

# WHEN THE GOVERNMENT HOLDS THE PURSE STRINGS BUT NOT THE PURSE: *BRADY*, *GIGLIO*, AND CRIME VICTIM COMPENSATION FUNDS

VIDA B. JOHNSON<sup>∞</sup>

I. INTRODUCTION.....	491
II. VICTIM COMPENSATION FUNDS: QUALIFICATIONS, AMOUNTS, AND ADMINISTRATION.....	493
III. MONEY: A POWERFUL MOTIVATOR.....	495
IV. A VICTIM COMPENSATION FUNDS APPLICATION IS <i>BRADY</i> MATERIAL THAT SHOULD BE DISCLOSED TO THE DEFENSE .....	496
V. A VICTIM COMPENSATION FUNDS APPLICATION AS <i>BRADY</i> MATERIAL IS ALSO CONSISTENT WITH <i>GIGLIO</i> AND <i>BAGLEY</i> .....	498
VI. IMPACT OF CONFIDENTIALITY STATUTES AFTER <i>DAVIS V. ALASKA</i> .....	500
VII. <i>BRADY</i> EVIDENCE IS EVIDENCE THAT IS “FAVORABLE TO THE ACCUSED” .....	500
VIII. CONCLUSION.....	503

## I. INTRODUCTION

Fifty years ago in *Brady v. Maryland*,<sup>1</sup> the Supreme Court held that “evidence favorable to the accused . . . where the evidence is material either to guilt or punishment” must be disclosed to the defense.<sup>2</sup> Fewer than ten years later, in *Giglio v. United States*,<sup>3</sup> the Court ruled that prosecutors must disclose information that impeaches the credibility of a government witness, including benefits that have been provided, promised, or offered to the witness.<sup>4</sup> Despite the clarity of these rulings and the increasing public outcry for more just

---

<sup>∞</sup> Visiting Professor of Law, Georgetown Law, Criminal Defense and Prisoner Advocacy Clinic and Criminal Justice Clinic. Prior to her position at Georgetown, Ms. Johnson was a supervisor at the Public Defender Service for the District of Columbia. Thanks to Jonathan Anderson and Devin Prater for their help with this article. Thanks also to the *Brady* panel at the Southeastern Association of Law Schools 2013 conference.

1. 373 U.S. 83 (1963).

2. *Id.* at 87.

3. 405 U.S. 150 (1972).

4. *Id.* at 154.

prosecutions,<sup>5</sup> one significant source of impeachment information is routinely withheld from the defense—information about crime victims' fund requests.<sup>6</sup>

Every jurisdiction in the United States provides money to compensate victims and witnesses of crime.<sup>7</sup> Most of these funds compensate victims and witnesses for losses, trauma, and even for re-location of victims or witnesses of crime.<sup>8</sup> The payouts from these funds can amount to thousands of dollars depending on the severity of the crime, the importance of the witness to the case, and the services needed.<sup>9</sup> In impoverished communities, which suffer from high levels of crime,<sup>10</sup> many people regard these programs as a potential source of needed money.<sup>11</sup> However, the money comes with certain obligations for the recipient.<sup>12</sup> A universal feature of victims' funds is a requirement that, in order for the victim or witness to access the resources of the program, she must cooperate with law enforcement throughout the pendency of the criminal case, all the way to trial.<sup>13</sup>

Despite the financial incentives for government witnesses created by victim-fund payments, prosecutors generally do not disclose information regarding these payments. In most instances, cases are tried without the defense ever being

---

5. Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES, Jan. 4, 2014, at 10.

6. *Giglio*, 405 U.S. at 154–55.

7. These funds are sourced in part through federal money. See 42 U.S.C. §§ 10601–10602 (2013). See also State Links, NATIONAL ASSOCIATION OF CRIME VICTIMS COMPENSATION BOARDS, <http://nacvcb.org/index.asp?bid=8> (last visited June 29, 2014).

8. For example, in New York, a victim may receive funds for loss or damage of essential personal property (up to \$500, including \$100 for cash); burial/funeral expenses (up to \$6,000); lost wages or lost support (up to \$30,000); transportation (necessary court appearances for prosecution or to related medical appointments); occupational/vocational rehabilitation, use of domestic violence shelters, or crime scene clean-up (up to \$2,500); good samaritan property losses (up to \$5,000); and/or moving expenses (up to \$2,500). N.Y. STATE EXECUTIVE LAW § 620 (McKinney 2013).

9. In Colorado, victims may be eligible to receive up to \$20,000 for out-of-pocket expenses not covered by insurance or other collateral resources, or up to \$1,000 in emergency funds directly related to the crime. COLO. REV. STAT.

§ 24-4.1-108 (2013). In Alaska, a person may be awarded up to \$40,000 per victim per incident. See ALASKA STAT. §18.67.130(c) (2013). In California, for applications submitted on or after January 1, 2013, regardless of the crime date, the claim maximum is \$70,000. CAL. CODE REGS., tit. 2, § 649.7 (2013).

10. According to the Bureau of Justice Statistics, in 2007, people making less than \$7,500 a year were almost three times more likely to be victims of crime than those making \$75,000 a year or more. See BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, VICTIMIZATION RATES 12 (2007), available at <http://www.bjs.gov/content/pub/pdf/cvus/previous/cvus15.pdf>.

11. *Crooks Cashing in on Crime Victim's Compensation Fund*, FOX MEMPHIS (Apr. 12, 2011, 10:17 PM), <http://www.myfoxmemphis.com/story/18545859/crooks-cashing-in-on-crime-victims-compensation-fund>.

12. See 42 U.S.C. § 10602(b)(2) (2013) (explaining that in order to receive federal funding, state crime victim compensation programs must “promote[] . . . cooperation with the reasonable requests of law enforcement”).

13. *Id.* See also Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 246 (2011).

made aware of the requests for funds. Even in cases where specific requests for such information are made by the defense, prosecutors argue that they need not disclose the information because the money is funded and administered by the court or some other branch of the state, not the police or district attorney's office.<sup>14</sup> This justification for non-disclosure, however, ignores the substantial control prosecutors and police have over the disbursement of these funds. Another excuse given in some jurisdictions is that the information is confidential.<sup>15</sup> That explanation ignores longstanding precedent. Given that this information would prove useful to the defense in impeaching a witness who had received money through one of these funds, this article seeks to answer the question of whether the practice of withholding victim's funds payment information runs contrary to the Supreme Court's decisions in *Brady v. Maryland* and *Giglio v. United States*.<sup>16</sup>

## II.

### VICTIM COMPENSATION FUNDS: QUALIFICATIONS, AMOUNTS, AND ADMINISTRATION

Crime-victim compensation programs were designed to assist victims recover from crime physically, emotionally, and financially.<sup>17</sup> These programs offer aid to reimburse victims and witnesses for out-of-pocket expenses, such as crime scene clean-up,<sup>18</sup> funeral expenses, and other monetary losses resulting directly from the crime.<sup>19</sup> Many programs also pay for counseling for people who have witnessed or been victims of violent crime.<sup>20</sup> Some programs pay for

---

14. This is the position taken by the United States Attorney's Office in many cases that I have litigated in District of Columbia Superior Court. Prosecutors also cite state confidentiality statutes as a justification for withholding this valuable information from the defense. *See* D.C. CODE § 4-511 (2001).

15. More than twenty states and the District of Columbia restrict information about crime victims' funds from the public. *See* ALA. CODE § 15-23-5(4) (2014), COLO. REV. STAT. ANN. § 24-4.1-107.5(2) (2000), CONN. GEN. STAT. ANN. § 54-204 (1993), D.C. CODE § 4-511 (1997), GA. CODE ANN. § 17-15-4(a)(2) (2014), IDAHO CODE ANN. § 72-1007 (2014), KAN. STAT. ANN. § 74-7308(e) (2014), LA. REV. STAT. ANN. § 46:1806(D) (2012), ME. REV. STAT. tit. 5, § 3360D(4) (2012), MISS. CODE ANN. § 99-41-31 (2000), N.D. CENT. CODE ANN. § 54-23.4-17 (2013), OHIO REV. CODE ANN. § 2743.62(2)(a) (2014), OKLA. STAT. ANN. tit. 21, § 142.9(G) (2014), OR. REV. STAT. ANN. § 147.205(1)(b) (2014), 18 PA. STAT. ANN. § 11.709 (2002), S.C. CODE ANN. § 16-3-1240 (2013), S.D. CODIFIED LAWS § 23A-28B-36 (2014), TEXAS GOV'T ANN. § 552.132(b) (2013), VT. STAT. ANN. § 13-5358A (2012), VA. CODE ANN. § 19.2-368.3(2) (1976) (2014), WASH. REV. CODE ANN. § 7.68.140 (2012).

16. 405 U.S. 150 (1972).

17. Rutledge, *supra* note 13, at 224.

18. DOUGLAS N. EVANS, COMPENSATING VICTIMS OF CRIME 7 (Research and Evaluation Center, John Jay College of Criminal Justice, June 2014) (explaining that thirty-five states plus Washington, D.C. compensate for crime scene clean-up).

19. 42 U.S. CODE § 10602(b)(1).

20. Evans, *supra* note 18, at 7.

relocation of witnesses into new homes<sup>21</sup> and provide money or vouchers for every-day expenses like groceries, toiletries, clothing, and public transportation.<sup>22</sup> Jurisdictions sometimes provide for lost wages that result from workdays missed due to the alleged crime.<sup>23</sup>

The amount of money at play is not trivial. Approximately \$500 million is awarded to victims and witnesses in the United States every year.<sup>24</sup> In the 2013 fiscal year, Nevada's state program paid out \$6 million dollars in claims among 1,900 claimants,<sup>25</sup> an average award of over \$3,000 per claimant. Louisiana also has an average payout of \$3,000 for qualified applicants,<sup>26</sup> Tennessee's program provides up to \$3,000 for "pain and suffering" for those claiming to be sexual assault victims.<sup>27</sup> The District of Columbia's program pays up to \$3,000 in moving and shelter costs and up to \$10,000 in lost wages.<sup>28</sup> While most programs have caps for the amount of money that a single victim or witness may receive, in many instances, that cap is in the tens of thousands of dollars.<sup>29</sup>

Although the courts or the state typically administers these funds, victims and witnesses are referred to the compensation programs primarily by police and

---

21. *Id.* (explaining that twenty-four states, Washington, D.C. and some Colorado districts pay for moving/relocation expenses).

22. There are other funds available for witnesses in addition to Crime Victims Funds. Federal and state money is available through various victim assistance programs and witness relocation programs.

23. Alabama, for example, compensates victims and next-of-kin for missed work due to certain crimes. *How to Apply*, ALABAMA CRIME VICTIMS' COMPENSATION COMMISSION, <http://acvcc.alabama.gov/faq.htm> (last visited March 2, 2014). Maryland also awards compensation from loss of earnings related to a victim's inability to work immediately after a crime. CRIMINAL INJURIES COMPENSATION BOARD, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, <http://www.dpscs.state.md.us/victimservs/cicb/index.shtml> (last visited June 29, 2014).

24. Evans, *supra* note 18.

25. Adam Kealoha Causey, *Federal Funds Help Nevada Crime Victims*, LAS VEGAS REV.-J. (Sept. 9, 2013, 5:03 PM), <http://www.reviewjournal.com/news/crime-courts/federal-funds-help-nevada-crime-victims> (telling the story of a man who has received \$15,000 in victim funds after being injured by a drunk driver).

26. Monica Hernandez, *Report Ranks Louisiana Second to Last in Crime Victims' Compensation*, SHREVEPORT TIMES, June 17, 2014.

27. *Crooks Cashing in on Crime Victim's Compensation Fund*, *supra* note 11.

28. D.C. SUP. CT., WHAT IS THE CRIME VICTIMS COMPENSATION PROGRAM?, [http://www.dccourts.gov/internet/documents/CVCP\\_Brochure.pdf](http://www.dccourts.gov/internet/documents/CVCP_Brochure.pdf).

29. *See, e.g.*, ALASKA STAT. ANN. § 18.67.130(c) (West 2013) (Alaska authorizes up to \$40,000 in payments); STATE OF COLO., VICTIM COMPENSATION APPLICATION, [http://dcj.state.co.us/ovp/Documents/Vic%20Comp/VC\\_English\\_Common\\_Appl.October2013.pdf](http://dcj.state.co.us/ovp/Documents/Vic%20Comp/VC_English_Common_Appl.October2013.pdf) (last visited March 2, 2014) (Colorado provides payment up to \$20,000); CAL. VICTIM COMPENSATION AND GOV'T CLAIMS, FAQ—EXPENSES, <http://www.vcgcb.ca.gov/victims/faq/expenses.aspx#limits> (last visited March 2, 2014) (California has the highest cap out of all fifty states—\$63,000 as of 2011); OFFICE OF ATT'Y GEN. OF ARK., CRIME VICTIM REPARATIONS, <http://arkansasag.gov/programs/criminal-justice/crime-victim-reparations> (last visited March 2, 2014) (Arkansas authorizes \$10,000 for most claims and \$25,000 only in the event of catastrophic injury).

victim advocates at prosecutors' offices.<sup>30</sup> To apply for funds under these programs, police must identify the applicant as either a victim or witness. Applications are available in police stations and prosecutors' offices in many states.<sup>31</sup> Sometimes the witnesses get help in filling out the forms from "victim advocates," who are employees of the prosecutor's office.<sup>32</sup> More than half of states require police officers to notify victims about crime-victim programs.<sup>33</sup> Most victims and witnesses will therefore understand that the money flows through the police or prosecutor. Because cooperation with law enforcement is a feature of every one of the programs,<sup>34</sup> even those who are aware that the money does not come directly from the police or prosecutors understand that they must satisfy the police and prosecutors in order to receive the money.

### III.

#### MONEY: A POWERFUL MOTIVATOR

Crime is most rampant in poor communities, and, as a result, the majority of crime victims are poor.<sup>35</sup> The financial assistance offered by crime-victim funds can provide much-needed relief from daily economic pressures that exist independent of the alleged crime. This is especially true when what is being offered is money for housing, food, toiletries and other daily expenses. An offer to move an entire family to another neighborhood may translate to a safer, less-crime ridden neighborhood as well. Access to this money can be a significant motivator both for individuals who have actually witnessed or been victimized by crime and those who have not.

Most jurisdictions may disqualify a witness from the funds for failing to come forward in a timely manner, failing to cooperate with the prosecution, refusing to testify, or requesting that the charges be dropped.<sup>36</sup> In some states, a criminal conviction against the person accused of committing the crime makes collecting the funds easier.<sup>37</sup> The funds can therefore provide a powerful incentive for some witnesses to fabricate, add details, shade their testimony at trial, or otherwise, make themselves seem more indispensable in order to get access to additional resources. Others may become concerned with their

---

30. D.C. CODE § 4-517(a) ("[a]ll law enforcement agencies in the District of Columbia shall inform victims or secondary victims of the existence of the Program and provide application forms . . . ."); OFFICE OF ATT'Y GEN. OF ARK., *supra* note 29.

31. OFFICE OF ATT'Y GEN. OF ARK., *supra* note 29.

32. CAL. VICTIM COMPENSATION PROGRAM, APPLICATION FOR CRIME VICTIM COMPENSATION, [http://www.vcgeb.ca.gov/docs/forms/victims/apps/victimcompensationapp\\_eng.pdf](http://www.vcgeb.ca.gov/docs/forms/victims/apps/victimcompensationapp_eng.pdf) (last visited March 2, 2014).

33. Evans, *supra* note 18, at 15.

34. 42 U.S.C. § 10602(b)(2) (2013).

35. *See* Editorial, *supra* note 5.

36. Rutledge, *supra* note 13, at 246.

37. The state of Alaska may require that the person requesting the funds submit to a hearing where she will be questioned about the allegation, though no such hearing is required where there is a criminal conviction. ALASKA STAT. § 18.67.040(a)–(e) (West 2013).

credibility once they realize money is at stake and simply fail to correct prior exaggerations or embellishments.

#### IV.

##### A VICTIM COMPENSATION FUNDS APPLICATION IS *BRADY* MATERIAL THAT SHOULD BE DISCLOSED TO THE DEFENSE

Although victims' fund money does not originate from police or prosecution budgets, the police and prosecutors control the flow of the money. For example, an individual cannot receive funds unless she is deemed a victim or witness by the government.<sup>38</sup> Accordingly, the police and prosecutors play a direct role in determining whether a victim or witness may receive funds. Additionally, individuals are often referred to the program by police or employees of a prosecutor's office, and the programs require cooperation with the police and prosecutors.<sup>39</sup> Because police and prosecutors control the witnesses' ability to obtain the funds, these funds create a motive for the witnesses to curry favor with the government. This is impeaching information that should be turned over to the defense.

Evidence of bias against the accused or in favor of the government is a classic form of impeachment material used to attack the credibility of government witnesses. In recognizing how powerful a motive to curry favor with the government may be, the Supreme Court wrote: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."<sup>40</sup>

Information that shows bias cannot be underplayed in terms of its significance to a jury. Most criminal cases rely heavily on the testimony of witnesses (as opposed to cases with DNA or other forensic evidence)<sup>41</sup> and evidence of bias that can cast doubt on the reliability of the government's main witness is often of critical importance. In 1974, in *Davis v. Alaska*, the Supreme Court stated, "the partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'"<sup>42</sup> The *Davis* Court recognized "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."<sup>43</sup>

---

38. Rutledge, *supra* note 13.

39. See BUREAU OF JUSTICE STATISTICS, *supra* note 10.

40. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

41. DNA plays no role in 90–95% of criminal convictions. See Sue Russell, *Seeking Second Chances Without DNA*, PACIFIC STANDARD, Oct. 11, 2012, available at <http://www.psmag.com/legal-affairs/seeking-second-chances-without-dna-48082/>.

42. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting 3A J. WIGMORE, EVIDENCE § 940, 775 (Chadbourn rev. 1970)).

43. *Id.* at 316–17.

## 2014 BRADY, GIGLIO, AND CRIME VICTIM COMPENSATION FUNDS 497

The pursuit of monetary gain is archetypal bias evidence.<sup>44</sup> To detect bias, the defense may cross-examine witnesses who pursue civil suits relating to pending criminal cases,<sup>45</sup> who request reward money,<sup>46</sup> and those who seek other forms of pecuniary gain.<sup>47</sup> Where a witness correctly perceives that his or her cooperation with the police or prosecutors is a necessary precondition to receiving victims' fund money, the witness has a classic form of bias in favor of the government.

Testimony from "motivated" witnesses is notorious unreliable. Jailhouse informants – witnesses with a different type of interest-bias, specifically the desire to be released from incarceration in exchange for their testimony – have proven to be unreliable in many instances. According to the Innocence Project, informants have testified falsely in more than fifteen percent of the DNA exonerations cases.<sup>48</sup> According to another study, in 2005, at least 50 innocent men had been on death row in whole or in part based on testimony of "witnesses with an incentive to lie."<sup>49</sup> A monetary interest can be as powerful a motive to lie for some as freedom is for incarcerated government cooperators. We know from the news that people make false accusations<sup>50</sup> or give false testimony in exchange for money or lesser sentences. The cases of the Duke Lacrosse Players,<sup>51</sup> Dominique Strauss-Kahn,<sup>52</sup> and others<sup>53</sup> are clear examples.

Information about receipt or requests for money from crime victims' funds would be quite useful to the defense in many cases. Without information on the

---

44. *United States v. Bagley*, 473 U.S. 667, 683 (1985).

45. For a detailed discussion of civil suits and bias by alleged crime victims, see Tom Lininger, *Is it Wrong to Sue for Rape?*, 57 DUKE L.J. 1557 (2008).

46. *Guzman v. Department of Correction*, 663 F.3d 1336 (11th Cir. 2011).

47. See *Reynoso v. Giurbino*, 462 F.3d 1099, 1118 (9th Cir. 2006) (explaining that where the receipt of reward money rendered a witness biased, counsel's decision to not cross-examine witnesses about their motivation for testifying was not sound trial strategy).

48. *Understand the Causes: Informants*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited June 30, 2014).

49. Survey, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Northwestern University School of Law, CENTER ON WRONGFUL CONVICTIONS 3 (Winter 2004-2005), <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf>.

50. Ariell Hart, *Runaway Bride is Indicted*, NEW YORK TIMES, May 26, 2005 (woman falsely accuses "Hispanic man and white woman" of kidnapping her to avoid wedding); Rick Bragg, *Focus on Susan Smith's Lies and Smile*, N.Y. TIMES, July 25, 1995 (woman kills her two children accuses black carjacker).

51. Duff Wilson and David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007.

52. John Eligon, *Strauss-Kahn Drama Ends with Short Final Scene*, N.Y. TIMES, Aug. 23, 2011.

53. Jennifer Pompei, *"It Wasn't The Right Skin Color": 4 year old Fails Babysitter's Home Invasion Plot*, WASHINGTON TIMES, June 24, 2014. See also, Mike Tierney, *At 28, Rookie Refuses to Focus on Time Lost*, N.Y. TIMES, Aug. 5, 2013 (high school football star falsely accused of rape by woman who won a \$1.5 million settlement from school district and recants ten years later); *Charges Dropped in Bogus MTU Rape Case*, ABC 10 NEWS, July 28, 2009 (Michigan Tech student makes false accusation of rape).

dispensing of victims' funds, there is little a defense attorney can do to prove that a witness has a financial stake in the case.<sup>54</sup>

It is not difficult to imagine that the credibility of an alleged victim might be questioned by a jury upon hearing of money received from victims' funds. One example might be an impoverished young woman who makes an allegation of rape against an ex-boyfriend who has left her for another woman. After making the report, she is offered a new apartment, money for groceries, money for transportation—money which ends up being in the thousands of dollars by the time the case gets to trial. If the information about her funds is admissible, the defense may argue in closing that the \$7,000 she has received is one of the reasons why she has failed to admit fabricating the accusation to the police and prosecutors. Another scenario might be where a man falsely claims to be robbed to cover up the fact the he had serious gambling losses. He initially claims to police that \$100 is taken from him. When he applies for victim compensation, he claims that the amount taken was \$250. In closing arguments, the defense attorney argues that, given the victim's inconsistencies about the amount of money taken, his testimony cannot be trusted. In either of the above two scenarios, the defense would lose an important argument about witness credibility without the disclosure of the victims' funds information.

## V.

### A VICTIM COMPENSATION FUNDS APPLICATION AS *BRADY* MATERIAL IS ALSO CONSISTENT WITH *GIGLIO* AND *BAGLEY*

It is now utterly uncontroversial that information possessed by the government related to the bias of a prosecution witness is evidence favorable to the accused that must be disclosed to the defense, pursuant to *Brady v. Maryland* and its progeny.<sup>55</sup> In *Giglio v. United States*, the Court held that *Brady*'s disclosure requirement extends to impeachment information “affecting credibility,” including benefits promised by prosecutors.<sup>56</sup> In *Giglio*, a prosecutor promised a key witness – an alleged co-conspirator – that he would not be prosecuted if he testified for the government. The prosecutor never disclosed the promise to the defense.<sup>57</sup> The Court found that because the

---

54. Though, of course, in many cases, the defense attorney may decide not to use the information even where the money at stake is thousands of dollars if it is inconsistent with the defense's theory of the case.

55. See *Brady*, 373 U.S. at 86 (holding that the suppression of a confession by a co-conspirator by the prosecution violated the Due Process Clause of the Fourteenth Amendment). To establish a violation of *Brady*'s disclosure requirement, the evidence must be material, which in the *Brady* context means “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). The materiality analysis for determining a *Brady* violation is necessarily case-specific, and therefore is not discussed in this article. It bears noting, however, that bias evidence concerning a central witness is often of critical importance.

56. *Giglio*, 405 U.S. at 154.

57. *Id.* at 150–51.

## 2014 BRADY, GIGLIO, AND CRIME VICTIM COMPENSATION FUNDS 499

witness's credibility was central to the case, the jury was entitled to know about any understanding or agreement regarding his potential prosecution.<sup>58</sup> The Court wrote: "When the reliability of a given witness may well be determinative of guilt or innocence nondisclosure of evidence affecting credibility falls within [the general rule of *Brady*]." <sup>59</sup>

Almost thirty years ago, in *United States v. Bagley*, the Court extended the reasoning of *Giglio*, and suggested that information regarding an offer of money by the police or prosecutors in exchange for a witness's assistance would be favorable to the defense and subject to *Brady* disclosure requirements.<sup>60</sup> In *Bagley*, the Bureau of Alcohol, Tobacco, and Firearms (ATF) offered two witnesses money for the provision of information that met the "satisfaction" of the ATF.<sup>61</sup> The offer of money in exchange for information was not disclosed to the defense at trial. After the trial, however, the defense learned not only that the money had been offered but also that the witnesses may have been paid for their testimony.<sup>62</sup> The Court remanded the case to the Ninth Circuit for a determination of whether, had the information been disclosed, there was a reasonable probability it would have affected the outcome.<sup>63</sup> Justice Blackmun, who wrote the majority opinion, noted separately that the "possibility of a [financial] reward" gave the witnesses "a direct, personal stake in respondent's conviction," and the "fact that the stake was not guaranteed . . . but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction."<sup>64</sup> In addition to specific findings by the Court with respect to *Bagley*'s claims, the court made clear that impeachment evidence, like all other favorable evidence, must be disclosed by the government. The Court noted that it had previously, "rejected any such distinction between impeachment evidence and exculpatory evidence."<sup>65</sup>

The requirement that funds are contingent upon cooperation with police or prosecutors turns a witness's request for funds into evidence of bias indistinguishable from offers of money made to the witnesses in *Bagley*.<sup>66</sup> Under

---

58. *Id.* at 154–55.

59. *Id.* at 154.

60. 473 U.S. 667, 683 (1985) ("In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government.").

61. *Id.* at 671.

62. *Id.* at 671–72.

63. *Id.* at 684–85.

64. *Id.* at 683.

65. *Id.* at 676–77.

66. There are victims of crimes who never testify at trial or have only a minimal amount of information about the crime. The mother of a murder victim, for example, who did not witness the killing would be entitled to witness fund money for burial expenses and counseling. Strategically, attorneys may not want to use this impeaching information, even if it is disclosed. For example, a

*Brady, Giglio, and Bagley*, financial benefits to a witness that are contingent upon her cooperation with the prosecution must be disclosed to the defense.

## VI.

### IMPACT OF CONFIDENTIALITY STATUTES AFTER *DAVIS V. ALASKA*

Forty years ago in *Davis v. Alaska*, the Court addressed the intersection of confidentiality statutes and a defendant's Sixth Amendment right to confront witnesses.<sup>67</sup> In that case the government successfully moved to prevent the defense from cross-examining a government witness on his status as a juvenile probationer.<sup>68</sup> The defense wanted to cross-examine the witness, not to impeach as one might with an adult criminal conviction, but instead to instead bring out the witness' motive to curry favor with the prosecution.<sup>69</sup> The Court wrote, "[t]he state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."<sup>70</sup>

Given the well-settled holding in *Davis v. Alaska*, arguments by prosecutors relying on confidentiality statutes as a basis not to disclose applications for crime victim's money fails. An accused person's right to cross-examine the witness should not be violated because of a simple privacy statute. Concerns about witness safety, if they are legitimate, can be addressed with redactions of some information or protective orders.

## VII.

### BRADY EVIDENCE IS EVIDENCE THAT IS "FAVORABLE TO THE ACCUSED"

In most instances, victims' funds promise witnesses and complainants money based on their cooperation with law enforcement. If the police are unhappy with a witness's level of engagement or collaboration in the investigation, payments can be denied.<sup>71</sup> Law enforcement officers and

---

defense attorney may not want to cross-examine a victim whose car is stolen but does not identify the defendant even if she received a substantial award.

67. 415 U.S. 308, 316 (1974).

68. *Id.* at 311.

69. *Id.*

70. *Id.* at 320.

71. See note 13. See also CVC Program Guidelines, MISSOURI DEPARTMENT OF PUBLIC SAFETY, <http://dps.mo.gov/dir/programs/cvc/guidelines.asp> (last visited June 29, 2014) ("A victim has a statutory duty to cooperate with law enforcement to be eligible for compensation. Section 595.015.6, RSMo, requires a victim, claimant or dependent to cooperate with law enforcement officials in the apprehension and prosecution of the alleged offender unless the Department has found that the failure to cooperate was for good cause. The Program interprets this requirement to include such things as pressing charges against the alleged offender, appearing in court to testify and looking at mug shots. The Program sends a Law Enforcement Verification form to the law enforcement agency where the police report was filed. This form requests a copy of the police report and information from the police department to assist the Program in determining whether the victim cooperated. Also, a Prosecutorial Input form is sent to the prosecuting attorney to assist

prosecutors, confronted with a reluctant witness need only communicate that fact to recalcitrant witnesses who are seeking or receiving victims' fund assistance. Moreover, the witness will likely perceive a link between the financial assistance and cooperation with the police or prosecutors, whether or not an explicit requirement of cooperation exists. The assumption of such a requirement may be bolstered by the fact that witnesses are referred to the program by the police or an advocate from the prosecutor's office.

Since Brady information is any information that is favorable to the accused, under *Brady*, the prosecution must disclose information about applications for victims' funds. As *Brady* imposes on the individual prosecutor in a particular case the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"<sup>72</sup> prosecutors must turn over victim fund information when anyone on the prosecution teams knows of it. Favorable evidence that the prosecutor knows or should know that rises "to a material level of importance" must be disclosed.<sup>73</sup> Police and prosecutors possess such favorable evidence when they make referrals to the program, help witnesses apply for the funds, or verify that a person is a witness for the program. Defendants and their lawyers, however, may not have access to information regarding the identity of potential witnesses who are seeking benefits because applications for victims' funds are confidential by statute.<sup>74</sup> Thus, it is incumbent on prosecutors to disclose the information.

Prosecutors' offices take the position that because the money itself does not come directly from the prosecutor or the police, the information regarding the financial benefits need not be disclosed.<sup>75</sup> This is a meaningless distinction. Bias, what the Supreme Court in *Davis* described as the witness's incentive to testify, stems from the witness's subjective point of view, not technical distinctions related to budgetary issues.<sup>76</sup> Whether the check is drawn from the account of the police, prosecutor, or the court, the witness understands that her receipt of that money depends on approval by the police or prosecutors. This creates a motive to curry favor with the government, and therefore, the information should be disclosed whether or not the money came directly from the police or prosecutor.

---

the Program in determining whether the victim cooperated in the prosecution of the alleged offender and whether or not restitution was ordered." The CVC Program Guidelines also go on to explain that "...the claim will be *denied* if the Program finds the victim or claimant fails to meet either a behavioral or filing requirement" (emphasis added).

72. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

73. *Id.* at 438.

74. *See* note 16.

75. This was the position taken by the United States Attorney's Office for the District of Columbia during litigation to prevent the disclosure of such information.

76. *Blunt v. United States*, 863 A.2d 828, 834 (D.C. Cir. 2004).

In *Yeung v. Finn*,<sup>77</sup> the Ninth Circuit found that prosecutors should have disclosed to the defense the fact that a rape accuser had hired a civil attorney.<sup>78</sup> While the Court did not reverse the conviction in light of the other evidence in the case supporting the accuser's claim, the Court acknowledged that the prosecution "breached its duty . . . by failing to disclose [that information]."<sup>79</sup> Certainly if a prosecutor is aware of an application for money from a crime victims' fund, that information should likewise be turned over to the defense as both instances show a financial interest by the victim or witness. Although only a few courts have addressed this issue, each court has at least suggested that crime victims' compensation requests may constitute *Brady* material and have recognized the potential importance of this type of evidence. In *Moore v. Marr*,<sup>80</sup> the Tenth Circuit noted that information indicating the complainant had applied for more than \$10,000 in crime victim compensation payments "may well have been 'favorable' within the meaning of *Brady*."<sup>81</sup> There, the payments depended on the compensation board determining that the defendant was not acting in self-defense, which the court concluded "would have demonstrated that [the complainant] had a financial interest in painting himself as the 'victim.'"<sup>82</sup> The court did not "determine whether the information was favorable," however, because Moore had not demonstrated that the information was "material" in light of the "overwhelming evidence of guilt" based on the testimony of multiple eye witnesses and Moore's own admissions.<sup>83</sup> While the court in *Moore* did not hold that the material was *Brady* material, it certainly seems to suggest that in some cases it would be material and should be disclosed.

In *People v. King*,<sup>84</sup> New York prosecutors failed to disclose a request by the central witness in the case to the Crime Victims Compensation Board for financial assistance, until just before closing arguments after the witness had already testified.<sup>85</sup> The prosecution effectively conceded that the request for money should have been turned over. The sole remaining issue was whether the remedy imposed by the judge was sufficient.<sup>86</sup> The Supreme Court of New York reversed the conviction,<sup>87</sup> holding that the "credibility of the victim was the central issue in this trial and request for compensation . . . would certainly have had an effect on that credibility."<sup>88</sup>

---

77. 160 Fed. App'x 568 (9th Cir. 2005).

78. *Id.* at 569.

79. *Id.*

80. 254 F.3d 1235 (10th Cir. 2001).

81. *Id.* at 1244.

82. *Id.*

83. *Id.* at 1245.

84. 659 N.Y.S.2d 469 (App. Div. 1997).

85. *Id.* at 470.

86. *Id.*

87. *Id.* at 469.

88. *Id.* at 470.

Furthermore, although not decided on *Brady* grounds, in *Bowen v. State*,<sup>89</sup> the Georgia Court of Appeals held that it was improper for a trial court not to allow defense counsel to question a witness about her application for money from the crime victims' fund.<sup>90</sup> In coming to its conclusion, the Court of Appeals stated, "A witness's financial interest in the outcome of a trial is always a proper subject for cross-examination."<sup>91</sup> In explaining how the information was clearly impeachment information, the court also wrote that the defendant was "entitled to cross-examine her about any financial interest in his trial to show possible improper motivation for her testimony so that the jury could make an informed judgment as to the weight to give it."<sup>92</sup> Even though it is not a *Brady* case, the Georgia Court of Appeals certainly saw the value to the defense in possessing that information about an important government witness.

### VIII. CONCLUSION

Although few courts have reached the issue, defense access to this impeachment information is an important one. Crime victims' funds award substantial amounts of money to a large numbers of victims and witnesses every year. In many cases, the amount of money or assistance is significant, and information regarding the witness's request for that money may have a material impact on a fact-finder's assessment of a witness's credibility. The influence that police and prosecutors hold over the disbursement of victims' funds creates a motive for prosecution witnesses who have requested the funds to curry favor with the prosecution. Victim fund information, possessed by the police or prosecutors and not by the defense, is favorable to the defense. Given the prosecutor's duty to disclose impeachment evidence to the defense, there is no justification for the non-disclosure of this important evidence of bias. Prosecutors' offices should develop policies to ensure that information regarding requests for such assistance by prosecution witnesses is routinely disclosed to the defense, while responding to any concerns related to statutory confidentiality requirements. Defense attorneys should be aware of the existence of such funds and the possibility of requests by prosecution witnesses, and should specifically demand the information from prosecutors when appropriate.

---

89. 556 S.E.2d 252 (Ga. Ct. App. 2001).

90. *Id.* at 254.

91. *Id.* at 253.

92. *Id.* at 254.