MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO OBTAIN, DISCLOSE AND PRODUCE *BRADY* INFORMATION

Defendant in the above action has elected to engage in discovery pursuant to Florida Rule of Criminal Procedure 3.220. In making this request, the state is bound to provide all information contained within this discovery rule as well as any and all information that is required to be turned over to the defense pursuant to the landmark United States Supreme Court case of Brady v. Maryland, 373 U.S. 83 (1963). It is worth noting that Rule 3.220(b)(4) (prosecutor's discovery obligations) reads:

> ***"As soon as practical after the filing of the charging document the 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."***

The above requirement is significant for several reasons. First, it obligates the prosecutor to disclose material information not only within the state's possession but also within its "control". That statement requires the prosecutor to turn over any Brady material which is within the possession or knowledge of law enforcement as well as any team working on the prosecutor's behalf as it relates to the above matter. Second, all information that "tends to negate the guilt of the defendant" encompasses not only material that exonerates an accused but also any information or evidence which would aid a defendant in presenting any valid defense. In short, the Florida Rules of Criminal Procedure require the prosecutor to comply with Brady v. Maryland even if discovery is not elected. This is shown by the statement in the rule "***regardless of whether the defendant has incurred reciprocal discovery obligations***".

Six years before the *Brady* decision was handed down by the U.S. Supreme Court, our State Supreme Court decided *Smith v. State*, 95 So.2d 525 (Fla. 1957). The following quote is found within that decision:

> ***"It is his (the prosecutor) duty to present all of the material facts known to him to the jury; and it is as much his duty to present facts within his knowledge which would be favorable to the defendant as it is to present those facts which are favorable to the state. Being an arm of the court, he is charged with the duty of assisting the court to see that justice is done and not to assume the role of persecutor." (Smith at 527)***

The failure of the state to turn over information that falls within the Brady decision, which results in prejudice to the defendant, is grounds for reversal (See Wearry v. Cain, 136 Sup. Ct. 1002 (2016)). And perhaps the biggest misconception of required material for the state to look for and turn over is that the prosecutor only has to disclose exonerating information which he or she is aware of. There are five areas that are covered under the prosecutor's obligations under the Brady decision and those decisions that followed. They include (1) evidence that materially impeaches any fact or witness; (2) any evidence that would lessen the punishment; (3) any evidence that supports a valid defense to the charge; (4) any material exculpatory evidence which is defined as "containing a reasonable probability that the conviction or sentence would have been different had the materials been disclosed"; (5) any evidence that tends to exonerate the accused. The reason for this is the very motivation behind the Brady decision. In the United

States Supreme Court decision of United States v. Bagley, 473 U.S. 667 (1985) our nation's highest court wrote:

> **"By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversarial model. This is because the prosecutor's role transcends that of an adversary" (Bagley at footnote 6). He "is the representative not of an ordinary party to a controversy, but of a sovereignty… whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger V. United States*, 295 U.S. 78, 88 (1935))**

It is uncontroverted that not only discoverable information required to be turned over pursuant to rule 3.220 is within the obligation of the prosecutor but also any information that falls within Brady "even if it is work product or exempt from discovery under the public records law." See Johnson v. Butterworth, 713 So.2d 985 (Fla. 1998)).

In other words, the obligations under Brady trump any and all protections that the state may ordinarily have in not turning over required information. Even a prosecutor's witness preparation notes, ordinarily protected as work product, must be turned over to the defense if they contain what may amount to material impeachment. In Young v. State, 739 So.2d 553 (Fla. 1999) a prosecutor was preparing his witnesses for trial in a murder case where self-defense was an issue. Witnesses were inconsistent on whether a shotgun or handgun was fired first by the defendant or victim (a critical fact). The prosecutor withheld his notes taken from witness statements during trial preparation that cast doubt on that fact. In preparing his main witness for trial, a Florida highway patrolman, the witness told the prosecutor that he initially thought that he had heard firecrackers going off. This inconsistency was never provided to the defense. The court found reversible error and reversed for a new sentencing hearing.

It is the prosecutor's obligation not only to turn over all information contained within the five categories above but also to go out and LOOK for that information. The United States Supreme Court in Kyles v. Whitley, 514 U.S. 419 (1995) wrote:

> ***"The 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" (Kyles at 437)***

This obligation is echoed by our state Supreme Court in Hurst v. State, 18 So.3d 975 (Fla. 2009) when it ruled that "Brady obligates the prosecutor even when the police know of discoverable evidence and the prosecutor does not."

There is even a memorandum sent out to assistant US attorneys in the Washington DC circuit by the Department of Justice that advises them where to look for Brady information (see MEMORANDUM FOR DEPARTMENT PROSECUTORS 2010 – attached). In that memorandum it is written: "Department policy states":

> ***"It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant."***

In the section entitled "what to review", the prosecutor is directed to look into the following non-exhaustive areas:

1. The investigative agency's entire investigative file, including documents such as electronic communications, inserts, emails, etc. should be reviewed for discoverable information. Should sensitive information ordinarily not discoverable be contained within the reviewed document, the entire document is not necessarily discoverable but rather only the discoverable information contained in it.

2. Confidential informant information should be reviewed in its entirety, including past cases the confidential informant cooperated in. It should include all proffers, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

3. Substantive case related communications may contain discoverable information. They are most likely to occur (a) among prosecutors and/or agents, (b) between prosecutors and/or agents and witnesses and/or victims, and (c) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility (Note: "Material exculpatory information that the prosecutor receives during a conversation with a law enforcement officer or a witness is no less discoverable than if that same information were contained in an email").

4. The prosecutor should not only look into any benefit that a witness may have in testifying against a defendant but also known conditions that could affect the witness's bias such as: animosity toward the defendant, animosity toward a group of which the defendant is a member or with which the defendant is affiliated, relationship with victim, known but uncharged criminal conduct that may provide an incentive to curry favor with a prosecutor, and known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

5. Information obtained in witness interviews whether memorialized in writing or overheard by law enforcement officers or prosecutors. Any material variances in a witness's statements should be memorialized and turned over to the defense as Giglio information.

6. Trial preparation meetings with witnesses are also subject to a Brady review. New information that is exculpatory or impeachment information should be disclosed to the defense.

7. Police officers' notes should be reviewed to determine whether or not they contain material impeachment or exculpatory information. Particular attention should be paid to notes gathered during discussions with the defendant or material witnesses.

It should be noted in the above memorandum sent out to federal prosecutors that their duty is to "seek" all exculpatory and impeachment information from all members of the prosecution team. The word "seek" is important as it puts the onus on prosecutors to go out and find Brady material as opposed to Brady material finding them. As noted in Kyles v. Whitley:

> ***"A 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… But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith) the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (Kyles at 437-8)***

It should be enough to make a general request under Brady for assistant state attorneys to go out and seek and search for such material. Unfortunately, if the defendant does not make specific requests (on where to look), they may be leaving the decisions up to the prosecutors as to where to look. In the Johnson decision above, our state Supreme Court ruled that "when a defendant makes only a general request under Brady, it is the state that decides what information must be disclosed. The prosecutor's decision on disclosure is final." It is for that reason this defendant has filed a specific request for the state to look for Brady material.

The reasoning behind the filing of a specific motion can be found in the United States v. Bagley decision. It held:

> ***"The more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption… The reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case" Bagley at 682-3.***

The defense is mindful that some of the areas being requested for review might involve inadmissible evidence. Our state Supreme Court has ruled that even though evidence may be inadmissible (such as the results of a polygraph) information that "might lead to admissible evidence" is required to be turned over (See: Rogers v. State, 782 So.2d 373 (Fla. 2001) and Hurst v. State, 18 So.3d 975 (Fla. 2009)). For example, the United States Supreme Court in Wood v. Bartholomew, 516 U.S. 1 (1995) has ruled that since the results of a polygraph are inadmissible, the government does not have to turn over the results of a polygraph given to a witness. However, if the pre-test interview differs from the post-test interview in a material way, then the Brady rule requires disclosure of that material impeachment. The results of the polygraph do not have to be turned over, just the discoverable information.

Lastly, timely disclosure of the records, information and material being requested is required so that there is sufficient time for the defense to investigate and potentially use the material provided at trial (See: Whites v. State, 730 So.2d 762 (Fla. 5th DCA 1999), Miller v. United States, 14 A.3d 1095 (D.C. 2011) and Perez v. United States, 968 A.2d 39 (D.C. 2009).

RESPECTFULLY SUBMITTED,

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Attorney for defendant