

EVIDENCE — Discovery — *Brady* material — Under Federal constitution and Arizona law, the State reviews evidence and decides what evidence is “material” so that it must be disclosed to defense. Revised 11/2009

Brady v. Maryland, 373 U.S. 83, 87 (1963), imposes on the prosecution an affirmative duty to disclose to the defense any exculpatory evidence — that is, any evidence material to the questions of guilt or punishment. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court explained defendants’ due process rights to discovery under the United States Constitution. The defendant contended that he needed to discover confidential child protection agency records to prepare his defense, and argued that denying him those records denied him his rights to confrontation and compulsory process. *Id.* at 43. The Court held that the denial of access to the confidential records did not deny the defendant the right to confrontation. *Id.* at 60. In explaining these due process rights, the Court noted, “It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.” *Id.* at 57. The Court noted that under the Compulsory Process Clause, a defendant is entitled to the prosecution’s assistance in compelling the attendance of favorable witnesses at trial. However, the Compulsory Process Clause does not guarantee the right to discover the identity of witnesses, nor does it require the government to produce exculpatory evidence. *Id.* at 56.

Under due process principles, the prosecution must give the defense all evidence in its possession that is both favorable to the accused and material to guilt or punishment. *Brady*, 373 U.S. at 87. Evidence is material only if there is a “reasonable probability” that, had the evidence been disclosed, the result of the proceeding would have been different. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). A “reasonable

probability” is “a probability sufficient to undermine confidence in the outcome.” *Bagley*, 437 U.S. at 682; *State v. Bennett*, 213 Ariz. 562, 568, 146 P.3d 63, 69 (2006). “The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish ‘materiality’ in the constitutional sense.” *United States v. Agurs*, 427 U.S. 97, 109-110 (1976).

A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [prosecution's] files. . . . [T]his Court has never held — even in the absence of a statute restricting disclosure — that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one”).

Pennsylvania v. Ritchie, 480 U.S. at 59-60 [citations and footnotes omitted]. The Court further held that the trial court should review confidential documents *in camera* to determine if they contain any information that would have changed the outcome at trial. *Id.* at 47.

Arizona law is the same. In *State v. Acinelli*, 191 Ariz. 66, 952 P.2d 304 (App. 1997), the defendant claimed that the officers involved in his case had planted the drugs in his car. The defendant asserted that the State had an affirmative duty to review the officers’ personnel files and determine if they had

ever been disciplined for similar conduct. He claimed that the personnel files were material because of his theory of defense, asserting that he needed to have the officers' files reviewed in order to attack their credibility. *Id.* at 71, 952 P.2d at 309. The Court of Appeals disagreed and held that the defendant's speculation that the officers might have acted improperly was insufficient to justify any *in camera* inspection. *Id.* The Court stated,

Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.

Id. (quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984).