NATIONAL CRIME VICTIM LAW INSTITUTE

LAW ENFORCEMENT-ASSOCIATED VICTIM SERVICE PROVIDERS[1] AND THE *BRADY* RULE: LEGAL BACKGROUND AND CONSIDERATIONS

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The Legal Background of the Brady *Rule*

The United States Constitution requires the prosecution to automatically disclose certain information in its possession or control to a criminal defendant and their attorney when that information could be beneficial to the defense. The United States Supreme Court articulated this rule in a 1963 case called *Brady v. Maryland*, in which the Court held that prosecutors are constitutionally obligated to disclose "evidence favorable to an accused . . . [that] is material either to guilt or to punishment."[2] This rule became known as the *Brady* Rule, and it imposes an affirmative duty on prosecutors "to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, and . . . the duty encompasses impeachment evidence as well as exculpatory evidence."[3] This duty extends to exculpatory and impeachment evidence in the possession of the prosecutor and others acting on the prosecution's behalf in the case, such as the police.[4] Put more simply, the *Brady* Rule obligates prosecutors to automatically disclose information in their possession or control to criminal defendants and their attorneys when that information could be helpful in defending against the criminal charges because it is relevant to the question of defendant's guilt or punishment, or to the credibility of witnesses.

Disclosures made pursuant to the *Brady* Rule are part of the general "discovery" obligations that govern the exchange of information between the "parties" in a criminal case; the parties are the prosecutor and defendant. Sometimes the term "discovery" is used to describe the parties' requests for information and records from nonparties, including victims, but this is an imprecise use of the word. The decision in *Brady* did not create a broad constitutional right to discovery, meaning that defendants do not have a general right to obtain information that a nonparty possesses.[5]

Even though the *Brady* Rule requires that prosecutors automatically disclose certain information to defendants, it does not require the prosecution to adopt an "open file" policy or "deliver [their] entire file to defense counsel"; rather, it imposes a constitutional duty to disclose

only favorable evidence "that, if suppressed, would deprive the defendant of a fair trial."[6] Some prosecutors' offices may choose to adopt a liberal disclosure policy, while others may adopt a policy of only disclosing exactly what is required by the *Brady* Rule or by other, related disclosure rules.[7]

Under the *Brady* Rule, the duty to disclose information to defendants includes information possessed by others acting on behalf of the prosecution in connection with the criminal case.[8] For instance, federal and state courts that have addressed the issue have generally concluded that the *Brady* Rule extends to information in the possession of a prosecution-associated victim advocate or victim-witness coordinator[9] because of the role that these professionals play on the prosecution team.[10] Courts also tend to reach this conclusion when considering state laws that impose *Brady*-like disclosure requirements on prosecutors.[11]

Additionally, the Supreme Court has expressly recognized that prosecutors' *Brady* disclosure obligations apply to information in the possession of law enforcement agencies (LEAs) and officers involved in the investigation of the case.[12] This is required because the Supreme Court has clarified that an "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" and has observed that "'procedures and regulations can be established . . . to [e]nsure communication of all relevant information on each case'" to the prosecution.[13]

Outside the clear context that information known to law enforcement officers working on a case is considered to be known to the prosecution and, therefore, subject to the *Brady* Rule, a case-by-case analysis guides the determination of whether another entity or individual is considered to be a part of the prosecution team or to be acting on behalf of the prosecution for *Brady* disclosure purposes.[14] Factors considered by courts include:

- whether the prosecution or law enforcement has authority or significant control over the individual or entity with the information,[15] such that the individual or entity would be considered an "agent" of the prosecution or law enforcement under agency theory;[16]
- whether the prosecution or law enforcement specifically requested that the individual or entity obtain the information[17] or otherwise retained the individual or entity to gather such information;[18]
- whether the individual or entity has assumed any of the roles or duties of the prosecution or law enforcement, such as investigating the case against a defendant[19] or keeping a defendant in custody,[20] or whether the individual or entity is merely cooperating with the prosecution or law enforcement as a witness;[21]
- whether the extent and nature of the interaction between the individual or entity and the prosecution or law enforcement suggests a working, collaborative relationship, including:
  - whether the individual or entity participated in a joint investigation with the prosecution or law enforcement;[22]

- whether the individual or entity is engaged in a joint venture or cooperative working relationship with the prosecution or law enforcement to collaborate on investigations;[23]
- whether the individual or entity is a member of a criminal incident response team, such as a sexual assault response team (SART)[24] or a family violence response team (FVRT);[25, 26]

▪ whether the individual or entity regularly reports to the prosecutor or law enforcement or has reported to the prosecutor or law enforcement in connection with the investigation of a specific case;[27] and
▪ whether the prosecutor or law enforcement has ready access to the entity's or individual's files.[28]

In summary, the prosecution is constitutionally required to disclose information to the defense if it is known by the prosecution or if it is in its possession or control either directly or through law enforcement or another entity working on behalf of the prosecution, as determined on a case-by-case basis—and if the information is relevant to the determination of guilt or to the credibility of witnesses.

Considerations for Assessing Application of the Brady *Rule to Information in the Possession of Law Enforcement-Associated Victim Service Providers*

Various types of victim service providers can be employed by or otherwise associated with law enforcement, including victim advocates[29] and professionals serving victims' medical, mental health, and behavioral needs. When these providers are considered to be acting on behalf of the prosecution for the purposes of the *Brady* Rule, the victim information that they collect and document may be subject to disclosure by the prosecutor to defendant and defendant's attorney.

Ultimately, whether the *Brady* Rule applies to a specific service provider depends on the multi-factor, case-by-case analysis noted above. State laws governing the communications between victims and law-enforcement victim service providers may also be instructive in determining whether such communications are subject to disclosure under *Brady*. For instance, at least one state requires that law enforcement-associated victim advocates provide "confidential communications" to a prosecutor so that the prosecutor can evaluate the communications for potential *Brady* material.[30]

When structuring and operating programs where victim advocates and other victim service providers are associated with LEAs, it is important to analyze factors that can help determine whether advocates may possess information subject to the *Brady* Rule's disclosure obligations. In some jurisdictions, LEAs directly hire victim advocates and/or other victim services personnel; in others, LEAs refer victims to outside providers without providing any in-house advocacy and/or victim services; and in others, victim services are provided in a hybrid model that combines the efforts of LEAs and outside entities. Agencies that provide services using a hybrid model may have victim service providers physically co-located with law enforcement or

they may be housed externally. Law enforcement-associated victim service providers should understand their own privacy obligations, as well as other advocacy providers' ability to protect victims' communications from disclosure, so that they can explain any privacy-related obligations or limitations to victims at the earliest moments and provide appropriate referrals.

A non-exhaustive list of considerations to assess *Brady* and other disclosure obligations follows. While no one consideration may be dispositive, affirmative answers to any one of these may each make it more likely that the *Brady* Rule will apply. A legal analysis of the specific advocacy structure used in a jurisdiction is recommended. Service providers can work with prosecutors, law enforcement counsel, and other attorneys to determine how the *Brady* Rule applies to their particular circumstances.

Questions to ask when assessing whether a law enforcement-associated victim service provider is subject to the *Brady* Rule include:

- ☐ Is the service provider an employee of the LEA?
- ☐ Is the service provider subject to supervision by a member of the LEA?
- ☐ Does the LEA contribute funding for the service provider's position?
- ☐ Does the service provider have any investigatory responsibilities or participate in investigatory or prosecution team meetings?
- ☐ Does the service provider receive requests from the prosecution or LEA to gather information from victims?
- ☐ Does the service provider regularly report to the employees of the prosecution or LEA?
- ☐ Is the service provider physically located on the same premises as the LEA?
- ☐ Is the service provider engaged in a joint venture with the prosecution or LEA?
- ☐ Does the service provider have a collaborative, working relationship with the prosecutor or LEA?
- ☐ Are any office resources shared by the service provider and members the LEA or the prosecutor's office, such as a printer, fax machine, or email server?
- ☐ Is information held by the service provider readily accessible by others?
  - Can the prosecution compel production of the service provider's files without issuing a subpoena?
  - Can individuals from the LEA or the prosecution readily access the area (physically or technologically) where victim information is stored?
  - Can individuals other than the service provider readily access the area where the service provider meets with victims during the time of the meeting?
- ☐ Is the service provider required to collect or report any information to law enforcement or to the prosecutor's office? If so, is that information identifiable to a specific victim?
- ☐ Is the service provider solely or partially responsible for carrying out duties assigned to law enforcement or to the prosecutor's office by law? Such as:
  - Providing victims with information about their rights;
  - Notifying victims of upcoming criminal justice proceedings; or

- Providing victims with information about state compensation programs.

☐ Does the jurisdiction have a law governing communications between victims and law enforcement-associated victim service providers that requires disclosure of those communications to the prosecution?

Once service providers' disclosure obligations are determined, policies and procedures—including training—should be developed and deployed. In addition, agencies should consider:

☐ A written Memorandum of Understanding between law enforcement and any outside entity documenting the division of duties, responsibilities, supervision structures and access to information.

☐ Written policies and procedures governing:
- Interactions between the service provider and members of law enforcement and the prosecutor's office; and
- The privacy of the service provider's files and communications with victims.

☐ Joint training of service providers, law enforcement (including records personnel) and prosecutors on the *Brady* Rule, the prosecutor's disclosure obligations, and the service provider's role in the disclosure process.

In most jurisdictions, *Brady* disclosure obligations are not the only laws relevant to victim privacy. Other legal considerations that may impact the privacy of the service provider's files and communications with victims may vary across jurisdictions, but all relevant privacy-related laws should be analyzed. Such laws may include the following:

- Privilege protections;
- Confidentiality obligations;
- Requirements regarding releases of information;
- Address confidentiality programs;
- Identity protection programs; and
- Exemptions from public records disclosure requirements.

A law enforcement-associated victim service provider may have certain obligations regarding victim privacy and confidentiality based on their funding source. Additionally, LEAs may have internal policies regarding the service provider's role and responsibilities with respect to the law enforcement team, such as policies governing recordkeeping, the flow of information between service providers and prosecutors,[31] or mandated reports of the abuse or neglect of children or vulnerable adults. Taking all of these requirements and policies into account is necessary when analyzing if, when, and to whom law enforcement-associated victim service providers can disclose private victim information.

The *Brady* Rule is an exception to the privacy protections that may otherwise safeguard victim information when a victim communicates with a prosecuting attorney or others acting on the prosecution's behalf. When a law enforcement-associated victim services provider is considered to be working on behalf of the prosecution, privilege protections, confidentiality rules, and other laws limiting the release of a victim's personal information generally will not prevent disclosure of victim information contained in the service provider's records that falls within the scope of the *Brady* Rule.[32]

A victim-centered approach to law enforcement-associated victim service providers' contact with victims will recognize these limitations and reflect the high costs that disclosure of victim information can have on victim privacy and safety. It will also reflect the complexity of determining whether a particular law enforcement-associated service provider is part of the prosecution team for the purposes of the *Brady* Rule. Unless there is a clear law stating that *Brady* does not apply to a service provider, they can best protect victims' interests by acting as if the *Brady* Rule does apply to them (*i.e.*, the prosecutor may be required to disclose victim information in the service provider's possession to the defendant and their attorney). Such a protective approach means, at a minimum, that at the first contact with a victim, the service provider discusses with the victim information about the limitations on their ability to keep the victim's information private and provides referrals to other service providers who are not required to make disclosures under the *Brady* Rule.[33] Ideally, this topic is revisited regularly to enable victims to make meaningful and informed choices about who has access to their information. Such an approach is essential, as it respects victims' agency, privacy and safety.

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[1] Throughout this resource, the term "law enforcement-associated victim service providers" is used to denote service providers who are employed by, funded by, or embedded in a law enforcement agency (LEA) who are part of the team that responds to a criminal incident with law enforcement, and/or who are physically co-located within an LEA.

[2] 373 U.S. 83, 87 (1963).

[3] *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted).

[4] *See id.* at 280–81 (recognizing that the *Brady* Rule "encompasses evidence 'known only to police investigators and not to the prosecutor'" and that "[i]n order to comply with *Brady,* therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in [a criminal] case, including the police'" (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995))).

[5] *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (observing that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").

[6] *United States v. Bagley*, 473 U.S. 667, 675 (1985); *see also United States v. Ruiz*, 536 U.S. 622, 629 (2002) (observing that *Brady* does not require prosecutors to "share all useful information with the defendant").

[7] Beyond that material to which a defendant is constitutionally entitled under *Brady*, state statutes or procedural rules may entitle a criminal defendant to additional discovery materials. It is important to identify and know these local rules and how they function, as they may require the disclosure of certain information in the possession of law enforcement and other individuals or entities considered to be working on the prosecution's behalf. Additionally, LEAs may be required to adopt policies to ensure compliance with such disclosure requirements. Review of these

policies may provide law enforcement-associated victim service providers with additional guidance regarding disclosure of their communications with victims.

[8] *See, e.g., United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (observing that the prosecution "'has no obligation to produce information which it does not possess or of which it is unaware,'" but noting that its obligation does extend to information held by other government agencies if the prosecutor can be deemed to have possession or control over those records (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995))); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) ("'*Brady* clearly does not impose an affirmative duty upon the government to discover information which it does not possess.'" (quoting *United States v. Beaver,* 524 F.2d 963, 966 (5th Cir.1975))).

[9] A "prosecution-associated victim advocate or victim-witness coordinator" refers to a victim advocate or victim-witness coordinator who is employed by the prosecutor's office and/or another government office within the same justice department.

[10] *See, e.g., Eakes v. Sexton*, 592 F. App'x 422, 429 (6th Cir. 2014) (finding that a prosecution-associated victim advocate's report fell within the scope of the state prosecutor's *Brady* obligations even though the advocate was "located 'in a separate part of the District Attorney's office'" and the prosecutor was unaware of the report before trial because the prosecutor was "responsible for disclosing all *Brady* information in the possession of that office"); *United States v. Drayer*, 499 F. App'x 120, 123 (2d Cir. 2012) (assuming, without discussion, that a document in the file of a victim coordinator working for the United States Attorney's Office implicated *Brady* disclosure obligations); *People v. Martin*, No. C043739, 2004 WL 2110783, at *6 (Cal. Ct. App. Sept. 23, 2004) (unpublished) (observing that the office of the Victim Witness Advocate (VWA) "appears to be prosecution personnel acting on the prosecution's behalf and assisting the government's case" for the purposes of *Brady*, to the extent that "the VWA's office appears to be comprised of district attorney personnel who help to ensure that witnesses are available for trial and, thus, who help to enable the prosecutor to present his or her case," but finding the court need not "decide whether the VWA's office is part of the prosecution team, acting on the government's behalf, because even assuming so, defendant's claim fails because the evidence does not meet the materiality prong necessary to prove a *Brady* violation"); *Commonwealth v. Kozakiewicz*, 107 N.E.3d 1255, at *4 (Mass. App. Ct. 2018) (unpublished table decision) (stating that the "prosecution team includes victim-witness advocates" for the purposes of *Brady*); *see State v. Lynch*, 885 N.W.2d 89, 108–09 (Wis. 2016) (plurality opinion) (distinguishing circumstances where *Brady* obligations are implicated, such as with records of prosecution-associated advocates, from records held by private mental health facilities, where *Brady* obligations do not apply; and stating that "a defendant has a constitutional right, under *Brady*, to material information but only when that information is held by the prosecutor, including others acting on the prosecutor's behalf"); *State v. Blonda*, 899 N.W.2d 737, at *7 (Wis. Ct. App. 2017) (unpublished table decision) (finding that defendant was entitled to a new trial where the prosecution conceded a *Brady* violation in connection with its failure to timely disclose both a statement made by the victim to a victim advocate from the district attorney's office and a written victim impact statement, both of which were exculpatory).

[11] *See, e.g.*, *Commonwealth v. Liang*, 747 N.E.2d 112, 116 (Mass. 2001) (concluding that "the work of [prosecution-associated] advocates is subject to the same legal discovery obligations as that of prosecutors and their notes are subject to the same discovery rules," given the function that such advocates perform as part of the prosecution team); *Commonwealth v. Torres*, 98 N.E.3d 155, 162 (Mass. 2018) (finding that a state rule governing the prosecution's disclosure obligations similar to the *Brady* Rule required disclosure of the victim's compensation application, "held by the victim witness advocate in the district attorney's office" because "[t]he victim witness advocate is a member of the prosecution team and, accordingly, subject to the same duty to disclose as is a prosecutor"); *State ex rel. Brandenburg v. Blackmer*, 110 P.3d 66, 71 (N.M. 2005) (holding that "victim advocates are part of the prosecution team" for the purposes of the rules governing attorney-client privilege and state disclosures, where the advocates are employed by the district attorney's office and "perform many tasks similar to those other members of the prosecution team"); *cf. State v. Young*, No. 1 CA-CR 17-0413, 2018 WL 6241449, at *2–4 (Ariz. Ct. App. Nov. 29, 2018) (unpublished) (holding, in a case where the facts were unclear regarding whether the advocate was a system-associated or community-associated advocate, that Arizona's crime victim advocate privilege is constitutional and observing that "[c]ommunications between the victim and victim's advocate may not be in the State's possession [where the privilege statute provides that] the State can only access those communications with the victim's consent").

[12] *See Kyles*, 514 U.S. at 437 (recognizing that the *Brady* Rule requires the prosecution's disclosure of "favorable information known to the others acting on the government's behalf in the case, including the police")*; cf. Walker v.*

City of New York, 974 F.2d 293, 299 (2d Cir. 1992) (observing, in the context of a lawsuit brought under 42 U.S.C. § 1983, that "the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors" and collecting cases).

[13] *Kyles*, 514 U.S. at 437–38 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam) (reiterating that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'" (quoting *Kyles*, 514 U.S. at 438)); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation."). This may extend beyond law enforcement information to information held by other government agencies, in some circumstances. *See Cano*, 934 F.3d at 1025 (recognizing, in the context of a federal criminal prosecution, that "'[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*'" (adding emphasis and quoting *United States v. Bryan*¸ 868 F.2d 1032, 1033 (9th Cir. 1989))).

[14] *See Avila v. Quarterman*, 560 F.3d 299, 308 (5th Cir. 2009) (stating that courts decide who is a member of the "prosecution team" for the purposes of the *Brady* Rule on a case-by-case basis); *United States v. Meregildo*, 920 F. Supp. 2d 434, 440–44 (S.D.N.Y. 2013) (observing that "[c]ourts disagree about when an individual's knowledge should be imputed to the prosecutor," as "[t]here is no clear test to determine when an individual is a member of the prosecution team," and collecting cases); *Zant v. Moon*, 440 S.E.2d 657, 664 (Ga. 1994) (explaining that courts "analyze whether a person is on the prosecution team on a case-by-case basis, reviewing the extent of interaction, cooperation, and dependence of the agents working on the case").

[15] *See, e.g.*, *IAR Sys. Software, Inc. v. Superior Ct.*, 218 Cal. Rptr. 3d 852, 863–66 (Cal. Ct. App. 2017), *as modified on denial of reh'g* (June 30, 2017) (finding that the involvement of the victim's counsel with the prosecution as a cooperating witness was not "significant enough to warrant the trial court's finding that [the victim's attorney's] files should be deemed under the district attorney's 'control' for purposes of *Brady*," where the tasks counsel took on behalf of the victim in preparing for civil litigation "sometimes overlapped with the district attorney's efforts to prosecute defendant," and counsel "cooperated with the district attorney in its efforts to uncover the truth about defendant's wrongdoing"); *Black v. State*, 582 S.E.2d 213, 217 (Ga. Ct. App. 2003) (finding that the victim's juvenile records were not subject to disclosure under *Brady* because there was "no evidence that the prosecutor actually had such records in her possession or exercised authority over" the juvenile detention system or Department of Family and Children Services officials who had actual possession of the records); *see also United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006) (finding that when addressing whether *Brady* requires prosecutors to disclose evidence known to other government agencies, courts consider three factors, including "whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'"); *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (recognizing prior case law defining the "'prosecution team' as 'the prosecutor or anyone over whom he has authority'" (quoting *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989))).

[16] *See, e.g., Moon*, 285 F.3d at 1310 (recognizing that the principles of agency law may guide a determination of whether the prosecution has "possession" of certain information for the purposes of *Brady*; refusing to impute the knowledge of an investigator for the Tennessee Bureau of Investigation (TBI), who was the case agent for a separate homicide by defendant, to the Georgia state prosecutor because, "the Georgia and Tennessee agencies shared no resources or labor; they did not work together to investigate the separate murders[;] [t]here [is no] evidence that anyone at the TBI was acting as an agent of the Georgia prosecutor[;] [t]he Tennessee investigator was not under the direction or supervision of the Georgia officials, and, had he chosen to do so, could have refused to share any information with the Georgia prosecutor;" and concluding that "[a]t most, the Georgia prosecutor utilized the Tennessee investigator as a witness to provide background information to the Georgia courts[, which] is insufficient to establish him as part of the Georgia 'prosecution team'"); *see also Bracamontes v. Superior Ct.*, 255 Cal. Rptr. 3d 53, 64 (Cal. Ct. App. 2019) (internal citations and quotation marks omitted) (recognizing that the question when determining whether an individual is a member of the prosecution team for the purposes of *Brady* can "be phrased as one of agency law: should a prosecutor be held responsible for someone else's actions?" and noting that "[t]his, in turn, requires consideration of—in simple terms—the 'degree of control' the prosecution exercises over the ostensible agent").

[17] *See, e.g.*, *McCormick v. Parker*, 821 F.3d 1240, 1247–48 (10th Cir. 2016) (finding that the sexual assault nurse who examined the victim "at the behest of" law enforcement was part of the prosecution team for the purposes of *Brady* because "she acted at the request of law enforcement in the pre-arrest investigation of a crime"; and

emphasizing that it was not holding "that all medical professionals treating survivors of sexual abuse are automatically members of the prosecution team for *Brady* purposes"); *In re C.J.*, 652 N.E.2d 315, 318 (Ill. 1995) (observing that a case worker from social service agency could be considered part of the prosecution team when they "act[] at the behest of and in tandem with the [prosecutor], with the intent and purpose of assisting in the prosecutorial effort," but finding that, in the case before it, the *Brady* Rule did not apply to evidence destroyed by the Department of Children and Family Services (DCFS), where there was no there was no evidence to support the conclusion that the DCFS investigator functioned "as an aid in the prosecution"); *State v. Farris*, 656 S.E.2d 121, 123, 126 (W. Va. 2007) (finding that a forensic psychologist who interviewed a potential witness to child sexual assault "became part of the prosecution team," where the interview took place at the request of the prosecution team and was monitored remotely by law enforcement).

[18] *Cf. Cleary v. Cty. of Macomb*, No. 06-15505, 2007 WL 2669102, at *17 (E.D. Mich. Sept. 6, 2007), *aff'd*, 409 F. App'x 890 (6th Cir. 2011) (unpublished) (stating the court's belief that "a social worker who was not retained by the police or prosecution (and thus not a 'police investigator') [cannot] be held liable for a *Brady* violation").

[19] *See, e.g., Pitonyak v. Stephens*, 732 F.3d 525, 531–33 (5th Cir. 2013) (affirming as reasonable, in the context of a federal habeas petition, the state court's conclusion that a mental health counselor at the jail who heard defendant confess while in custody was not a member of the prosecution team or a member of the law enforcement investigatory team for the purposes of *Brady*, where the counselor was "not involved in investigating or preparing the case against [defendant]," where jail mental health professionals did not communicate "to police any information learned within the scope of mental health services," and where the counselor's file notation referenced potentially communicating with defense counsel—not the prosecutor—regarding self-incriminating statements made by defendant); *Avila*, 560 F.3d at 309 (declining to impute to the prosecution, for the purposes of *Brady*, the opinion of a pathologist as to the cause of the victim's injuries because the court was "not persuaded that [the pathologist] became part of the prosecution team," where, *inter alia*, the pathologist's "own affidavit does not portray his role as anything but a pathologist"); *Bracamontes*, 255 Cal. Rptr. 3d at 62 (noting that government crime laboratories are routinely considered part of the prosecution team for the purposes of *Brady* because of their role in the investigation against a defendant and the direct assistance they provide to prosecutors; and citing federal and state cases); *State v. Pinder*, 678 So. 2d 410, 414 (Fla. Dist. Ct. App. 1996) (finding that sexual assault counselors who work for a county victim services office were not agents of the prosecution for the purposes of *Brady*, where the counselors "[did] not investigate potential criminal conduct" and "[t]here was no showing that they assist the prosecution by providing information or offering suggestions"); *Blackmer*, 110 P.3d at 71 (holding that "a victim advocate employed by a district attorney's office is part of the prosecution team" for the purposes of a state laws governing attorney-client privilege and the prosecution's disclosure obligations, where, *inter alia*, the advocate's duties are similar to those of other members of the prosecution team); *Brian W. v. Martin*, No. 17-0185, 2018 WL 317374, at *2 (W. Va. Jan. 8, 2018) (rejecting defendant's argument that a Child Protection Services (CPS) worker was a member of the police investigative team for the purposes of *Brady* where defendant based this argument on their perception that the "prosecutor relied heavily" upon CPS's investigation "to prove the charges brought against petitioner"; and concluding that nothing in the record suggested that the CPS worker "was acting as a police investigator at any time during the underlying proceedings"); *see also Risha*, 445 F.3d at 304 (stating that *Brady* does not require prosecutors "to undertake a 'fishing expedition' in other jurisdictions to discover impeachment evidence" or obligate them "to learn of all information 'possessed by other government agencies that have no involvement in the investigation or prosecution at issue'" (quoting *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003))); *Goff v. Bagley*, 601 F.3d 445, 475–76 (6th Cir. 2010) (recognizing that prosecutors do not have an obligation under *Brady* to learn information in the possession of "'other government agencies having no involvement in the investigation or prosecution at issue'" (citation omitted)).

[20] *See, e.g.*, *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001) (finding that the U.S. Marshal's Service's knowledge that a government informant failed a drug test was imputed to prosecutors, as members of the "team" participating in the prosecution, "even if the role of the Marshal's Service was to keep the defendants in custody rather than to go out on the streets and collect evidence").

[21] *See, e.g.*, *United States v. Josleyn*, 206 F.3d 144, 154 (1st Cir. 2000) (concluding that knowledge of defendant's private employer was not attributable to the government for the purposes of *Brady* even though the employer was cooperating with the prosecution and noting that "[w]hile prosecutors may be held accountable for information known to police investigators . . . [the court is] loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests" (citing *Kyles,* 514 U.S. at 437–38)); *United States v. Lujan*, 530

F. Supp. 2d 1224, 1231 (D.N.M. 2008) (recognizing that prosecutors do not have an affirmative obligation under *Brady* to "seek out information that is not in its or its agents' possession," such as information that is only "in possession of independent, cooperating witness[es]" (citing *Graham*, 484 F.3d at 415–18)).

[22] *See, e.g., United States v. Ellison*, 527 F. Supp. 3d 161, 165–67 (D.P.R. 2021) (analyzing whether other government entities were part of the prosecution team for purposes of *Brady* by considering the level of involvement by another government agency and whether a joint investigation occurred—specifically, whether one agency was acting on behalf or under the control of another, the extent to which the entities were working as a team and sharing resources, and whether the agencies had ready access to each other's files; citing cases; and concluding that members of other government agencies being interviewed by investigators, providing information and advice in interviews, providing documents to investigators, or conducting independent investigations of defendant that are unrelated to the criminal prosecution were insufficient to transform these agencies into members of the prosecution team for purposes of *Brady* disclosure obligations); *United States v. Collins*, 409 F. Supp. 3d 228, 241-42 (S.D.N.Y. 2019) (finding no joint investigation to trigger the prosecutor's *Brady* obligations where the federal prosecutor and the Securities and Exchange Commission (SEC) conducted "parallel but separate investigations" and where "personnel, information and documents were not shared in any material way between the [United States Attorney's Office] and SEC, and each agency made charging decisions independently of each other"); *see Risha*, 445 F.3d at 304 (finding that, when addressing whether *Brady* requires prosecutors to disclose evidence known to other government agencies, courts consider three factors, including "the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources").

[23] *See, e.g., United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005), *as amended* (Mar. 8, 2005) (finding Pension and Welfare Benefits Administration (PWBA) records were not subject to disclosure under the *Brady* Rule because the agency had no working relationship with prosecution team and "the PWBA investigators who possessed the documents at issue played no role in this criminal case"); *People v. Lewis*, 167 A.D.3d 158, 161 (N.Y. App. Div. 2018) (explaining that '[w]hile social workers are generally not agents of the police,' in situations where they engage in a 'joint venture' with police agencies to collaborate on child abuse or sexual abuse investigations, share information and a common purpose, and have a 'cooperative working arrangement' with police, an agency relationship may exist such that the social workers' knowledge is imputed to the [prosecution]" for the purposes of *Brady* (citations omitted)).

[24] *See, e.g.*, *People v. Uribe*, 76 Cal. Rptr. 3d 829, 842–43 (Cal. Ct. App. 2008) (finding the medical center where the victim's SART exam was conducted was acting on the prosecution's behalf for the purposes of the *Brady* Rule and that failure to disclose a video of the exam violated *Brady* because the SART exam "was clearly spearheaded by the police, who advised [the doctor performing the exam] of a report of alleged sexual abuse in which [the examinee] was the victim"; "[a] major purpose of the examination was to determine whether the allegation could be corroborated with physical findings"; and the doctor "collected and preserved physical evidence, consistent with statutory protocol" and "provided a copy of the forensic report to the police"). .

[25] *Cf. People v. Greene*, 306 A.D.2d 639, 641 (N.Y. App. Div. 2003) (finding that, under the specific facts of the case, a caseworker from Child Protective Services (CPS) who was a member of the Family Violence Response Team (FVRT) was an agent of the police for the purposes of defendant's constitutional right to counsel, where, *inter alia*, the FVRT was "a joint venture between the Division of Family Services and police agencies, [which] collaborated on sexual abuse investigations" and "[a]s a member of the FVRT, the CPS caseworker interviewed the victim with a State Police investigator," and "regularly shared information gained through her interviews with the police and District Attorney's office").

[26] *See also Commonwealth v. Pope*, 188 N.E.3d 96, 104 (Mass. 2022) (finding that a preliminary field report and memorandum were in the possession of the state for the purposes of *Brady*, where the materials were prepared by an assistant district attorney who reported to the scene of a shooting as a member of the homicide response team, and where the memorandum was prepared specifically for the district attorney prosecuting the case).

[27] *See, e.g., Pope*, 188 N.E.3d at 104 (recognizing that the prosecutor's duty to disclose under *Brady* "'extend[s] to material and information in the possession or control of members of [the prosecutor's] 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 [the prosecutor's] office'" (quoting *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1292 (Mass. 1998))).

[28] *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002) (clarifying that the court in *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991), held that the United States Attorney did not violate *Brady* when it failed

to turn over California State Department of Corrections files that were under the exclusive control of California officials because "the United States Attorney had no control over the state's files"); *United States v. Kuntz*, No. 3:17-CR-0026, 2020 WL 6505016, at *3 (D.V.I. Nov. 5, 2020) (finding that the prosecution did not have constructive possession of the victim's receipts for the purposes of *Brady* because, *inter alia*, "the Government did not have 'ready access' to the receipts because they were in the possession of a third party outside of the government"); *see also Risha*, 445 F.3d at 304 (finding that, when addressing whether *Brady* requires prosecutors to disclose evidence known to other government agencies, courts consider three factors, including "whether the entity charged with constructive possession has 'ready access' to the evidence"); *Pinder*, 678 So. 2d at 414 (concluding that the aspect of due process protected by *Brady* "does not compel disclosure of records or information which are shielded from all eyes, state and defense").

[29] Courts do not yet appear to have considered whether advocates employed by LEAs are part of the prosecution team for purposes of *Brady* disclosures. The analysis employed in the cases addressing prosecution-associated advocates, *see supra* notes 10 & 11, suggests that law enforcement-associated advocates, much like other members of the police force, will be considered part of the prosecution team and the information they hold potentially subject to disclosure under *Brady*.

[30] *See* Utah Code Ann. § 77-38-405(1)(a)(i) ("A victim advocate may not disclose a confidential communication with a victim, including a confidential communication in a group therapy session, except . . . that a criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness[.]"); *see also* Utah Code Ann. § 77–38-403(4)(a) (defining "[c]riminal justice system victim advocate" as an individual who, *inter alia*, "is employed or authorized to volunteer by a government agency that possesses a role or responsibility within the criminal justice system"). If a Utah prosecutor "determines that the confidential communication is exculpatory or goes to the credibility of a witness," the court will notify the victim and defense attorney of the opportunity to be heard and conduct an *in camera* review of the material. Utah Code Ann. § 77-38-405(1)(b); Utah R. Evid. 512(e)(1)(E) (addressing the process for review of victim communications with a criminal justice system advocate). A criminal justice system victim advocate-victim communication will only be disclosed to defense counsel if the court determines "that: (i) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or (ii) the confidential communication is exculpatory evidence, including impeachment evidence." Utah R. Evid. 512(e)(1)(E).

[31] *See, e.g.*, 725 Ill. Comp. Stat. Ann. § 5/114-13(b) (requiring every investigative and law enforcement agency in Illinois to adopt policies to ensure compliance with law enforcement's criminal discovery-related obligations).

[32] In fact, a number of the states that protect victim advocate-victim confidentiality and/or privilege expressly provide that such protections do not apply when the victim advocate is employed by or otherwise affiliated with a law enforcement agency and/or prosecutor's office. *See, e.g.*, Ala. Code § 15-23-41(8) (stating that, for the purposes of victim counselor-victim confidentiality and privilege under Ala. Code § 15-23-42, the term "victim counselor," does not include counselors affiliated with a law enforcement agency or prosecutor's office); Colo. Rev. Stat. Ann. § 13-90-107(1)(k)(II) (stating that the domestic violence advocate-victim and sexual assault victim advocate-victim privileges do not extend to "advocate[s] employed by any law enforcement agency"); Ind. Code Ann. § 35-37-6-3.5(b) (stating that, for the purposes of victim advocate-victim confidentiality and privilege under Ind. Code Ann. § 35-37-6-9, the term "victim advocate" does not include "(1) a law enforcement officer; (2) an employee or agent of a law enforcement officer; (3) a prosecuting attorney; or (4) an employee or agent of a prosecuting attorney's office"); Ind. Code Ann.§ 35-37-6-5(1)-(2) (stating that for the purposes of victim services provider-victim confidentiality and privilege under Ind. Code Ann. § 35-37-6-9, the term "victim service provider" does not include a public agency, unit of a public agency, or a nonprofit organization that is "affiliated with a law enforcement agency"); Ga. Code Ann. § 24-5-509(a)(1), (3), (8) (stating that the family violence shelter agent-victim and rape crisis center agent-victim privileges under Ga. Code Ann. § 24-5-509(b) do not apply to agents for programs that are "under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency"); Minn. Stat. Ann. § 595.02(l)(*l*) (stating that the domestic abuse victim advocate-victim privilege does not apply to advocates "employed by or under the direct supervision of a law enforcement agency who is not employed by or under the direct supervision of a law enforcement agency, a prosecutor's office, or by a city, county, or state agency"); Neb. Rev. Stat. Ann. § 29-4302(1) (stating that the domestic violence victim advocate-victim and sexual

assault victim advocate-victim confidentiality and privilege protections under Neb. Rev. Stat. Ann. § 29-4303 do not apply to employees or supervised volunteers of programs, agencies, businesses or organizations that are "affiliated with a law enforcement or prosecutor's office"); N.M. Stat. Ann. § 31-25-2(E) (stating that, for the purposes of the Victim Counselor Confidentiality Act, the term "victim counselor" does not apply to employees or supervised volunteers of programs, agencies, businesses or organizations that are "affiliated with a law enforcement agency or the office of a district attorney"); Wash. Rev. Code Ann. § 5.60.060(8)(a) (stating that the domestic violence advocate-victim privilege does not apply to advocates "employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of children, youth, and families"). At least one court has indicated that the purpose of such an exception to a victim advocate-victim privilege is to avoid concerns related to the prosecution's disclosure obligations. *See In re Crisis Connection, Inc.*, 949 N.E.2d 789, 800 (Ind. 2011) (finding that "Indiana's victim advocate privilege avoids *Brady* issues by excluding from its protection persons affiliated with the State," such as victim service providers affiliated with law enforcement and victim advocates who are employees or agents of law enforcement officers).

[33] *See* Utah Code Ann. § 77-38-405(3)(b) ("A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused: (a) whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and (b) of the name, location, and contact information of one or more nongovernment organization advocacy services providers specializing in the victim's service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate.").

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