

**NACDL DETECTING AND DISCOVERING MISCONDUCT THROUGH  
SURVEILLANCE  
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**I. Targeting Police Misconduct Through Litigation – Seeking IAD Files, the Traditional Route**

- A. Local Discovery Rules
- B. Motion for subpoena for tangible evidence
- C. Motion to compel
- D. Subpoena Duces Tecum
- E. Fed. R. Crim. Proc. 16;
- F. Fed. R. Crim. Proc. 17

**II. Law In Support of Disclosure**

- A. Fifth and Sixth Amendments to the United States Constitution;
- B. State Constitutional Provisions
- C. Supreme Court Case Law
  - 1. Brady v. Maryland, 373 U.S. 83 (1963)– (1) favorable to the defendant, (2) material, and (3) known to a member of the prosecution team
  - 2. Application of Gault, 387 U.S. 1, 20–21 (1967) – Due Process of Law applies in juvenile proceedings
  - 3. Giglio v. United States, 405 U.S. 150 (1972) -- Expanded Brady to include impeachment evidence
  - 4. Davis v. Alaska, 415 U.S. 308, 319 (1974) -- Weighed the right to confrontation against confidentiality
  - 5. United States v. Agurs, 427 U.S. 97 (1976) -- Extended Brady to facts and information not related to the particular case, i.e., murder victim’s criminal record
  - 6. United States v. Bagley, 473 U.S. 667 (1985) -- Eliminated the requirement that the defendant make a request for the evidence
  - 7. Pennsylvania v. Ritchie, 480 U.S. 39 (1987) -- Extended Brady to child abuse records related to the immediate case and to others related to separate investigations

8. Kyles v. Whitley, 514 U.S. 419, 437 (1995) – “[T]he 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.”
9. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See Agurs, 427 U.S., at 108 (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure”). **This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... 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). \*440 And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. . . . The prudence of the careful prosecutor should not therefore be discouraged. Kyles v. Whitley, 514 U.S. 419, 439–40 (1995)

#### D. Maryland Law

1. Fields v. State, 432 Md. 650 (2013)
2. Zaal v. State, 326 Md. 54 (Md. 1992);
3. Robinson v. State, 354 Md. 287 (1999) (State has constructive possession and a duty to disclose even if they don’t have actual possession);
4. Fields v. State, 432 Md. 650 (Md. 2013); “A person facing criminal charges may be entitled nonetheless to discovery of confidential personnel records.” . . . “While confidentiality does go to discoverability, it does not guarantee insulation of the confidential matter from disclosure.”
5. State v. Williams, 392 Md. 194, 218-219 (2006): “We do ... agree ... with defendant's argument that the police detective must be viewed as a part of the prosecution for purposes of applying the *Brady* rule.”. . . “[P]olice, when involved in the investigation and preparation of the criminal case being prosecuted” are part of the prosecution team, for purposes of Brady.” Williams, 392 Md. at 218–19. (calling police as a witness is not determinative)
6. In re Parris W., 363 Md. 717, 730 (2001) (ineffective assistance of counsel for attorney in juvenile proceedings to fail to issue proper subpoenas)
7. Mezu v. Morgan State University, 269 F.R.D. 565, 576 (D. Md. 2010) (MPIA does not bar discovery)

#### E. Evidence Rules

1. Md. Rule 5-806 -- When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.
2. 5-608(b)
3. 5-609
4. 5-616

#### F. Prosecutor Rules & Recommendations

1. Rule 3.8 Special Duties of Prosecutors
2. United States Attorney's Manual, § 9-5.100(5)(c) (2014) “[P]otential impeachment information relating to agency employees may include, but is not limited to... i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding; ii) any past or pending criminal charge brought against the employee; iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence-- including witness testimony--that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.”

### **III. Looking Beyond IAD Files, Seek to Discovery Misconduct Through Surveillance**

- A. Are the police using stingray or other surreptitious tracking devices?
  1. If so, did they get a warrant? *State v. Andrews*, 227 Md. App 350 (2016)
  2. See Motion to Suppress in the Andrews Case, attached
- B. Seek Motions to Compel; discovery hearings; and if you suspect surreptitious tracking is being used, don't take no for an answer until law enforcement has been asked under oath

### **IV. Examining BWC for Evidence Planting & Shut Offs**

- A. Be Sure to Watch BWC footage in its Entirety -- sometimes officers forget they are being filmed and sometimes they turn it off when they should not
- B. *State v. Pinheiro* - Officer failed to realize BWC bumped back 30 seconds, during which time the camera recorded the officers allegedly planting drugs
- C. Officer Convicted of Misconduct; Maryland Circuit Court Case Number 118023003
- D. Challenging in Court
  1. Obtain Local BWC Policies and Procedures;
  2. Obtain Officers' BWC Issue Date for his camera;
  3. Subpoena all training logs;
  4. Request IAD records or any other documents related to reprimands for failing to record;
  5. Request log from law enforcement for all officer's camera numbers and issue dates

### **V. Examining BWC for Concealed Misconduct**

- A. Verify all Important Facts alleged by the government, where possible, on BWC
- B. If the Government alleges a fact, and has not shown the BWC of that important fact, compel the BWC
- C. Assume facts are contested; unless you can see it for yourself
- D. If the government alleges that an officer had not BWC, subpoena Audit Logs and any other documents related to the questioned incident
  - 1. See Motions to Compel and Dismiss, Attached, State v. Dudley

## **VI. Surveillance Footage and Authentication / Discovery Abuses**

- A. Authentication in Maryland requires “testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath.” *Washington v. State*, 406 Md. 642, 655 (2008); Md. Rule of Evid. 5-901
  - 1. See Motions in State v. Dudley & State v. Smith, Attached
- B. For Store Surveillance Footage, always request to watch the footage in its entirety, in the player or CODEC that the store or business used to capture it
- C. If the State refuses to provide it, go to the store or the residence to examine the footage & the player yourself
- D. Download the manuals from the internet
- E. Interview the store owner, resident, or operator of the system
- F. Request to See All Documents Related to Video Retrieval
  - 1. Be Sure to Examine the Video Retrieval Forms, including time in and time out, that the local police department completed when retrieving the footage

## **VII. Text and Group Me Messaging**

- A. Law enforcement is using text and chat apps to discuss cases and investigations in real time to skirt discussions being recorded on BWC
- B. File discovery requests seeking all text messages and group chats related to each case
  - 1. See Documents in State v. Dudley, Attached
- C. Ask Court to order State to subpoena chat applications directly
- D. Require police departments to forbid the use of text messaging

## **VIII. Other Tactics**

- A. Gather law enforcement manuals on the use of technology including body cameras

- B. Obtain discipline documents related to the use of technology
- C. Subpoena Audit Logs
- D. Physically inspect the original evidence in person prior to trial
- E. Conduct file reviews