



Office of the State Attorney
Ninth Judicial Circuit
The Honorable Andrew A. Bain
***Brady* Identification System**

INTRODUCTION

This document addresses how the Office of the State Attorney for the Ninth Judicial Circuit (“SAO9”) will handle and retain *Brady* material regarding potential recurring state witnesses including but not limited to law enforcement officers, law enforcement personnel, and forensic experts who regularly testify on behalf of the State of Florida.

This office joins prosecutors across the nation who employ *Brady* procedures to adhere to the highest standards of prosecutorial ethics. A written policy is vital to creating and retaining trust within our community as well as ensuring uniformity in our application of the law.

The following considerations are embedded in this policy:

- Compliance with the law;
- The legal and ethical obligations of prosecutors;
- Effective communication with defense counsel, law enforcement agencies, and other recurring state witnesses.

POLICY OBJECTIVES

1. To outline how the Office of the State Attorney will resolve *Brady* obligations in the Ninth Judicial Circuit.
2. To provide a guide that creates trust within the community and across state agencies as we ensure uniformity in our application of the law.

BASICS OF BRADY

The United States Supreme Court’s decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963) requires the prosecution to disclose to the defense any evidence that is “favorable to the accused” and “material” on the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Any failure to disclose such evidence violates a defendant’s right to due process. *Id.* at 86-87. The prosecutor’s duty to disclose applies even if the defense has not requested that piece of information.

- “Exculpatory evidence” is evidence favorable to the defendant that is likely to change the result on an issue of a defendant’s guilt or his or her eventual punishment if convicted. *Rhodes v. State*, 986 So.2d 501, 507-08 (Fla. 2008).
- “Favorable evidence” includes exculpatory evidence, as well as evidence that may impeach the credibility of a state witness, whether that witness is a law enforcement officer or a civilian. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).
- “Impeachment evidence” is defined by Florida Evidence Rules 90.608, 90.609, and 90.610 and includes any evidence that can be used to impeach the credibility of a witness.

The following is a non-exhaustive list of categories falling within *Brady*'s purview:

- Information related to witness bias or corruption, which includes racial, religious, or personal bias. See *Giglio v. U.S.*, 405 U.S.105, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Love v. State*, 971 So.2d 280, 285 (Fla. 4th DCA 2008) (finding abuse of discretion where trial court excluded evidence of a witness' racial bias).
- Pending criminal charges against a recurring state witness or facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions or parole or probation status of a witness. See, e.g., *State v. Gunsby*, 670 So.2d 920, 923 (Fla. 1996).
- Information linking someone other than the defendant to the crime. See *Floyd v. State*, 902 So.2d 775, 785-86 (Fla. 2005).
- Information that supports an affirmative defense. *United States v. Spagnuolo*, 960 F.2d 990, 994-95 (11th Cir. 1992) (finding *Brady* violation where prosecution failed to disclose evidence that may have supported insanity defense).

BRADY IDENTIFICATION SYSTEM

The SAO9 *Brady* Identification System is a system whereby flags are generated for criminal justice recurring witnesses in the State Attorney Case Management System who the State Attorney or designee has determined that our office has information that must be disclosed to the defense under the *Brady* decision and its progeny.

BRADY IDENTIFICATION SYSTEM ADMINISTRATION

The State Attorney will appoint a *Brady* Administrator to provide administrative oversight to the *Brady* identification process. This staff member provides recommendations to the Chief Assistant State Attorney, who makes a final recommendation to the State Attorney regarding individual *Brady* matters. The Chief Investigator, Felony Bureau Chief, and Osceola Bureau Chief will be involved in the *Brady* process, as necessary.

INFORMATION SUBMITTED BY LAW ENFORCEMENT AND STATE AGENCIES

Florida Statute section 112.536(1)(b) (2023) requires the employing agency of a law enforcement officer or correctional officer to forward all sustained and finalized internal affairs complaints relevant to s. 90.608, s. 90.609, or s. 90.610 to the prosecuting agency in the circuit in which the employing agency is located to assist the prosecuting agency in complying with its obligations under *Brady*.

Brady notifications should be sent via email to the Office of the State Attorney at SAO9BradyNotification@SAO9.org within ten (10) days of the finalized internal affairs report.

ASSISTANT STATE ATTORNEY RESPONSIBILITIES

If an Assistant State Attorney ("ASA") becomes aware of potential *Brady* material regarding a recurring state witness, the ASA shall inform the *Brady* Administrator by email. The *Brady* Administrator will review the information with the Chief Assistant State Attorney or designee. If it is determined that the information may require disclosure under *Brady*, the case will enter the BRADY REVIEW PROCEDURE below.

It is the obligation of the SAO9, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include all SAO9 employees, federal, state, and local law enforcement officers, and any other state officials participating in the investigation and prosecution of a criminal case against the defendant. An ASA

shall bring any relevant information about a law enforcement officer and/or a recurring state witness to the attention of the *Brady* Administrator as promptly as possible.

The prosecutor is ultimately responsible for compliance with discovery obligations.

While a prosecutor may involve other SAO9 employees, such as paralegals and support staff, and engage in computer searches in compiling relevant information, the prosecutor may not delegate the disclosure decision itself.

Any defense motion and/or objection based on an alleged failure to disclose *Brady* material shall be reported to the Bureau Chief as soon as practically possible.

Any judicial finding of a failure to comply with *Brady* obligations shall be reviewed by the Chief Assistant State Attorney. Any finding of inadvertent mistake, neglect, or bad faith shall be relevant in determining appropriate disciplinary action, if any, up to and including termination for any SAO9 employee. Law enforcement agencies will be notified if the *Brady* violation was a result of evidence in the actual possession of the agency.

All ASAs will be required to attend an annual training on their *Brady* obligations.

DISCLOSURE PARAMETERS

The SAO9 will inform defense counsel via notice of the existence of information that falls within the following parameters:

1. All convictions, no-contest pleas, or active diversion agreements for offenses implicating truthfulness and excessive use of force;
2. all sustained findings in personnel records for untruthfulness or other misconduct as defined in s. 943.13(7) and Rule 11B-27.005(5)(d), F.A.C.
3. all open criminal cases, including any case in which the recurring state witness is currently on probation, parole, or other form of court supervision; and
4. any other information the SAO9 learns and believes affects the credibility and/or truthfulness of a recurring state witness relevant to s. 90.608, s. 90.609, or s. 90.610.

Although the SAO9 will notice defense counsel of *Brady* material, discovery of documents containing such information will be handled on a case-by-case basis. If the SAO9 is in possession, custody, or control of such documents, they will be turned over to defense counsel.¹ If the SAO9 is not in possession, custody, or control of such documents, this office will promptly notify defense counsel, who will then be responsible for filing a motion and/or issuing a subpoena to the agency or person in possession of such documents.²

If disclosure is impermissible by law, such disclosure may be declined, and defense counsel advised in writing, with a copy filed with the clerk, of the specific matters on which disclosure is declined and the reasons for declining. If the defendant files a motion to compel discovery, the SAO9 will argue, by affidavit and supporting memorandum, why such disclosure should not be made. The SAO9 may file its submissions in support of declination under seal for the courts *in camera* consideration. Unless otherwise ordered by the court, a redacted version of each such submission shall be served on the defendant.

BRADY REVIEW PROCEDURE

When the *Brady* Administrator discovers information about a recurring witness that may meet the disclosure requirements under *Brady*, a consultation will be made with the Chief Assistant State Attorney or designee(s). If it is determined that the information meets the requirements for *Brady*

¹ Redactions may be made in compliance with Florida law governing public records found in Chapter 119.

² Upon receipt of a motion, ASAs are to notify their Bureau Chief.

Disclosure, the following steps will be taken:

1. The *Brady* Administrator will send an email notification to all ASA's, Administrators, and the designated Information Technology staff member containing a list of all the recurring witness's open cases and requesting the appropriate Administrator create a *Brady* Notice (Form N36W) for the ASAs to review and file on the recurring witness's open cases.
2. The *Brady* Administrator will provide written notification to the recurring witness through their current or last known agency that he or she will be placed in the *Brady* Notification System.
3. The designated information technology staff member will create a *Brady* flag for the recurring witness in the SAO9 Case Management System.
4. The *Brady* Administrator will ensure all appropriate notes and paperwork are entered into the SAO9 Case Management System.

If the *Brady* disclosure involves a pending criminal matter or agency internal investigation, the *Brady* Administrator will monitor the case and provide regular updates to the Chief Assistant State Attorney or designee(s).

A secure electronic database shall be maintained with copies of all *Brady* material. Hard copies of *Brady* material will be kept in a single secure location. Access to *Brady* material will be monitored. The ASA on the case will be permitted to view the *Brady Identification System secure database* to determine if any recurring state witness has *Brady* material. The *Brady* Administrator or designated support staff will be responsible for ensuring all information contained in the secure *Brady* database is redacted per current law in a timely manner.

PROCEDURE TO FOLLOW WHEN AN ASA DISCOVERS A RECURRING STATE WITNESS IS IN THE BRADY IDENTIFICATION SYSTEM

All ASAs shall search for any potential *Brady* recurring state witnesses upon receipt of a case and before extending a plea offer, except for diversion referrals.

If a potential witness's name is highlighted, the ASA shall disclose this information to Defense Counsel immediately. Upon request, the ASA will disclose the reason for inclusion.

If, during the investigation of a case, the ASA discovers potential *Brady* material about a recurring state witness that is not highlighted in our system, they must immediately alert the *Brady* Administrator.

RECURRING STATE WITNESS'S RIGHT OF RECONSIDERATION AND PETITION FOR REMOVAL FROM THE SAO9 BRADY IDENTIFICATION SYSTEM

An impacted recurring state witness has the right to request reconsideration of the SAO9's decision to include the name and information of the recurring state witness in the *Brady* Identification System and the right to submit documents and evidence in support of the request for reconsideration. Any documents and evidence submitted to the SAO9 will be shared with the employing agency of the recurring state witness. The burden of production for removal is on the recurring state witness, and the SAO9 will consider all information submitted in this regard. All requests should be submitted in writing and determination regarding whether removal is warranted rests solely within the discretion of the State Attorney or designee.

In accord with Florida Statute § 112.536(5) (2023), the SAO9 will not reconsider any cases where the information in the *Brady* Identification System is based upon:

1. A criminal conviction that may be used for impeachment under s. 90.610; or
2. A sustained and finalized internal affairs complaint that may be used for impeachment under s. 90.608, s. 90.609, or s. 90.610

However, a recurring state witness *may* be reconsidered for inclusion in the *Brady* Identification System where:

1. There is a reversal of a sustained and finalized internal affairs complaint; or
2. there is a successful appeal of the criminal charges that led to the recurring witness's inclusion in the *Brady* Identification System.

For reconsideration cases, the recurring state witness and/or the agency will have twenty (20) days from receipt of notice that the recurring state witness is eligible for reconsideration to submit a request for reconsideration. Once received, the information will be reviewed by the Chief Assistant State Attorney who will decide on the reconsideration. The decision made on all reconsideration requests rests solely within the discretion of the State Attorney or designee.

If the SAO9 determines that the recurring state witness should no longer be included in the *Brady* Identification System, the following will occur:

1. The recurring state witness will be removed from the active *Brady* Identification System;
2. written notice will be sent to the relevant agency and impacted recurring state witness at their current or last known agency. It will be left to the discretion of the relevant agency to notify the impacted recurring state witness if they are no longer with the agency; and
3. if the name of the recurring state witness was previously included in the *Brady* Identification System and his or her name was disclosed in a pending criminal case, the *Brady* Administrator will notify, via the assigned Assistant State Attorney, all parties to the pending criminal case of the recurring witness's removal from the *Brady* Identification System.

Any case in which an Indictment or Information was filed in which the witness's misconduct raises concerns about his or her truthfulness, bias or prejudice, witness coercion, propensity toward violence, or any moral turpitude, regardless of the outcome of the criminal case, *may* result in the witness remaining in the *Brady* Identification System. If, however, the criminal case is unrelated to any relevant misconduct and there are no pending credibility concerns, upon the final disposition of the case the witness *may* be removed from the *Brady* Identification System. It is incumbent upon the witness to notify the *Brady* Administrator in writing of the final disposition of the case.

CONFIDENTIALITY AND PUBLIC RECORDS LAW

Brady information exchanged between a state agency and the SAO9 may fall under an exemption in accordance with Florida public records law. Both agencies will agree to assert any exemptions allowed under public records law. This information is exempt from release until such exemption ceases to apply.

Copies of *Brady* materials will be kept in a single, secure, and locked location. Employees of the SAO9 will be trained to maintain strict confidentiality regarding all information concerning *Brady* material and potential state witnesses. The SAO9 will take strong action against any employee making improper use of confidential information or contributing to a breach of confidentiality, which will include disciplinary action, up to and including termination.

However, all public employees must be aware that all records involving their employment are subject to potential disclosure pursuant to the Florida public records law. The SAO9 will engage in all necessary legal analysis to determine the scope of disclosure on a case-by-case basis and will rely upon the exceptions to the public records law where appropriate.

Effective January 1, 2024