# SAMPLE MOTION TO COMPEL DISCLOSURE OF LAPEL VIDEOS: Provided by

**Barry G. Porter, Burgess and Porter Law, LLC**

SECOND JUDICIAL DISTRICT COURT COUNTY OF X

STATE OF NEW MEXICO

No. CR 2016-12345

STATE OF NEW MEXICO,

Plaintiff,

vs.

JOHN DOE,

Defendant.

# MOTION TO COMPEL DISCLOSURE OF LAPEL VIDEOS

Defendant, through counsel undersigned and pursuant to Rules 5-501 and 5-505, NMRA 1986, respectfully moves this Court for an Order requiring the State to comply with Rules 5-501 and 5-505, NMRA 1986. This motion is made pursuant to Article II, sections 4, 12, and 18 of the New Mexico Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. As grounds for this motion, defendant states:

# Supporting Facts and List of Requested Material

* 1. Defense counsel entered an appearance on July 1, 2016. Upon making the appearance Defendant requested disclosure of all discoverable material.
  2. In addition, defense counsel submitted an email request to ADA Smith on July 1, 2016 and then again on August 1, 2016. (See attached Exhibit A).
  3. Discovery was provided on August 2, 2016.
  4. Initial discovery has been supplied in this case, however, at least one other discovery items remains outstanding.
  5. According to the evidence log, the only item tagged into evidence was marijuana and a lapel video was not tagged into evidence.
  6. On August 4, 2016, defense counsel submitted an email to ADA Smith specifically requesting a copy of the lapel video and asking that ADA Smith contact Officer

George Jones for a copy of the lapel video. (See attached Exhibit B).

* 1. To date, the video has not been provided nor has there been a response to the email.
  2. Defendant specifically requests the additional disclosure of the following:

# Lapel Videos from X Police Department issued Lapel Cameras of Officer George Jones, #5555, and Officer Richard Rogers, #1111.

* + 1. **Any other documents, statements or tangible pieces of evidence the state intends to introduce or refer to at trial.**
  1. On June 15, 2012, Chief X issued Department Special Order 11-27, which mandated that all officers use a lapel camera. (See attached Exhibit C).
  2. The Albuquerque Police Department General Orders 1-39 mandates that all officers use the lapel camera to document specific incidents, including:

1-39-2(C) All sworn department personnel will record each and every contact with a citizen during their shift that is the result of a dispatched

call for service… The recordings will be saved for no less than 120 days.” (See attached Exhibit D).

* 1. Defendant is requesting an emergency hearing on this matter because the 120 day deadline for the records to be saved is X DATE, 2016.

# Federal Constitutional Law on Disclosure of Materials

Pursuant to United States Supreme Court decisions delineating Constitutional Due Process rights, the prosecution must provide favorable information to defense that **tends to negate guilt, reduce punishment, or goes to the credibility of witnesses (impeachment evidence)**. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); *Giglio v. United States*, 405 U.S.

150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972).

Moreover, in *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), the U.S. Supreme Court held that the prosecution must volunteer exculpatory evidence even in the absence of a particularized request therefore. *United States v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985), acknowledged that the failure to provide specifically requested impeachment evidence can affect independent investigation, defenses, or trial strategies. *Penn- sylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989 (1987), held that under the Due

Process clause, the defendant had a right to discover information over claims of privilege which are not based on the constitution (such as the constitutional privilege against self-incrimination).

# State Constitutional Law on Disclosure of Material

Likewise, the New Mexico Supreme Court has mandated that the prosecution is required by due process clause of Fourteenth Amendment of United States Constitution to disclose evidence favorable to defendant. *U.S.C.A. Const.Amend. 14*; Rules Crim.Proc., Rule 27(a)(6).

*State v. Wisniewski*, 103 N.M. 430, 708 P.2d 1031 (1985). Furthermore, the *Brady* requirement of disclosing evidence favorable to defendant applies to all members of prosecutorial team, including police authorities or other agents of the state. Id., NMRA 1986, Rule 5-501A(4), and *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993).

The district attorney should not hesitate to show his entire file to the defendant since his primary duty is not to convict the defendant, but to see that the defendant has a fair trial and that justice is done. Rules of Criminal Procedure, rule 27(b). *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

Deliberate suppression by prosecutor of evidence favorable to and requested by accused violates due process when evidence is material either to guilt or punishment. [*State v. Stephens*,](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1982147679&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.07&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [99 N.M. 32, 653 P.2d 863 (1982);](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1982147679&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.07&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [*State v. Morris*, 69 N.M. 244, 365 P.2d 668](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1961125164&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.07&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) (1961).

Suppression of evidence or use of false evidence knowingly by prosecuting officer in criminal case constitutes denial of due process if the evidence is material to guilt or innocence of accused or to penalty to be imposed. [*Trimble v. State*, 75 N.M. 183, 402 P.2d 162](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1965123329&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.07&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) (1965).

Additionally, it is immaterial if the suppression of evidence was negligent rather than willful. *Id.*

The requested information includes all information material to guilt, punishment,1 and the credibility of government witnesses,2 including potential impeachment material for all government witnesses.3 Failure to disclose impeachment information is the same, under *Brady*, as the failure to disclose exculpatory information.4

1. *See Brady v. Maryland*, 373 U.S. 83, 87(1963).
2. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the reliability of a given witness may well be

determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this rule.”) (citations and internal quotation marks omitted).

3 *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence … as well as exculpatory evidence falls within the *Brady* rule.”).

4 *See Bagley*, 473 U.S. at 676; *Sykes v. United States*, --A.2d.-- 2006 WL 564050, at \*8 (D.C. March 9, 2006)

NMRA Rule 5-501 rule was derived from Rule 16(a) of the [Federal Rules of Criminal](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=344&amp;SerialNum=0292103239&amp;FindType=Y&amp;ReferencePositionType=S&amp;ReferencePosition=304&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [Procedure. See generally, 62 F.R.D. 271, 304-313 (1974)](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=344&amp;SerialNum=0292103239&amp;FindType=Y&amp;ReferencePositionType=S&amp;ReferencePosition=304&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split); 48 F.R.D. 553, 587-606 (1970).

Subparagraph (6) of Paragraph A of the New Mexico rule was added in 1979 to make it clear that the state has a duty to provide the defense with exculpatory material evidence. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giles v. Maryland*, 386 U.S.

66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). *See* NMRA Rule 5-501 Commentary.

Deliberate suppression by prosecutor of evidence favorable to and requested by accused violates due process when evidence is material either to guilt or punishment. [*State v. Stephens*,](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1982147679&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [99 N.M. 32, 653 P.2d 863 (1982);](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1982147679&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [*State v. Morris*, 1961, 69 N.M. 244, 365 P.2d 668](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1961125164&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split). That

suppression of evidence was negligent rather than willful was immaterial to question whether the suppression amounted to denial of due process to defendant. [*Trimble v. State*, 75 N.M. 183, 402](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1965123329&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) [P.2d 162](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1965123329&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split) (1975). Furthermore, “[I]f the prosecution has a prior inconsistent statement of a material witness, it should disclose that statement to defendant”. *State v. Altgilbers*, 109 N.M.

453, 463, 786 P.2d 680, 690 (N.M.App.,1990). Indeed, the New Mexico appellate court has stressed:

[T]he best way to avoid reversal for failure to disclose evidence to defendant before trial is for the state to review methodically and diligently the information available to it and to disclose all exculpatory information to defendant, giving defendant the benefit of the doubt on arguable matters. *See State v. Sandoval,* 99 N.M. 173, 655 P.2d 1017 (1982).

*State v. Altgilbers*, 109 N.M. 453, 464, 786 P.2d 680, 691 (N.M.App.,1990).

The requested information includes all information that the state or any part of the prosecution team “know or reasonably should know tends to negate the guilt of the accused or to mitigate the offense.” Under *Brady* and its progeny, this request extends to all information known by all law enforcement or other government agencies involved in this case, whether or not personally known to the individual prosecutor.5

(“[T]he grand jury testimony of Mr. Parrott and Mr. Sellers should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching

evidence.”).

5 *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (The duty of disclosure is not limited to evidence in the actual possession of the prosecutor. Rather, it extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies.); *see also United States v. Safavian*, 233 F.R.D. 205, 207 (D.D.C. 2006) (Prosecutor has a duty to search and disclose *Brady* evidence, within reason, in the possession of all

Information within custody or control of agent of state is presumed to be within control of prosecutor, for purposes of determining whether there is duty to disclose such information. NMRA 1986, Rule 5-501, subd. A(4). [*State v. Hernande*z, 115 N.M. 6, 846 P.2d 312 (1993),](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=661&amp;SerialNum=1993041511&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split)

denial of habeas corpus affirmed [210 F.3d 389](http://web2.westlaw.com/find/default.wl?vc=0&amp;rp=%2ffind%2fdefault.wl&amp;DB=506&amp;SerialNum=2000087288&amp;FindType=Y&amp;AP&amp;fn=_top&amp;utid=%7b737804FE-5FE9-4727-B6D5-A96E0173F336%7d&amp;rs=WLW7.11&amp;mt=NewMexico&amp;vr=2.0&amp;sv=Split). [I]t is irrelevant for *Brady* purposes whether evidence was suppressed intentionally or negligently. It is also irrelevant whether the district attorney or the police were ultimately responsible for the suppression. Law enforcement personnel involved in an investigation are considered part of the prosecution for *Brady* purposes. *Case v. Hatch*, 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905.

The following are examples of evidence courts have construed as *Brady*:

## *INFORMATION REGARDING GOVERNMENT WITNESSES*

* **Exculpatory and/or impeachment Grand Jury Testimony.** *See Sykes v. United States*,

--A.2d.-- 2006 WL 564050 (D.C. 2006).

* **Personnel files, especially of testifying officers:** See, e.g., *United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (if specific request is made, prosecutor must search personnel records of police officer/witnesses to fulfill *Brady* obligations); *United States v. Muse*, 708 F.2d 513, 516 (10th Cir. 1983) (recognizing that prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.).
* **Misconduct by government witnesses**: *See, e.g., United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness, and “continuous stream of unlawful favors” including phone privileges, presents, special visitors, provided by prosecution to witnesses is considered *Brady* material).
* **Police perjury in motions hearings**: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517- 19 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding is considered material *Brady* evidence relevant to impeachment).
* **Knowledge of police intimidation of witnesses**: *See, e.g., Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and

Executive Branch agencies and departments.)

information regarding suspect seen carrying murder weapon minutes after shooting is considered *Brady*).

## *INCONSISTENT STATEMENTS*

* **Contradictory or inconsistent statements**: [I]f the prosecution has a prior inconsistent statement of a material witness, it should disclose that statement to defendant. *State v. Altgilbers*, 109 N.M. 453, 463, 786 P.2d 680, 690 (N.M.App.,1990). *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to turn over statement by co-defendant that he had planned the killing, and that co-defendant had performed actual killing is violation of due process); *Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles’ car in supermarket parking lot).
* **Statements of potential witnesses not called to testify**: *See, e.g., United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of potentially exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).

New Mexico’s discovery law is further stated in NMRA Rule 5-501(A) which provides:

**A. Information subject to disclosure**. Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

1. any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;
2. the defendant's prior criminal record, if any, as is then available to the state;
3. any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;
4. any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the

defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

1. a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and
2. any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

# Conclusion

The matters requested above in this motion fall squarely within the parameters of required disclosure. WHEREFORE, the Defendant requests this Court to enter an Order requiring the State to disclose those matters requested above and for such other relief as the Court may deem just and proper pursuant to Rules 5-112, 5-501, and 5-505, NMRA.

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| This will certify that a copy of the foregoing was placed in the District Attorney's incoming basket and mailed to other counsel upon filing.  Counsel for Defendant | NEW MEXICO PUBLIC DEFENDER  Respectfully Submitted,  Attorney X  Phone: 888-555-1212  Judge: X  Time: |