaii · Idaho · Illinois · Maryland (uses both “exculpatory” and “negate”) · Minnesota · Missouri · Montana · Utah · Vermont · Washington
- **Nine (9) states use language “exculpatory”:** Alabama · California · Connecticut · Maryland (uses both “exculpatory” and “negate”) · Massachusetts · Michigan · Mississippi · New Jersey · Wisconsin

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- **Five (5) states use language “favorable”:** Louisiana • New Mexico • Ohio • Oklahoma • Pennsylvania

- **One (1) state uses language “raises a reasonable doubt”:** Maine

- **Five (5) states use a hybrid/varied approach:**

Nebraska (Discovery statute is to read more broad than federal standard)

Texas (Duties of district attorneys requires them to not suppress or secrete witnesses capable of establishing innocence)

New York (Discovery statute provides the prosecutor is bound to disclose information as required by the Constitution)

Nevada (Discovery statute provides the prosecutor is bound to disclose information as required by the Constitution)

Tennessee (Advisory notes to discovery statutes expressly states that *Brady v. Maryland* is to be read into discovery rules)

- **Seventeen (17) states contain no Brady provision:**

Delaware • Georgia • Indiana • Iowa • Kansas • Kentucky • New Hampshire • North Carolina • North Dakota • Oregon • Rhode Island • South Carolina • South Dakota • Tennessee • Virginia • West Virginia • Wyoming

The scope of the prosecutor’s duty or knowledge of Brady material:

- **Two (2) states have no standard of scope of prosecutor’s duty or knowledge:** Alabama • New Jersey

- **Four (4) states use mandatory language “shall disclose”:** Alaska • Connecticut • Florida • New Mexico

- **Eighteen (18) states use language “in the possession or control” of the prosecutor, staff and/or law enforcement:** Arizona • Arkansas • Colorado • Hawaii • Idaho • Louisiana • Maryland • Massachusetts • Minnesota • Mississippi • Missouri • Montana • Ohio • Oklahoma • Pennsylvania • Vermont • Washington • Wisconsin

- **Four (4) states limit duty to prosecutor’s personal knowledge:** California • Maine • Michigan • Utah

- **One (1) state imposes duty on law enforcement to disclose to prosecutor:** Illinois

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TWENTY-NINE (29) STATES HAVE “BRADY DUTY” IN DISCOVERY PROVISIONS

STATE	STATUTORY CITE	STANDARD OF PROSECUTOR’S KNOWLEDGE	LANGUAGE
Alabama	AL ARCrP Rule 16.1(f)	No standard.	(f) “Nothing in this Rule 16.1 shall be construed to limit the discovery of exculpatory material or other material to which a defendant is entitled under constitutional provisions or other provisions of law.”
Alaska	AK RCrP Rule 16(b)(3)	As noted in rule: “shall disclose.”	(3) “The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney’s possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce the accused’s punishment therefor.”
Arizona	AZ RCrP Rule 15.1 (b)(8)	(b) “Except as provided by Rule 39 (b), the prosecutor shall make available to the defendant the following material and information within the prosecutor’s possession or control . . .”	(8) “All then existing material or information which tends to mitigate or negate the defendant’s guilt as to the offense charged, or which would tend to reduce the defendant’s punishment therefor.”
Arkansas	AR RCrP Rules 17.3 and 17.1(d)	Rule 17.3 (a): “The prosecutor attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney, upon timely request and designation of material or information by defense counsel.”	Rule 17.1 (d): “[T]he prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.”

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California	CA Penal Code §1054.1 (e)	"The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies . . ."	(3) "Any exculpatory evidence."
Colorado	CO RCrP Rule 16 (a) (2) and (3); Rule 16 (b) (4); Rule (c) (1)	(a) (3) "The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office." (a) (4) "The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." (c) (1) "Upon the defense's request and designation of material and information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to	(a) (2) "The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor."

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		the defense.”	
Connecticut	Conn Code Crim Proc Sec. 54-86c	As noted in rule: “shall disclose.”	(a) “[T]he state’s attorney . . . shall disclose any exculpatory information or material which he may have with respect to the defendant whether or not a request has been made therefor.”
Florida	FL RCrP Rule 3.220 (b)(4)	As noted in rule: “shall disclose.”	(b) (4) “[T]he prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.”
Hawaii	HA Rule Penal Proc 16 (b) (1)(vii)	(1) “The prosecutor shall disclose to the defendant or the defendant’s attorney the following material and information within the prosecutor’s possession or control . . .”	(vii) “any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment therefor.”
Idaho	ID CrimRule 16(a)	(a) “The prosecuting attorney’s obligations under this paragraph extend to material and information in the possession or control of members of prosecuting attorney’s staff and of any others who have participated in the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney.”	(a) “As soon as practicable following the filing of charges against the accused, the prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control, or which thereafter comes into the prosecuting attorney's possession or control, which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment therefor.”

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Illinois	725 ILCS 5/114-13 (b)	NOTE: The burden of production is placed upon law enforcement to disclose to the prosecutor. The obligation is differentiated between "homicide offenses" and "non-homicide felony" offenses.	"[T]he investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports or memoranda, within its possession or control that would tend to negate the guilt of the accused of the "non-homicide felony" offense charged or reduce his or her punishment for the "non-homicide felony" offense. This obligation to furnish exculpatory evidence exists whether the information was recorded or documented in any form."
Louisiana	LSA-C.Cr.P. Art. 718 (1)	"[O]n motion of the defendant, the court shall order the district attorney . . .to inspect, copy, [etc] . . . that are within the possession, custody, or control of the state, and that: . . ."	(1) "are favorable to the defendant and that are material and relevant to the issue of guilt or punishment."
Maine	ME RCrP Rule 16(a)(1)(C)	As noted in rule: "any matter or information known to the attorney for the state which may not be known to the defendant . . ."	(C) "A statement describing any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the crime charged."
Maryland	MD Rule 4-262 (c) and (d)(1)	(c) (1): "The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule. (2) The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the	(d) (1) "Without the necessity of a request, the State's Attorney shall provide to the defense all material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged and all material or information in any form, whether or not admissible, that tends to

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		possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case."	impeach a State's witness."
Massachusetts	MA CrP Rule 14: (a)(1)(A)(iii)	(A) "The prosecution shall disclose to the defense . . . the following items and information . . . provided it is . . . in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case: . . ."	(iii) "Any facts of an exculpatory nature."
New Mexico	NMRA 5-501 (A) (6)	A. [T]he state shall disclose or make available to the defendant . . . "	(6) "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution."
Michigan	MI Rules MCR 6.201 (B)(1)	(B) "Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant . . ."	(1) "any exculpatory information or evidence known to the prosecuting attorney."
Minnesota	49 MSA Rule 9.01 (6)	Subd. 1a. "(1) Scope of Prosecutor's Obligations. The prosecutor's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly	(6) "Material or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt."

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		report, or with reference to the particular case have reported, to the prosecutor's office."	
Mississippi	URCCP 9.04 A (6)	A. "The prosecution must disclose . . . the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution . . ."	(6) "Any exculpatory material concerning the defendant."
Missouri	MO Sup. Ct. Rule 25.03(A)(9)	(A) "[T]he state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part of all of the following material and information within its possession or control designated in said request . . ."	(9) "Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment."
Montana	MCA 46-15-322(1)(e)	(1) "Upon request, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control . . ."	(e) "all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence."
New Jersey	NJ RCrP Rule 3:13-3 (b)	None stated.	"Discovery shall include exculpatory information or material."
New Mexico	NMRA 5-501(A)(6)	A. "[T]he state shall disclose or make available to the defendant . . ."	(6) "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution."
Ohio	OH RCrP 16(B)(5)	(B) "Upon receipt of a written demand for discovery by the defendant . . .the prosecuting attorney shall	(5) "Any evidence favorable to the defendant and material to guilt or punishment."

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		provide the following items . . . within the possession of, or reasonably available to the state . . . “	
Oklahoma	22 Okl.St. Ann. §2002(A) (2) and (3)	(3) “The prosecuting attorney’s obligations under this standard extend to: a. material and information in the possession or control of members of the prosecutor’s staff, b. any information in the possession or law enforcement agencies that regularly report to the prosecutor of which the prosecutor should reasonably know, and c. any information in the possession of law enforcement agencies who have reported to the prosecutor with reference to the particular case of which the prosecutor should reasonably know.”	(2) “The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment.”
Pennsylvania	PA RCrP Rule 573(B)(1)(a)	As stated in rule: i.e., “within the possession or control of the attorney for the Commonwealth.”	(1) (a) “Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth.”
Utah	Utah Rule Crim Proc Rule 16 (a)(4)	(a) “Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge . . . ”	(a)(4) “evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment;”

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Vermont	VT RCrP Rule 16(b)(2) and (c)	(c) "Scope. – The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office."	(b) "The prosecuting attorney shall, as soon as possible, after a plea of not guilty, *** (2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor."
Washington	WA CrR 4.7 (3) and (4)	(4) "The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff."	(3) "[T]he prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged."
Wisconsin	WSA 971.23 (1)(h)	(1) "Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:"	(h) "Any exculpatory evidence."

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