The Psychology of a Favor: Why Hidden Witness Payments Demand a New *Brady* Rule

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Abstract

Prosecutors and the police regularly pay informants and other witnesses in criminal cases. These payments can be in the form of rewards, relocation expenses, crime victims funds, and even simple cash. Although witness payments are legal, prosecutors are supposed to disclose them under the Brady *doctrine because they are favorable evidence that the defense could use to impeach the witness. Yet prosecutors often fail to disclose witness payments because of communication failures with the police, poor training, excessive caseloads, and occasional ethical lapses.*

This Article examines dozens of hidden witness payments that prosecutors failed to disclose. In nearly eighty percent of these cases, courts rejected Brady *challenges on the ground that the evidence was not significant enough to change the outcome. This Article catalogues the often unpersuasive reasons that courts give for finding witness payments immaterial, such as the witness only receiving a small amount of money or the defense cross-examining the witness about an unrelated issue.*

In minimizing the importance of witness payments, courts ignore decades of psychological research about the reciprocity effect—the idea that a person who receives a benefit feels obligated to reciprocate and behave favorably toward the person who gave the benefit. Considering the robust literature on the reciprocity effect, this Article proposes an automatic prejudice rule that eliminates Brady*'s materiality prong when the government paid a witness and failed to disclose the payment. Eliminating the materiality prong would bring the* Brady *doctrine in line with the ineffective assistance of counsel doctrine, which has long recognized an automatic prejudice exception for situations involving a conflict of interest.*

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INTRODUCTION

The government regularly pays witnesses in criminal cases. Police pay informants cash in exchange for information.[1] Police also pay for informants' basic living expenses,[2] such as transportation[3] and rent.[4] Law enforcement agencies pay witnesses out of crime victims funds.[5] And the police provide monetary rewards to third parties who provide crucial information for ongoing investigations.[6] Prosecutors also pay witnesses, often covering expenses for lodging and travel to the trial.[7]

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1 *See, e.g.*, Mastracchio v. Vose, No. CA 98-372T, 2000 U.S. Dist. LEXIS 3766, at *16 (D.R.I. Mar. 15, 2000), *aff'd*, 274 F.3d 590 (1st Cir. 2001) (adopting a recommendation by the Supreme Court of Rhode Island to deny the defendant's petition for writ of habeas corpus on the basis that withheld evidence of an informant's compensation by police with cash and other favors likely would not have altered the jury's determination of that informant's credibility at trial); Hartman v. State, 896 S.W.2d 94, 112 (Tenn. 1995) (Reid, J., concurring in part and dissenting in part) (describing a situation in which the prosecution paid an informant $1,000 to help procure evidence against defendant).

2 *See, e.g.*, United States v. Joelson, No. 98-50619, 2000 U.S. App. LEXIS 5929, at *3 (9th Cir. Mar. 29, 2000) ("To the extent that [the witness's] informant payment record—which lists expense payments dating back to 1985—reveals that the payments were for [the witness's] expenses and not as payment for his cooperation, the impeachment value was minimal and thus not material.").

3 *See, e.g.*, Jalowiec v. Bradshaw, 657 F.3d 293, 309 (6th Cir. 2011) (detailing a $200 payment from detective to buy tires for a witness's car); Hooper v. Schriro, No. cv 98-2164, 2008 WL 4542782, at *7 (D. Ariz. Oct. 10, 2008) ("[A] prosecution investigator, Dan Ryan, made car payments for Kathy Merrill, [the witness's] wife, totaling over $800, for which Ryan received only partial reimbursement . . . .").

4 *See, e.g.*, United States v. Taylor, No. cr97-0001, 2005 WL 984519, at *4 (N.D. Iowa Apr. 28, 2005) (involving, inter alia, the exchange of $275 from a Drug Enforcement Agency ("DEA") officer to help a witness pay her rent).

5 *See, e.g.*, Breezee v. Perry, No. 17-cv-01207, 2023 WL 4353154, at *13 (W.D. Tenn. July 5, 2023); Vida B. Johnson, *When the Government Holds the Purse Strings but Not the Purse:* Brady*,* Giglio*, and Crime Victim Compensation Funds*, 38 N.Y.U. REV. L. & SOC. CHANGE 491, 492 (2014).

6 *See, e.g.*, Pierce v. Thaler, 355 F. App'x 784, 789 (5th Cir. 2009) (referencing payment of a $1,000 reward after trial to be split by three witnesses, two of whom testified at trial).

7 *See, e.g.*, State v. Tice, No. M2021-00495-CCA-R3, 2022 WL 2800876, at *25 (Tenn. Crim. App. July 18, 2022) (describing more than $1,400 in travel reimbursements by the State of Tennessee for the witness and his wife).

And both prosecutors and police regularly provide money to help witnesses relocate for their safety.[8]

The fact that the government pays informants and witnesses is not surprising,[9] nor is it illegal.[10] But payments to witnesses are favorable evidence that should be disclosed to the defense before trial.[11] Over sixty years ago in *Brady v. Maryland*,[12] the Supreme Court held that prosecutors must disclose evidence that is favorable and material to the defense's case.[13] Favorable evidence is not limited to exculpatory evidence that suggests a defendant is innocent; the Supreme Court has consistently maintained that favorable evidence also includes impeachment evidence that the defense could use to cast doubt on a witness's credibility.[14] When the government has paid money to a witness, it is certainly impeachment evidence that impacts their credibility.[15]

Unfortunately, prosecutors often fail to disclose impeachment evidence to the defense.[16] In some instances, prosecutors intentionally withhold evidence in an unethical quest to win at all costs.[17] In other instances, prosecutors fail to recognize their *Brady* obligations and accidentally withhold evidence.[18] And still in other cases, prosecutors are themselves unaware of impeachment evidence because police never told them about the evidence.[19]

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8 *See, e.g.*, Salcedo v. Hedgpeth, No. cv 10-3882, 2013 WL 5230807, at *9 n.14 (C.D. Cal. Sep. 13, 2013) (noting receipt of "$13,984.94 in rent (paid directly to the management of the facility where the victim was residing), $4,363.40 in meals and $324.87 in incidentals"), *aff'd sub nom.*, Salcedo v. Davey, 672 F. App'x 735 (9th Cir. 2017).

9 *See* Alexandra Natapoff, Snitching 29 (2d ed. 2022) (noting that in one year alone, the federal government paid nearly $100 million to confidential informants).

10 *See* Bruce A. Green, *There but for Fortune: Real-Life vs. Fictional "Case Studies" in Legal Ethics*, 69 Fordham L. Rev. 977, 984–85 (2000) ("Paid informants and salaried police officers frequently gather evidence by inducing the target of the investigation to commit a crime.").

11 *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375, 1388 n.90 (2014).

12 373 U.S. 83 (1963).

13 *See id.* at 87. This principle is commonly referred to as "the *Brady* doctrine." *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 Geo. Wash. L. Rev. 1525, 1546 (2018).

14 *See* Giglio v. United States, 405 U.S. 150, 153–55 (1972).

15 *See* Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The* Brady *Database*, 114 J. Crim. L. & Criminology 185, 193 (2024) (describing how the Court has "adopted a broad view of what constitutes favorable evidence").

16 *See id.* at 190.

17 *See* Thomas L. Dybdahl, When Innocence Is Not Enough 149 (2023). The single biggest weakness in the *Brady* doctrine is that it requires the government to police itself. *See* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1541–42 (2010).

18 *See* Adam M. Gershowitz, *Accidental* Brady *Violations*, 12 Tex. A&M L. Rev. 533, 536–37 (2025); *see also* Jennifer Mason McAward, *Understanding* Brady *Violations*, 78 Vand. L. Rev. 875, 927 (2025) ("[A] substantial minority of *Brady* violations are the product of mistake.").

19 *See, e.g.*, Natapoff, *supra* note 9, at 30 ("In Durham, North Carolina, the police department ran a secret bonus program for years—issuing payments of hundreds of dollars to informants willing

If police hide evidence or prosecutors misunderstand their *Brady* obligations, favorable evidence may never come to light. There is no way to know how often impeachment evidence, in general, and witness payments in particular, remain hidden.[20] There are surely many such cases in which the defense never learns that the government paid witnesses.[21]

But not all cases remain hidden. Sometimes, prosecutors recognize their discovery mistakes as they are cleaning out their files and own up to their *Brady* errors.[22] Or defendants get lucky during a posttrial investigation and stumble across evidence that should have been disclosed.[23] Whatever the reason, each year defendants file appeals and habeas corpus petitions based on prosecutors' failure to disclose payments to witnesses.[24]

This Article explores what happens when hidden witness payments come to light.[25] At first glance, it may appear obvious that courts should find hidden payments to witnesses to be *Brady* violations.[26] Cash payments are favorable evidence; a capable defense attorney should be able to cast doubt on a witness's credibility by showing that the witness took money before testifying for the government.[27] The *Brady* doctrine,

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to testify—without telling prosecutors or defendants about the money."). Even when prosecutors are in the dark, their failure to disclose favorable and material evidence is still a *Brady* violation. *See* 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.").

20 *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 748 (2016). Professor Jennifer Mason McAward's research reveals, however, that in many cases in which courts find *Brady* violations, the reason was withheld promises or benefits. *See* McAward, *supra* note 18, at 921 ("[F]ailure to disclose [promises or compensation to witnesses] represents one of every ten *Brady* violations.").

21 *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 909 (1995) ("[I]t is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported.").

22 *See, e.g.*, McAward, *supra* note 18, at 922 & n.210.

23 *See id.* at 921–22.

24 *See* Garrett et al., *supra* note 15, at 189.

25 In addition to paying witnesses, prosecutors can also confer benefits on witnesses by dismissing charges, reducing charges, or recommending lighter sentences. *See* McAward, *supra* note 18, at 921. Such plea-bargaining benefits constitute favorable evidence, and prosecutors' failure to disclose cooperation deals could also amount to *Brady* violations. *See id.* This Article does not explore undisclosed charging and sentencing benefits for cooperating witnesses because it is far harder for prosecutors to claim that a charging or sentencing bargain is not material. By contrast, as this Article explains, prosecutors offer excuses such as "it was only a small amount of money" to claim that witness payments were not material. *See infra* Section II.B.1.

26 *See* Russell D. Covey, *Manufacturing False Convictions: Lies and the Corrupt Use of Jailhouse Informants*, 96 U. Colo. L. Rev. 131, 190 (2025) ("Certainly, information about benefits provided to a testifying witness . . . fall[s] within the heartland of a prosecutor's *Brady* obligations.").

27 *See* Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. Rev. 679, 682 (1999) ("[L]arge financial rewards for successful prosecutions diminish an informant's credibility.").

however, requires not just that evidence be favorable, but also that it be material.[28] The Supreme Court has held that there can be no *Brady* violation unless the withheld evidence creates a reasonable probability of a different outcome in the case.[29] And the Court has adopted a constricted view of materiality.[30] Indeed, when it comes to impeachment evidence, lower courts seem particularly stingy in finding materiality.[31]

If ever there were an area for courts to be expansive in finding materiality, it would seemingly be cases in which the government made hidden monetary payments to witnesses. This Article tests that assumption by reviewing nearly fifty cases in which courts addressed the materiality of hidden witness payments. These cases involved cash payments, reimbursement for informants' expenses, crime victims funds, "Crime Stoppers"[32] rewards, travel and lodging payments, and witness relocation assistance.[33] The payments ranged from a fifty-dollar gift card on the low end[34] to more than $60,000 in cash on the high end.[35]

This Article's findings are surprising and alarming. In nearly eighty percent of the cases in the sample, courts found hidden witness payments to be immaterial.[36] Courts offered a variety of reasons—some persuasive, most not—for rejecting the *Brady* claims based on hidden payments. In some instances, courts refused to find the hidden payments to be material because witnesses received only a small amount of money.[37] In other cases, courts maintained that the evidence of guilt was so strong that the witness payments could not have changed the outcome.[38] Other courts relied on the fact that the defense was able to impeach the witnesses on other grounds, and thus the witness payments should not have mattered.[39] Still other cases were based on the

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28 Brady v. Maryland, 373 U.S. 83, 87 (1963).

29 United States v. Bagley, 473 U.S. 667, 682 (1985).

30 *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643, 647 (2002) (recognizing that the Court has "gradually defined *Brady*'s materiality requirement with increasing strictness").

31 *See* Brandon L. Garrett & Adam M. Gershowitz, *The* Brady *Materiality Standard*, 78 Stan. L. Rev. 303, 353 (2026).

32 "Crime Stoppers" is a private entity that "offers cash rewards for information leading to arrests and claims to have contributed to over 800,000 arrests." Farhang Heydari, *The Private Role in Public Safety*, 90 Geo. Wash. L. Rev. 696, 715 (2022).

33 *See infra* Part II.

34 *See* Weissman v. Clark, No. 22-cv-04005, 2023 WL 8853715, at *17 (N.D. Cal. Dec. 21, 2023), *aff'd*, No. 23-4407, 2025 WL 1177521 (9th Cir. Apr. 23, 2025).

35 *See* United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010) (affirming denial of *Brady* claim).

36 *See infra* Section II.A.

37 *See infra* Section II.B.1.

38 *See infra* Section II.B.2.

39 *See infra* Section II.B.4.

unpersuasive argument that the witness was not paid until after trial or the dubious claim that the witness was supposedly paid for something unrelated to the case at hand.[40]

In some instances, courts did offer plausible explanations for finding the hidden payments to be immaterial. If a witness was a minor figure at trial and their testimony was cumulative, it is understandable for a court to find the hidden cash payments to be immaterial.[41] Similarly, if the prosecutor paid a witness to reimburse hotel expenses that the witness incurred after being physically threatened by the defendant, it is quite unlikely that the defense attorney would have highlighted those payments to the jury.[42] But the cases with plausible reasoning were the exception, not the rule.[43]

Worse yet, in finding hidden payments to be immaterial, courts ignored the basic psychological principle of reciprocity. For decades, researchers have demonstrated that when a person receives a benefit—even a small benefit—that person feels compelled to return the favor.[44] Courts failed to appreciate that a witness who was paid might have shaped their testimony to be more favorable to the government—at least in part—because the witness had first received a benefit from the police or prosecutor.[45] Rather than take a nuanced view of whether a witness may have consciously or unconsciously exaggerated or shaped their testimony to be slightly more favorable to the government, courts made a binary assessment that a witness was either lying or telling the truth. Courts simply failed to appreciate the psychological concept that people are more favorable to those who pay them. And, in turn, courts minimized the extent to which defense attorneys could point out such human nature to the jury.

Of course, it is difficult for judges to appreciate how strongly the psychological concept of reciprocity plays out in any particular case. Some witnesses may be particularly vulnerable to being influenced by government payments, although other witnesses are less affected. Indeed, psychological literature indicates that the person who reciprocates a benefit often has no idea that they are being influenced, let alone by how much.[46] Determining the materiality of a hidden witness payment should therefore be much more difficult than courts acknowledge.

To deal with the challenge of determining materiality, this Article suggests that the Supreme Court should look to its ineffective assistance

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40 *See infra* Sections II.B.5., II.B.7.

41 *See infra* notes 145–54 and accompanying text.

42 *See infra* Section II.B.8.

43 *See infra* Section II.C.

44 *See infra* Section III.A.

45 *See infra* Section III.B.

46 *See infra* notes 280–86 and accompanying text.

of counsel doctrine as a guide. Both the ineffective assistance of counsel and *Brady* doctrines have nearly identical prejudice prongs requiring the petitioner to show a reasonable probability of a different outcome to prevail.[47] There is one key difference between the two doctrines, however. The Court's ineffective assistance of counsel jurisprudence has long recognized an automatic prejudice exception for cases involving conflicts of interest.[48] If the defendant demonstrates that their lawyer had an actual conflict of interest, the defendant need not show prejudice to prevail on an ineffective assistance of counsel claim.[49] The *Brady* doctrine has no such automatic prejudice exception.[50] As a matter of logic and symmetry, and to comport with what the psychological literature says about reciprocity and human behavior, the Court should recognize an automatic prejudice rule under the *Brady* doctrine for cases in which the government pays a witness but fails to disclose the payment to the defense.

This Article reviews dozens of cases in which courts grappled with payments to witnesses that were not disclosed to the defense. Part I catalogues the types of situations in which the government pays witnesses. Part II then shows how most courts utilize *Brady*'s materiality prong to reject claims based on hidden payments. In doing so, Part II dives into the courts' reasoning and creates a taxonomy of the reasons that courts use to find hidden payments to be immaterial. Part II explains that some reasons for rejecting materiality—particularly in cases in which a witness was physically threatened and had to relocate—are plausible. But Part II ultimately describes how courts typically offer nonsensical reasons for finding immateriality. Part III reviews the psychological literature on the concept of reciprocity and explains that people behave more favorably toward those who have given them benefits, even small benefits. As such, when police and prosecutors pay witnesses, one should expect that the witnesses will testify more favorably for the prosecution. Finally, Part IV compares the *Brady* doctrine to ineffective assistance of counsel claims, demonstrating that the petitioner is required to show prejudice in almost all cases, but not those involving a conflict of interest. Part IV argues that the Supreme Court should create a comparable automatic prejudice exception for *Brady* cases in which the government has failed to disclose payments to witnesses.

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47 *See infra* Part IV.

48 *See* Cuyler v. Sullivan, 446 U.S. 335, 340, 349–50 (1980). The Court has also created a presumed prejudice doctrine for a small number of other ineffective assistance of counsel scenarios under *United States v. Cronic*, 466 U.S. 648 (1984). *See infra* notes 327–40 and accompanying text.

49 *Sullivan*, 446 U.S. at 348–49.

50 *See infra* Section IV.B.

I. Courts Find Most Hidden Payments to Witnesses to Be Immaterial

To understand the universe of cases in which the government paid—but did not disclose—payments to witnesses, I conducted an expansive Westlaw search.[51] I was careful to only include cases in which payment occurred. For instance, in multiple cases, witnesses *requested* a payment or a reward, but the government did not oblige.[52] A witness's request for money itself amounts to impeachment evidence and a possible *Brady* violation,[53] but I did not include such cases because no money changed hands. I also did not include cases in which the benefit was a sentencing reduction or dismissal of charges. Those benefits are also favorable, but they are not monetary payments. I also excluded section 1983 lawsuits in which courts were asked whether claims were viable to go to a jury rather than definitively deciding whether the payments were material. Finally, I excluded cases in which the defendant alleged that a payment was made, but the court concluded otherwise.

The final dataset consisted of forty-seven cases in which the government clearly provided cash, reimbursements, a reward, or some other payment to a witness and did not disclose the benefit to the defendant. As noted above, this dataset undercounts—likely dramatically—the universe of cases in which prosecutors or the police paid a witness without the defendant being informed.[54] Nevertheless, the cases in this sample provide an illuminating view of the kinds of payments that prosecutors and the police make to witnesses and the reasons that courts give for finding such payments to be immaterial and thus not *Brady* violations.

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51 The Westlaw search was

> (BRADY /s VIOLAT!) & ((UNDISCLOS! OR WITHHOLD! OR NONDISCLOS! OR CONCEAL!) /p (PAY! OR "FINANCIAL BENEFIT" OR "FINANCIAL ASSISTANCE" OR "LIVING EXPENSE" OR "RELOCATION EXPENSE" OR REWARD)) /p (WITNESS OR INFORMANT OR "COOPERATING WITNESS") & (IMMATERIAL! OR "NOT MATERIAL" OR "NO BRADY VIOLATION") & ((police OR prosecut! OR "law enforcement" OR "district attorney" OR "da" OR "government" OR "fbi" OR "dea" OR "atf") /p (pay! OR "financial benefit" OR "financial assistance" OR "living expense" OR "relocation expense" OR reward).

The date limitation was from 1990 to 2025. This search returned more than 300 cases. My research assistant eliminated those that were obviously nonresponsive, leaving a sample of eighty-five cases that I then carefully reviewed. As explained below, forty-seven of those cases involved hidden witness payments.

52 *See, e.g.*, United States v. Edwards, 549 F.2d 362, 364 (5th Cir. 1977).

53 *See, e.g.*, Hanna v. Ishee, 694 F.3d 596, 610 (6th Cir. 2012) (acknowledging that "evidence that a witness sought consideration for his testimony" can qualify as *Brady* evidence "if there is cause to believe that the witness actually reached an express or tacit agreement with the prosecution in exchange for his testimony").

54 *See* Meares, *supra* note 21, at 909.

To fully understand the types of situations in which prosecutors and the police pay witnesses but fail to disclose it, I coded each case for the type of payment. The categories include cash payments, reimbursement of expenses, crime victims funds, rewards (e.g., Crime Stoppers), relocation assistance, and transportation or lodging assistance to travel for trial. Several cases involved more than one type of payment. In total, I identified forty-seven cases with fifty-one different payments.[55]

A. Cash Payments

The largest category of cases was pure cash payments. In twenty-five cases, the government—typically police officers—paid individuals with physical cash. As Table 1 indicates, straightforward cash payments accounted for nearly half of the hidden witness payments in the sample.

TABLE 1. TYPES OF PAYMENTS

Type of Payment	Number of Cases	Percentage
Cash	25	49%
Crime Victims Funds	1	2%
Reward for Reporting Information	8	16%
Relocation Funding	15	29%
Transportation or Lodging for Trial	2	4%
Total	51	100%

Although pure cash payments were the most common category of hidden payment, the amount of money varied widely. In some instances, the cash payment was modest. For instance, in one case, unbeknownst to prosecutors, a witness advocate gave a juvenile who testified at trial a fifty-dollar gift card.[56] In another case, prosecutors failed to disclose that the police had paid a witness $145 in cash.[57] In a third case, prosecutors neglected to disclose that a detective had given a key eyewitness $200 to help her buy tires for her car.[58] And in a high-profile capital case, the U.S. Supreme Court analyzed a $200 cash payment to an informant witness that was not disclosed until well after trial.[59]

But not all the cash payments were small in amount. For example, in one case, prosecutors disclosed $40,000 in witness payments, but the defendant credibly asserted that the government actually made $80,000

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55 *See infra* Appendix.

56 Weissman v. Clark, No. 22-cv-04005, 2023 WL 8853715, at *17 (N.D. Cal. Dec. 21, 2023), *aff'd*, No. 23-4407, 2025 WL 1177521 (9th Cir. Apr. 23, 2025).

57 *See* People v. Felder, 2012 IL App (4th) 110419-U, ¶ 15.

58 Jalowiec v. Bradshaw, 657 F.3d 293, 309 (6th Cir. 2011).

59 Banks v. Dretke, 540 U.S. 668, 685, 703 (2004).

in payments.[60] In another case, prosecutors did not disclose $11,600 in cash payments.[61]

In multiple cases, the court either did not know or did not say how much money the government paid to the witness.[62] So, one is left to speculate how well the witnesses were compensated.

Interestingly, multiple cases demonstrate how a single informant sometimes receives multiple payments over long periods of time, thus making it harder for prosecutors to be sure that they disclosed all *Brady* evidence. For instance, in one case, a court found that although the government did disclose $5,000 in payments to a witness, it inadvertently failed to disclose an additional $300 payment.[63] In another case, the local police made multiple cash payments to a cooperating witness both before and after the trial, amounting to $400.[64]

B. Rewards and Crime Victims Funds

Another large category of hidden payments involved official rewards for reporting information. In eight cases, or sixteen percent of the sample, prosecutors failed to disclose that a witness received a reward for providing information. Many jurisdictions have "Crime Stoppers" or a similar program that encourages witnesses to come forward with information about crimes in exchange for a reward.[65]

At first blush, Crime Stoppers rewards might not seem to fit within the *Brady* paradigm because Crime Stoppers are separate from the police department.[66] Prosecutors are obligated to turn over favorable evidence held by the police, crime laboratories, and other law enforcement agencies that are members of the "prosecution team."[67] If Crime Stoppers were purely private and operated completely separate from law enforcement agencies, Crime Stoppers would not be part of the prosecution team. In reality, however, Crime Stoppers are often closely intertwined with law enforcement.[68] Police departments actively use

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60 *See* United States v. Rodriguez-Aguirre, 30 F. App'x 803, 808 (10th Cir. 2002).

61 United States v. Sanchez, 917 F.2d 607, 618 (1st Cir. 1990).

62 *See, e.g.*, United States v. Cruz-Velasco, 224 F.3d 654, 661–62 (7th Cir. 2000); United States v. Price, 13 F.3d 711, 721 (3d Cir. 1994); United States v. Thornton, 1 F.3d 149, 157 (3d Cir. 1993).

63 United States v. Nagle, No. 09-cr-384-01, 2013 WL 3894841, at *60 (M.D. Pa. July 26, 2013).

64 United States v. Dones-Vargas, 936 F.3d 720, 721–22 (8th Cir. 2019).

65 *See* Heydari, *supra* note 32, at 715 & n.76.

66 *See id.* at 715 (acknowledging that Crime Stoppers is a private entity).

67 *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); U.S. Dep't of Just., Just. Manual § 9-5.001(B)(2) (2020) ("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.").

68 *See, e.g.*, *500k of Criminals' 'Dirty Money' Aims to Help Houston Crime Stoppers' 'Catch a Killer*,' CLICK2HOUSTON.COM (Sep. 10, 2021, at 13:21 ET), https://www.click2houston.com/news/local/2021/09/10/watch-live-houston-crime-stoppers-harris-county-da-kim-ogg-to-announce-

Crime Stoppers rewards to entice witnesses to help gather information for ongoing investigations.[69] Indeed, in at least eight states, convicted defendants must pay a fee that goes to Crime Stoppers.[70]

In some jurisdictions, Crime Stoppers are intertwined so heavily with the police that the program is run out of police stations. For instance, a Connecticut court found that in Waterbury, Connecticut, the Crime Stoppers phone number was connected to a phone at the local police department and the police department had a designated Crime Stoppers officer whose salary was paid by the city.[71] Because of the substantial police involvement, the court found information on the reward was in the hands of the prosecution team and thus had to be disclosed.[72]

Yet I found seven cases in which the rewards were not disclosed to the defense. Once again, the size of the payments varied—one case did not specify the amount,[73] another involved $200,[74] other cases had undisclosed rewards of $1,000[75] and $1,750,[76] and one case involved a $5,000 reward payment from a "private foundation."[77]

As with some pure cash payments, though, prosecutors were not always aware that a reward had been paid by Crime Stoppers or law enforcement. In one case, the court specifically found that "[t]he police officers had no recollection of providing any of [the reward] information to the State prior to trial."[78] In another case, the court noted that "[a]t the time of trial, the state's attorney did not have knowledge of the reward payment arrangement between Crime Stoppers, the police[,] and [the witness]."[79]

In addition to Crime Stoppers rewards, there is a related category of payments from crime victims funds. In this category of cases, as Professor Vida Johnson has explained, "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

public-safety-effort/ [https://perma.cc/3GA8-6UH3] (explaining how the Harris County District Attorney's Office gave Crime Stoppers $500,000).

69 *See id.*

70 *See* Tana Ganeva, *How Crime Stoppers Hotlines Encourage Sketchy Tips and Hurt Poor Defendants*, New Republic (Oct. 29, 2021), https://newrepublic.com/article/164156/crime-stoppers-fees-police-reform [https://perma.cc/EW85-8JUM].

71 *See* Quintana v. Comm'r of Corr., 739 A.2d 701, 706 (Conn. App. Ct. 1999).

72 *See id.* at 710.

73 *See* Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000).

74 State v. Butler, 263 So. 3d 195, 197 (Fla. Dist. Ct. App. 2019).

75 Pierce v. Thaler, 355 F. App'x 784, 789 (5th Cir. 2009); Kopycinski v. Scott, 64 F.3d 223, 225 (5th Cir. 1995); *Quintana*, 739 A.2d at 707–08.

76 *See* United States v. Cheely, No. 95-30248, 1997 WL 265000, at *3 (9th Cir. May 19, 1997).

77 *See* Garnett v. Morgan, 462 F. App'x 706, 707 (9th Cir. 2011).

78 *Butler*, 263 So. 3d at 197.

79 *Quintana*, 739 A.2d at 709.

police or prosecutors."[80] The sample included one case in which the government used crime victims funds to pay the victim of a sexual assault a year before she testified at trial, but never disclosed the payment.[81]

C. Relocation Payments

Another common category of hidden payments involves relocation assistance. Witnesses are often scared of testifying at trial, and sometimes for good reason.[82] Defendants or their confederates—such as gang members—sometimes threaten witnesses with physical injury or death if they testify.[83] Accordingly, the police occasionally arrange for witnesses to move out of the neighborhoods where the defendant and their confederates operate.[84] Both prosecutors and the police also sometimes arrange for witnesses to maintain a low profile and stay at a hotel in the days before trial.[85]

When prosecutors and the police reimburse or directly pay for moving expenses, hotel expenses, or food stipends, they are providing money to those witnesses. That does not mean the witnesses will lie at trial, of course. But it does amount to favorable impeachment evidence that prosecutors should disclose to the defense.

The sample included fifteen cases in which prosecutors did not disclose witness relocation funding. In one case, the relocation funding was a modest $100 for bus fare to get out of town.[86] But the amounts escalated substantially from there.

In a 2015 case, the witness "testified that she became afraid once she learned that the shooting was gang-related and that she was leaning toward not testifying because she lived in the neighborhood where the shooting occurred and she feared for her safety."[87] The government "provided her money to move, including $550 for one month's rent and another $550 for a security deposit."[88] Similarly, in a 2014 case, the prosecutor's office made payments to cover a witness's security deposit, first month's rent, and moving expenses in response to outside attempts to influence testimony.[89]

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80 Johnson, *supra* note 5, at 501.

81 *See* Breezee v. Perry, No. 17-cv-01207, 2023 WL 4353154, at *8–9 (W.D. Tenn. July 5, 2023).

82 Peter Finn & Kerry Murphy Healey, Preventing Gang- and Drug-Related Witness Intimidation 4 (1996).

83 *See id.* at 2.

84 *See id.* at 29–30.

85 *See id.* at 24.

86 State v. Butler, 263 So. 3d 195, 197 (Fla. Dist. Ct. App. 2019).

87 People v. Tyler, 2015 IL App (1st) 123470, ¶ 214.

88 *Id.*

89 *See* Austin v. Harrington, No. 10 C 6474, 2014 WL 2725985, at *9 (N.D. Ill. June 16, 2014).

In a 2017 case, the prosecutor failed to disclose "around two thousand dollars to put [a witness] up in a hotel for about a week and then to move him and his mother into a different apartment."[90] The prosecutor made the payments because the witness "represented that he felt in danger because of his connection to the crimes at issue."[91]

Some cases involved far more substantial payments. In a 2013 case, the government paid $13,984.94 "directly to the management of the facility where the victim was residing."[92] In a New Jersey case from 2018, the amount of the relocation expenses was unclear, but the defendant alleged that it was approximately $17,000.[93]

In one Illinois case, the State's Attorney paid a key witness $20,000 in relocation expenses.[94] The payment in another Illinois case was even more eye-popping. A federal habeas court found that "[t]here is no dispute that [the witness] received money from the prosecutor's office. . . . [T]he State's Attorney's office spent over $66,000 in relocation expenses for [the witness] and his dependents."[95] Even more astonishingly, "the majority of the money was paid to [the witness] *after* he testified against [the defendant] (about $7,000 before testimony and the rest afterwards)."[96] In both Illinois cases, the defense did not learn about the relocation payments before the trial began.[97]

In all these cases—and others[98]—the government made substantial payments to witnesses in the name of relocation assistance. Remarkably, in all but one of them, courts rejected *Brady* challenges on materiality grounds.[99] As this Article explains in Section II.B below, the courts' reasoning is rational in some of those cases. No competent defense attorney would mention a small relocation payment if it was made following a clear, violent threat by the defendant or their accomplices.[100]

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90 Kennell v. Dormire, 873 F.3d 637, 639–40 (8th Cir. 2017).

91 *Id.* at 640.

92 Salcedo v. Hedgpeth, No. cv 10-3882, 2013 WL 5230807, at *9 n.14 (C.D. Cal. Sep. 13, 2013), *aff'd sub nom.*, Salcedo v. Davey, 672 F. App'x 735 (9th Cir. 2017).

93 State v. Ragland, No. A-0747-16T2, 2018 WL 3596376, at *4 (N.J. Super. Ct. App. Div. July 27, 2018).

94 *See* People v. Blackman, 836 N.E.2d 101, 104–05 (Ill. App. Ct. 2005).

95 United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010).

96 *Id.* (emphasis added).

97 *See Blackman*, 836 N.E.2d at 104–05; *Mathy*, 2009 WL 2252238, at *9.

98 *See* White v. Steele, 853 F.3d 486, 492 (8th Cir. 2017); Williams v. Davis, No. cv 00-10637, 2016 WL 1254149, at *9 (C.D. Cal. Mar. 29, 2016); Ramirez v. Keyser, No. 20-cv-8445, 2024 WL 1076945, at *6–7 (S.D.N.Y. Mar. 12, 2024); Hooper v. Schriro, No. cv 98-2164, 2008 WL 4542782, at *10 (D. Ariz. Oct. 10, 2008); United States v. Taylor, No. cr97-0001, 2005 WL 984519, at *4 (N.D. Iowa Apr. 28, 2005); Cauthern v. State, 145 S.W.3d 571, 619 (Tenn. Crim. App. 2004); State v. Marshall, 690 A.2d 1, 36 (N.J. 1997).

99 *See infra* Part II.

100 *See infra* Section II.B.8.

Yet, in some cases, the reason for the relocation was less obvious, and courts erroneously presumed that a jury would unquestionably believe that massive payments could not have been influential.[101]

D. Travel and Lodging Payments

In addition to relocation expenses, the sample included two cases in which prosecutors did not disclose payments for transportation and lodging. When a witness lives far from the trial location, the costs of getting to trial can be substantial. And some witnesses simply do not have the money to travel, while others are disinclined to spend their own funds. Accordingly, prosecutors will sometimes fund hotels and meals or otherwise reimburse travel costs for witnesses.[102] There is nothing improper about prosecutors paying travel expenses, but that money amounts to a benefit that should be disclosed. In several cases, prosecutors failed to do so.

In one instance, the travel payments were quite modest. In a California case, the prosecutor's office paid a witness "to stay in a hotel for three nights . . . at a cost of $260.70" and provided "a food stipend of $40 dollars [sic] per day."[103]

In another case, though, the travel assistance funding was significant enough to prompt a defendant to compare the payments to an "all-expenses-paid vacation."[104] That allegation arose out of a case in which prosecutors failed to disclose that a witness was paid "$656.96 from the State and her husband received $761.13, for a total of $1,418.09."[105] Most of the money was for airline tickets to a trial near Nashville, Tennessee.[106]

In sum, the majority of cases in the sample involved cash payments. When adding rewards to the cash payments, that circumstance accounts for roughly two-thirds of the hidden payments in the sample. A single case involved a payment out of a crime victims fund. And the remaining one-third of the cases in the sample involved relocation expenses or travel expenses. In all these cases, the prosecutors failed to disclose the witness payments, and the courts recognized that the evidence was favorable impeachment evidence. The key remaining question, therefore, was whether the failure to disclose the payments was material.

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101 *See infra* notes 245–55 and accompanying text.

102 *See, e.g.*, 18 U.S.C. § 201(d) (excluding "reasonable cost of travel" from the federal bribery statute).

103 Williams v. Swarthout, No. cv 09-6645, 2012 WL 6552147, at *10 (C.D. Cal. Sep. 25, 2012), *report and recommendation adopted*, 2012 WL 6554741 (C.D. Cal. Dec. 14, 2012).

104 State v. Tice, No. M2021-00495-CCA-R3, 2022 WL 2800876 at *30 (Tenn. Crim. App. July 18, 2022).

105 *Id.* at *25.

106 *See id.* at *30.

II. Materiality and Hidden Payments

A. *Courts Overwhelmingly Found Hidden Payments to Be Immaterial*

The key question in each of the forty-seven cases in the sample was whether the hidden witness payments were material. In other words, each case turned on whether the court believed that there was a reasonable probability that had the witness payment been disclosed to the defense, the outcome of the case would have been different.[107]

The answer to the materiality question was lopsided, and not in a way one might guess. In thirty-seven of the forty-seven cases, courts found the hidden witness payment was *not* material. Thus, as Table 2 demonstrates, in seventy-nine percent of the cases in the sample, courts were faced with undisclosed witness payments and decided that there was no reasonable probability that the juries would have reached a different outcome if they knew that one of the key witnesses received money from the government.

Table 2. Courts Find Most Hidden Witness Statements to Be Immaterial

	Number of Cases	**Percentage**
Material	10	21%
Not Material	37	79%

B. *Reasons for Finding Hidden Witness Payments to Be Immaterial*

I reviewed each decision not just for the outcome but also to understand the court's reasoning. All told, courts offered nearly a dozen different categories of reasons for finding hidden witness payments to be immaterial. Table 3 below identifies the reasons courts gave for finding the witness payments to be immaterial. The numbers in Table 3 add up to more than thirty-seven—the number of cases in which courts found hidden witness payments to be immaterial—because many courts offered multiple rationales in a single case. After describing the prevalence of each type of reason, this Section then explores each rationale in detail and explains which reasons for finding materiality were persuasive and which were nonsensical.

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107 *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

TABLE 3. REASONS FOR FINDING HIDDEN PAYMENTS TO BE IMMATERIAL

Reasons Given by Courts	**Number of Cases**
Only a Small Amount of Money Was Paid	5
Payment Was Outweighed by Other Evidence of Guilt	20
Defense Cross-Examined About Other Benefits Received	8
Witness Was Impeached on Nonbenefit Issues, Such as Prior Crimes	9
Payment Was Made Only After Trial	1
Payment Occurred Well Before Trial	2
Payment Was for Something Other than Cooperation	2
Payments to Relocate a Witness or from a Victims Fund Reinforced the Defendant's Guilt	7
Witness Receiving Benefit Did Not Testify	1
Procedurally Defaulted Issue by Failing to Brief Issue in Detail	1
Conclusory Reasoning	2

1. Only a "Small" Amount of Money

When prosecutors or the police pay a witness—particularly in cash—one may expect the defense to argue that the prosecution had effectively bribed a witness to lie or shape their testimony. In five cases, courts rejected this argument on the ground that the government only paid the witness a "small" amount of money.[108] Colloquially speaking, these courts took the position that a jury would conclude the witness "could not be bought off so cheap." This reasoning seems logical in the abstract, but when one considers the fragile financial position of some witnesses, it becomes far less persuasive.

To begin, consider a California assault and battery case in which the government gave an unhoused witness "$150 to buy clothes for trial" as well as three nights in a hotel "at a cost of $260.70" and "a food stipend of $40 dollars [sic] per day."[109] The prosecutor disclosed the $150 clothing payment, and the defense used it to impeach the witness on cross-examination.[110] Yet, the prosecutor did not disclose the witness's hotel stay and food stipend until the middle of trial because the

108 *See infra* notes 109–28 and accompanying text.

109 Williams v. Swarthout, No. cv 09-6645, 2012 WL 6552147, at *10 (C.D. Cal. Sep. 25, 2012), *report and recommendation adopted*, 2012 WL 6554741 (C.D. Cal. Dec. 14, 2012).

110 *See id.* at *12.

prosecutor learned from her colleague during a lunch break that she had to disclose this information.[111]

The California Court of Appeals found the withheld evidence immaterial in part because "[i]t is doubtful that evidence of a comparatively small additional amount of money given by the prosecution to this homeless witness for a few days hotel stay and food to insure her presence at trial would further impact her credibility."[112] In making this statement, the court ignored or was unaware that three nights in a hotel and $120 in food would be extremely valuable to a person who was unhoused.[113] Instead, the court seemed to assume that because $380 in lodging and food might not be a big deal for many people, it was not a big deal for the witness in this case.[114]

Courts have also dismissed payments as "small" by drawing comparisons to unsuccessful *Brady* claims involving larger payments. For example, in a recent drug trafficking case, prosecutors failed to disclose that they paid an informant $250 before trial and another $150 after trial.[115] Among the reasons for finding the hidden $400 in payments to be immaterial, the court explained that "[i]n other cases, we have held that undisclosed payments of $2,000 from law enforcement to a witness were not material, where there was no evidence that the payments gave the witness an incentive to testify."[116]

In dismissing the $400 in payments to the witness, the court completely failed to grapple with whether $400 was a lot of money to this particular witness. The fact that a witness might be more influenced by $2,000, for example, does not mean that $400 was not enough to lead the witness to change or shape his story.

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111 *Id.* at *10. This case demonstrates that some *Brady* violations occur not because of maliciousness, but because prosecutors are not always well trained and fully versed on their legal obligations. *See* Gershowitz, *supra* note 18, at 544–45.

112 *Williams*, 2012 WL 6552147, at *11.

113 Perhaps realizing that the California Court of Appeals's reasoning was flawed, the federal habeas court offered different reasons for immateriality, including that the hotel and food stipend were similar to the clothing stipend that was disclosed and that "the government's case did not hinge on [this witness's] testimony." *See id.* at *12–13.

114 *See id.* at *10. Of course, some witnesses are in far worse economic circumstances than others. *See* Roxann Matthews, *The Perverse Carrot: How Extreme Economic Precarity Is Exploited Through Witness Perks*, 57 U.S.F. L. Rev. 111, 112–13 (2022) (citing an example in which an indigent witness was moved into permanent housing). As Professor Vida Johnson has explained, "Crime is most rampant in poor communities . . . . The financial assistance offered by crime-victim funds can provide much-needed relief from daily economic pressures that exist independent of the alleged crime." Johnson, *supra* note 5, at 495.

115 United States v. Dones-Vargas, 936 F.3d 720, 723 (8th Cir. 2019).

116 *Id.* The court offered other unpersuasive reasons, such as that the government made the final payment only after the witness testified. *See id.*

Some courts engaged in even weaker reasoning when comparing the amount of money in different cases. In *People v. Tyler*,[117] an Illinois court rejected a *Brady* claim on the grounds that the amount of money at issue was smaller than in a different case, *People v. Blackman*,[118] in which an Illinois court actually found a *Brady* violation.[119] The *Tyler* case involved a murder prosecution in which prosecutors failed to disclose $1,100 in relocation expenses for a witness.[120] The defense pointed out that in the earlier *Blackman* case, an Illinois appellate court found a *Brady* violation when the prosecution failed to disclose relocation expenses paid to a witness.[121] The court rejected the comparison, however, because the other case involved more money:

> Defendant compares this case to *People v. Blackman*, where we remanded for a new trial where the State failed to disclose that it paid for a testifying witness' relocation expenses. However, *Blackman* is distinguishable because the amount the State paid to the witness was $20,000, a significantly higher amount than the $1,100 the State paid [here].[122]

The *Tyler* court seemed to suggest that $20,000 was the floor for a *Brady* violation, and hidden payments for less money could not be material.[123] But the *Blackman* case never said that.[124] Nor could it have, because the amount of money, by itself, is not the only consideration in a materiality analysis. Instead, it is important to consider whether the payment would have incentivized the witness to lie. A payment of $1,100 might be an enormous amount of money—and thus very influential—to a poor witness, for example, but a pittance to a rich executive.

Another way in which courts explain away hidden payments is by saying the payment was small in comparison to what the prosecution actually disclosed. For instance, in a first-degree murder case, the prosecution disclosed that it paid a key informant witness over $7,000, but failed to disclose an additional $310 in payments.[125] The court rejected the *Brady* claim on the ground that "[t]he payments, amounting to several hundred dollars, are significantly smaller than the more than

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117 2015 IL App (1st) 123470.

118 836 N.E.2d 101 (Ill. App. Ct. 2005).

119 *Tyler*, 2015 IL App (1st) 123470, ¶ 217.

120 *See id.*

121 *See id.*

122 *Id.* (citation omitted).

123 *See id.*

124 *See* People v. Blackman, 836 N.E.2d 101, 106–07 (Ill. App. Ct. 2005).

125 Hernandez v. Lewis, No. 12-cv-01661, 2018 WL 1870449, at *25–26 (E.D. Cal. Apr. 18, 2018), *report and recommendation adopted sub nom.*, Cianez Hernandez v. Lewis, 2020 WL 2216562 (E.D. Cal. May 7, 2020).

seven thousand dollars-worth [sic] of benefits provided to [the witness] that were disclosed at trial."[126]

Similarly, in a white-collar fraud case, a Federal Bureau of Investigation ("FBI") agent represented that a witness was paid $5,000, but after trial, it became clear that the government had failed to disclose an additional $300 payment.[127] The court described this hidden payment as "relatively insignificant" and rejected the *Brady* claim.[128]

Once again, the reasoning of these courts is flawed. The total size of the payments is not the only consideration. For example, a jury could also have been influenced by the fact that the witness was paid repeatedly as part of an ongoing relationship with law enforcement. In other words, the fact that the police kept coming back to the witnesses and paying them is impeachment evidence that might have been useful to the defense.

Perhaps most important, none of the cases recognized that a small amount of money can be very influential. As described in Part III below, psychologists have long documented a reciprocity principle in which people who receive a benefit behave more favorably toward the person who gave them the benefit.[129] To foreshadow the rich literature described in Part III, researchers have documented that people who are given small items—for instance, a free sample of chocolate at a store or a free dessert at a restaurant—change their behavior. Those who receive a free sample of chocolate buy more from the store; those who receive a free dessert give a larger tip to their server.[130] In short, psychologists have documented that free items worth a few dollars can change a person's behavior. Accordingly, it is inaccurate for courts to assume that cash payments of a few hundred or a few thousand dollars could not alter a witness's testimony.

2. The Hidden Payment Was Outweighed by Other Evidence

The most common type of reasoning that courts employed to find hidden payments to be immaterial is simply that the value of that evidence was outweighed by the other evidence at trial. This line of reasoning was present in twenty of the forty-seven cases. In some instances, courts reached this conclusion by saying that the testimony of the paid witness was corroborated by another witness, thus blunting the paid witness's impact. In other cases, courts suggested that the paid witness was a minor figure in the trial and that their testimony was not that important. In still other cases, courts focused exclusively—and

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126 *Id.* at *26.

127 United States v. Nagle, No. 09-cr-384-01, 2013 WL 3894841, at *60 (M.D. Pa. July 26, 2013).

128 *Id.*

129 *See infra* Part III.

130 *See infra* notes 303–07 and accompanying text.

improperly—on the evidence of guilt at trial, without considering the withheld evidence and whether it would have created a reasonable probability of a different outcome.[131]

a. The Witness's Testimony Was Corroborated

In many of the twenty cases, courts found hidden payments to be immaterial because the testimony of the witness was corroborated by other witnesses. As detailed below, however, when there is only one corroborating witness and limited physical evidence, the corroboration explanation is not very compelling.

In some cases, the additional corroborating evidence was extensive. For example, in a murder case, the government failed to disclose relocation expenses paid to a witness.[132] The court found the payments immaterial because of the vast other corroborating evidence, including an additional identification, multiple confessions by the defendant to third parties, an incriminating recording, and even incriminating statements made to the police.[133]

In another case in which prosecutors did not disclose nearly $4,000 in payments to a witness, the court pointed to the testimony of four other individuals who corroborated the different aspects of the witness's testimony.[134] The court noted that "this is not a case where the witness supplied the only evidence linking Petitioner to the crime."[135]

Sometimes the corroborating evidence was compelling because it came not just from an additional witness, but also as a confession by the defendants themselves. Consider a sexual assault case in which prosecutors provided victim funds to a witness.[136] The court explained that the hidden payments were immaterial because the witness's "testimony about the details of the rape [was] strongly corroborated by other witnesses."[137] The court further explained that the details provided by the victim "also appear[ed] in the eyewitness account given by her mother" and were consistent with the defendant's jailhouse confession

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131 Judge Harry Edwards called this the "guilt-based approach." *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1171 (1995). By contrast, the proper approach is "evidence-based analysis," in which courts analyze the withheld evidence in the context of what was in fact presented at trial. Brandon Garrett and I assessed five years of *Brady* claims and found that many courts improperly utilized guilt-based analysis in assessing *Brady* claims. *See* Garrett & Gershowitz, *supra* note 31, at 33–36.

132 *See* State v. Ragland, No. A-0747-16T2, 2018 WL 3596376, at *6 (N.J. Super. Ct. App. Div. July 27, 2018).

133 *See id.*

134 *See* Hooper v. Schriro, No. cv 98-2164, 2008 WL 4542782, at *7–9 (D. Ariz. Oct. 10, 2008).

135 *Id.* at *8.

136 Breezee v. Perry, No. 17-cv-01207, 2023 WL 4353154, at *14–15 (W.D. Tenn. July 5, 2023).

137 *Id.* at *14.

to another inmate.[138] In another case, the court relied on the defendant's own confession as a reason to find $66,000 in hidden witness relocation payments to be immaterial.[139]

Multiple other courts pointed to corroborating evidence as a basis to find hidden payments to a witness to be immaterial. For instance, in four cases, courts pointed to corroborating evidence from other witnesses as well as physical evidence to find hidden witness payments to be immaterial.[140]

Courts did not point to substantial corroborating evidence in all cases, however. In some instances, courts should have been more reluctant to conclude that hidden payments to the witness were immaterial. For example, consider the previously mentioned case in which prosecutors failed to disclose that the police gave a witness $200 to buy tires for her car.[141] The court rejected a *Brady* challenge on the ground that the witness's testimony was "corroborated by other witnesses."[142] But the court never explained who those witnesses were or what testimony they corroborated.[143]

An even more concerning case involved a murder in which one witness was paid an undisclosed $1,000 reward, and the only corroborating witness was the defendant's ex-girlfriend.[144] The court found the hidden payment immaterial because the witness's testimony that the defendant had confessed was "substantially corroborated by other evidence."[145]

Yet the court conceded that there was a major inconsistency in the testimony of the two witnesses. The paid witness—who got the bulk of the reward *after* testifying—told the jury that the defendant confessed to stabbing the victim during an attempted robbery, whereas the defendant's ex-girlfriend said the defendant confessed to having stabbed the victim but claimed he acted in self-defense.[146]

When it came time to analyze the materiality of the hidden $1,000 reward payment to the paid witness, the court minimized the inconsistent testimony, concluding that "[b]ecause the only part of his testimony that is inconsistent with [the defendant's ex-girlfriend's] is substantially

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138 *Id.*

139 *See* United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10, *14 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010).

140 *See* United States v. Price, 13 F.3d 711, 722 (3d Cir. 1994); United States v. Thornton, 1 F.3d 149, 158–59 (3d Cir. 1993); Kopycinski v. Scott, 64 F.3d 223, 226 (5th Cir. 1995); Williams v. Swarthout, No. cv 09-6645, 2012 WL 6552147, at *11 (C.D. Cal. Sep. 25, 2012), *report and recommendation adopted*, 2012 WL 6554741 (C.D. Cal. Dec. 14, 2012).

141 *See* Jalowiec v. Bradshaw, 657 F.3d 293, 309 (6th Cir. 2011).

142 *See id.*

143 *See id.*

144 *See* Quintana v. Comm'r of Corr., 739 A.2d 701, 707, 709 (Conn. App. Ct. 1999).

145 *See id.* at 710.

146 *See id.* at 709–10.

corroborated by other evidence, . . . there is not a reasonable probability that, had the information been conveyed to the [defendant], the result of his trial would have been different."[147]

The court's reasoning and decision are troubling. Had the defense been aware of the reward payment, the defense could have told a very different story that showed reasons to disbelieve both witnesses. The defendant's ex-girlfriend could have been painted as unreliable because she was a disgruntled *former* girlfriend. And to the extent that the jury was willing to overlook the defendant's ex-girlfriend's possible bias because there was another witness, that witness was also unreliable because he was paid $1,000, most of which came as a reward only *after* he testified.

It is especially troubling when courts affirm that paid witness testimony is corroborated but only mention a single corroborating witness or are otherwise vague on the subject. A jury might only have been willing to convict the defendant because the witness's testimony was corroborated. Although the testimony of a single witness is technically sufficient for a jury to find proof beyond a reasonable doubt,[148] that will only be the case if the jury is confident about that witness's truthfulness. If a jury has doubts about a witness, it may only be willing to convict when there is a second credible witness offering similar testimony. How would the jury react if it learned that the confirming witness had been paid by the government? If the jury lost confidence in the second witness after learning about a cash payment, the jury might have been unwilling to convict solely based on the testimony of a single other witness.

In short, the argument that hidden payments are immaterial because the witness's testimony was corroborated by other evidence only works when the jury is willing to convict based on that other evidence alone. Thus, the "corroboration" argument is more persuasive when there are multiple other witnesses who were not paid or when there is ample physical evidence. When there is a single other corroborating witness and limited physical evidence, the corroboration argument is not particularly compelling.

b. The Witness Provided Only a Small Amount of the Evidence

Six courts explained away hidden payments on the ground that the paid witness was only a minor player at trial. These courts focused less on the witness's testimony being corroborated and more on the fact that the witness provided only a modest amount of evidence of guilt.

In some instances, the court offered a compelling narrative about the witness being relatively unimportant in the grand scheme of the

147 *Id.* at 710.

148 *See, e.g.*, State v. Sinclair, 569 A.2d 551, 555–56 (Conn. App. Ct. 1990).

trial. For instance, in one case, prosecutors failed to disclose a substantial $5,000 reward.[149] But the government called forty-nine other witnesses and presented "a host of circumstantial evidence" that tied the defendant to the murder scene, showed a financial motive, and demonstrated that he had stolen the same type and caliber of gun used in the murder.[150]

In another case, prosecutors failed to disclose $300 in payments to a witness.[151] But the court found that the witness's "contribution to the case was not his testimony or credibility; rather, it was obtaining [the defendant's] confession in a recording that was played for the jury."[152] Thus, any damage to the witness's credibility from the payment would not have mattered anyway.[153]

In the same vein, another court relied on the fact that a witness's testimony was not legally significant. The witness, who had received $300, recounted the defendant's confession to a killing.[154] But the prosecution had pursued a felony murder theory, thus enabling a conviction based solely on the underlying felony without needing the confession to the killing itself.[155]

In the three cases above, it is possible to see how the courts could reach the argument that the witness who received payments was a minor figure; thus, even if the payments had been disclosed, the jury would not have reached a different result. But in other cases, courts offered less persuasive reasoning. In these cases, courts effectively asserted that everyone should take their word for it that the witness was unimportant and that the hidden payment would not have mattered.

For example, in 2024, a federal court said that the witness's testimony "was just one piece in the large trove of evidence at trial, such that her testimony was not what ultimately connected Petitioner to the attack."[156] Another federal court offered a similarly conclusory explanation in a case involving $400 in payments to a witness.[157] The court explained, "The prosecution's case did not hinge on [the witness's] testimony. Several other witnesses implicated [the defendant] in a drug trafficking conspiracy."[158] In a different case in which the prosecutor failed to disclose a monetary reward made to a witness, the court noted that the witness had been impeached with his prior convictions and

149 *See* Garnett v. Morgan, 462 F. App'x 706, 707 (9th Cir. 2011).

150 *Id.* at 707–08.

151 *See* State v. Butler, 263 So. 3d 195, 197 (Fla. Dist. Ct. App. 2019).

152 *Id.* at 198.

153 *See id.*

154 Cauthern v. State, 145 S.W.3d 571, 617, 619 (Tenn. Crim. App. 2004).

155 *Id.* at 620.

156 Ramirez v. Keyser, No. 20-cv-8445, 2024 WL 1076945, at *7 (S.D.N.Y. Mar. 12, 2024).

157 *See* United States v. Dones-Vargas, 936 F.3d 720, 721–22 (8th Cir. 2019).

158 *Id.* at 722.

emphasized the "abundant evidence showing [the petitioner's] involvement in the murder."[159]

In these three cases, it may be that the jury viewed the witnesses as minor players. Or perhaps the jury may have found their testimony far more important than the appellate courts acknowledged. But the courts offered little explanation to make it possible to know for sure.

c. Guilt-Based Reasoning

As Professor Brandon Garett and I have recently explained, courts are supposed to conduct *Brady* materiality analysis by using "evidence-based" reasoning that considers how the withheld evidence would have affected the jury's perception of the evidence presented at trial.[160] In other words, courts should make a counterfactual assessment of what would have happened had the jury been presented with the withheld evidence.[161] Some courts unfortunately engage in improper guilt-based reasoning in which they ignore the withheld evidence and simply focus on the evidence presented at trial.[162] In other words, these courts are only focused on the evidence at trial instead of considering the evidence that was withheld.[163]

From this data set, at least three courts improperly engaged in guilt-based reasoning to explain away hidden witness payments. The first example of this flawed reasoning occurred in a Ninth Circuit case. The prosecutor had not disclosed Drug Enforcement Agency ("DEA") files documenting a witness's work as a paid informant.[164] The court conducted no real analysis of the withheld evidence and simply found it to be immaterial because the witness's "credibility was not important to the government's case given extensive other evidence against [the defendant] (including tapes), and was, in any event, amply challenged at trial."[165]

In the second case—an Iowa drug prosecution—the prosecutor was unaware that the Iowa Division of Narcotics Enforcement had paid $990 in moving expenses for a witness and that an officer paid the witness $275 out of his own pocket to help the witness pay her rent and avoid eviction.[166] In a confused opinion, this federal court in Iowa

159 Johns v. Bowersox, 203 F.3d 538, 545–46 (8th Cir. 2000).

160 *See* Garrett & Gershowitz, *supra* note 31, at 6.

161 *See id.* at 11.

162 *See id.* at 6.

163 *See id.*

164 *See* United States v. Joelson, No. 98-50619, 2000 U.S. App. LEXIS 5929, at *2–3 (9th Cir. Mar. 29, 2000).

165 *Id.*

166 *See* United States v. Taylor, No. cr97-0001, 2005 WL 984519, at *4 (N.D. Iowa Apr. 28, 2005).

refused to grant the defendant a new trial, but in a footnote acknowledged that "the newly discovered evidence is probably material in that it would have aided him when cross examining [the witness]" and that "[a]lthough [the witness] played a minor role in the defendant's trial, [the witness's] testimony was material to the defendant's guilt."[167] Despite the apparent acknowledgement of materiality, the court upheld the conviction on the grounds that "there was overwhelming evidence introduced at trial which showed that the defendant conspired to distribute crack cocaine."[168] The court's explanation was guilt-based because the court did not analyze how the withheld evidence affected the full picture;[169] instead, the court focused only on the "overwhelming" evidence presented at trial.[170]

In a third case of conclusory reasoning, the court refused to find relocation expenses material because "[t]he State presented overwhelming evidence of [the defendant's] guilt, and thus [the] insignificant impeachment evidence would not have changed the result."[171]

3. The Defense Cross-Examined About Benefits Generally

In eight cases, courts found hidden witness payments to be immaterial in part because the defense was able to cross-examine the witness about other benefits that the witness received.

The most eye-popping case involved a federal prosecution in which prosecutors disclosed that the FBI and DEA had paid a witness more than $100,000, but were unaware, and thus failed to disclose, that the witness was also paid $11,600 by state agents.[172] The court found that the withheld payments were not material.[173] The court emphasized that the $100,000 in federal payments had been the subject of extensive cross-examination and that, as such, the undisclosed state payments were "merely cumulative."[174]

A similar case of incomplete benefit disclosure occurred with a much smaller sum of money when the prosecutor disclosed $150 in payments for an unhoused victim-witness to buy clothing but did not disclose hundreds of dollars in payments during the three-day trial.[175]

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167 *Id.* at *7 & n.13.

168 *Id.* at *7.

169 *See* Garrett & Gershowitz, *supra* note 31, at 6.

170 *Taylor*, 2005 WL 984519, at *7.

171 Austin v. Harrington, No. 10 C 6474, 2014 WL 2725985, at *10 (N.D. Ill. June 16, 2014).

172 *See* United States v. Sanchez, 917 F.2d 607, 616–18 (1st Cir. 1990).

173 *Id.* at 618.

174 *Id.* at 618–19.

175 *See* Williams v. Swarthout, No. cv 09-6645, 2012 WL 6552147, at *10 (C.D. Cal. Sep. 25, 2012), *report and recommendation adopted*, 2012 WL 6554741 (C.D. Cal. Dec. 14, 2012). The court also relied on other reasons to find the payment in *Williams* to be immaterial. *See supra* notes 112–14 and accompanying text.

Even though lodging and food for someone living on the street is a valuable benefit, the intermediate appellate court found it to be immaterial because the jury was told about the $150 in clothing benefits and the witness "emphatically testified" that the free clothing would not have influenced her testimony.[176] The federal district court adopted this reasoning when it denied the defendant's habeas petition, stating that the undisclosed hotel and food payments were "similar to and cumulative of" the clothing payment "that was used to impeach [the witness] during cross-examination."[177] The court further explained that "the government's remuneration for the witness's testimony" was "'put . . . directly before the jury' during cross examination."[178]

A court adopted similar reasoning in a first-degree murder case in which the government failed to disclose a $310 cash payment.[179] The court found the $310 payment to be immaterial because the prosecutor had disclosed paying "over $7,000 in benefits" to that same witness.[180] The court explained that "there was significant impeachment evidence presented regarding [the witness's] prior informant work in which he was provided compensation, and the benefits he received through the witness protection program the year before providing his testimony against [the defendant]."[181]

Similarly, in a complicated white-collar prosecution, the government failed to disclose that it had a fee arrangement in which the government paid $56,500 to a witness who analyzed data.[182] The court recognized that the fee arrangement was useful impeachment evidence, but the court found it to be immaterial because the jury learned that the witness "was receiving tens of thousands of dollars from the government and [a private company] in exchange for over 350 hours of analysis in this case."[183]

Consider also an attempted murder case from California. The defendant alleged that the prosecutor failed to disclose payments from the witness protection program.[184] The court pointed out, however, that even if the prosecutor failed to disclose the specific amount of the

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176 *Swarthout*, 2012 WL 6552147, at *11.

177 *Id.* at *12.

178 *Id.* (alteration in original). The court also pointed to other reasons for rejecting materiality, including the victim-witness's criminal record and history of mental illness. *Id.* at *13.

179 *See* Hernandez v. Lewis, No. 12-cv-01661, 2018 WL 1870449, at *25 (E.D. Cal. Apr. 18, 2018), *report and recommendation adopted sub nom.*, Cianez Hernandez v. Lewis, 2020 WL 2216562 (E.D. Cal. May 7, 2020).

180 *Id.*

181 *Id.* at *26.

182 *See* United States v. Valencia, 600 F.3d 389, 415 (2010).

183 *Id.* at 418–19.

184 *See* Salcedo v. Hedgpeth, No. cv 10-3882, 2013 WL 5230807, at *8 (C.D. Cal. Sep. 13, 2013), *aff'd sub nom.*, Salcedo v. Davey, 672 F. App'x 735 (9th Cir. 2017).

payment, the jury did learn that the witness was in a protection program and had received "'thousands of dollars' to relocate as well as food and spending money."[185]

Finally, in two cases, courts pointed to the jury learning about the witness's favorable plea deal as a reason to disregard the monetary benefits the prosecution failed to disclose.

In a Rhode Island murder case, the government failed to disclose "family visits, custodial recreation, financial arrangements, possession of a gun, access to or use of unlawful controlled substances while in custody, consumption of alcoholic beverages, and freedom to leave the police station without a police escort."[186] Although it is unclear from the court's opinion how much of the financial benefits were hidden, the expenses and benefits were worth more than $165,000.[187] The court pointed to multiple reasons to find the withheld evidence immaterial, including the fact that the jury learned that the state was giving the witness a favorable plea bargain and a light sentence.[188]

In a New Jersey murder case, the court took an identical approach. The prosecution had failed to disclose documents showing financial support for a witness's family.[189] The court found this favorable evidence to be immaterial, however, because defense counsel cross-examined the witness about receiving a reduction in charges from capital murder to conspiracy—"thereby reducing his maximum possible punishment from a death sentence to a five-year prison term with no parole disqualifier."[190] The court concluded that "[a]ny possible incremental effect on [the witness's] credibility from the additional revelation that financial accommodations were made to support his family would have been merely cumulative."[191]

In all these cases, courts were willing to overlook hidden payments because the jury saw the defense counsel impeach the same witness for receiving other benefits.[192] These courts took a binary approach in which a witness could either be impeached for receiving benefits or not be impeached. But, of course, whether there was any impeachment is not

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185 *Id.*

186 *See* Mastracchio v. Vose, No. CA 98-372T, 2000 U.S. Dist. LEXIS 3766, at *12–13 (D.R.I. Mar. 15, 2000), *aff'd*, 274 F.3d 590 (1st Cir. 2001).

187 *Id.* at *20.

188 *See id.* at *8. The court also highlighted the jury's awareness of the witness's criminal history and the compelling nature of his testimony. *See id.* at *32.

189 *See* State v. Marshall, 690 A.2d 1, 36 (N.J. 1997).

190 *Id.* at 37 (quoting State v. Marshall, 586 A.2d 85, 207 (N.J. 1991)).

191 *Id.* (quoting *Marshall*, 586 A.2d at 207).

192 Additionally, in the Ninth Circuit case *United States v. Cheely*, "the Government did not disclose the promise of a $1750 payment," but the court found a lack of materiality in part because the witness was questioned about other "payments totalling [sic] $520." No. 95-30248, 1997 WL 265000, at *3 (9th Cir. May 19, 1997).

the only relevant question. Had defense counsel been aware of the hidden payments, the extent of the impeachment most likely would have been more significant and more persuasive to the jury. That is not to say that the jury would have reached a different result in each of the cases above. But it does suggest the idea that the binary approach taken by these courts is not always persuasive.

4. The Witness Was Impeached on Other Issues, Such as Prior Crimes

In nine cases in which the prosecution failed to disclose payments to a witness, courts based their materiality decision in part on the fact that the witness was impeached successfully on other nonbenefit issues. In other words, courts concluded that the hidden payments did not matter that much because the witnesses who received them had their credibility so substantially undermined through other issues during cross-examination that the payments would not have mattered.

In multiple cases, courts downplayed withheld payment information because witnesses were subjected to cross-examination about prior crimes or bad acts. For example, a federal court in Arizona found $3,800 in hidden payments to be immaterial because the witness was cross-examined about his "extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police officers; and his private out-of-jail visit with his wife while being incarcerated for first degree murder."[193]

In an Illinois case, the court overlooked tens of thousands of dollars in undisclosed witness payments because "[t]he jury heard he was a killer, drug dealer, robber, and thief who said, in exchange for testimony, he was going to have a firearms charge and a drug case dismissed and a disposition of time served on an armed robbery charge reduced to robbery."[194] The court went on to say that "[r]evealing that he was paid cash would not have diminished his credibility much more than these other factors."[195]

In a capital murder case, the court noted that defense counsel elicited testimony on cross-examination that the witness "had been convicted of grand larceny, and had agreed to testify against [the defendant] in exchange for a reduced sentence in a pending armed robbery charge. Thus, the suppressed evidence [about payment of a reward] had limited impeachment value."[196]

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193 Hooper v. Schriro, No. cv 98-2164, 2008 WL 4542782, at *8 (D. Ariz. Oct. 10, 2008).

194 United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *14 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010).

195 *Id.*

196 Johns v. Bowersox, 203 F.3d 538, 546 (8th Cir. 2000).

A federal court in Iowa focused on the defense's ability to cross-examine the witness on "prior convictions or involvement in various crimes of deceit; [] prior prison stays and desire to avoid future imprisonment; [] numerous probation violations; and [] ability to avoid conspiracy charges or escape prosecution in exchange for cooperating with the government."[197] Similarly, in a Rhode Island case, the court pointed to defense counsel attacking a witness's credibility based on his "long criminal history."[198]

In other cases, courts focused on the fact that the witnesses had been cross-examined about inconsistent statements and their history of lying generally. For example, in a California sexual assault case, the state appellate court noted that the witness was impeached with prior denials that he had been molested; "'considerable' evidence that he had a history of mental health issues, including hallucinations; his admission that he had previously suggested that his mother had sexually molested him when she had not; and his admission at trial that he had a 'history of lying.'"[199] On federal habeas review, the court reached the same conclusion and said that "the undisclosed [hidden payments were] far less damaging to [the witness's] credibility than the impeachment evidence that defense counsel used at trial."[200]

Similarly, in a New Jersey case, the court focused, inter alia, on defense counsel's "ample ammunition" to cross-examine the witness about her "repeated lying to [the] police in her earlier statements."[201] And in a Ninth Circuit case, the court noted that "the defense offered significant impeachment evidence, including [the witness's] past criminal history, and testimony from [his] family that [he] was a habitual liar and a thief."[202]

There is some logic to the idea that hidden witness payments are immaterial when other very damaging impeachment evidence failed to convince a jury to acquit. If the defense attorney could not undermine a witness in the eyes of the jury with serious prior convictions, then hidden payments for a few hundred dollars probably would not have made a difference.

But for several reasons, that argument is not always as compelling as it appears. First, some witnesses were paid far more than a few

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197 United States v. Taylor, No. cr97-0001, 2005 WL 984519, at *6 (N.D. Iowa Apr. 28, 2005).

198 Mastracchio v. Vose, No. CA 98-372T, 2000 U.S. Dist. LEXIS 3766, at *18 (D.R.I. Mar. 15, 2000), *aff'd*, 274 F.3d 590 (1st Cir. 2001).

199 *See* Weissman v. Clark, No. 22-cv-0400, 2023 WL 8853715, at *17 (N.D. Cal. Dec. 21, 2023), *aff'd*, No. 23-4407, 2025 WL 1177521 (9th Cir. Apr. 23, 2025).

200 *Id.* at *19.

201 State v. Ragland, No. A-0747-16T2, 2018 WL 3596376, at *6 (N.J. Super. Ct. App. Div. July 27, 2018).

202 United States v. Cheely, No. 95-30248, 1997 WL 265000, at *3 (9th Cir. May 19, 1997).

hundred dollars.[203] Second, cash payments are damaging to a witness's credibility because they look like a quid pro quo.[204] Third, when courts point to a witness being impeached with other crimes, not all those cases involve lengthy and damaging criminal histories. Sometimes, a witness's crimes may be far in the past or not that significant.[205] In other words, sometimes the impeachment evidence that the defense did have access to is not powerful. Fourth, and most important, the question should not be an "either-or"; courts should not be asking whether disclosed prior convictions are more significant impeachment evidence than hidden cash payments. The reason is that impeachment evidence aggregates. Had the prosecutor properly disclosed the cash payments, the defense attorney would have impeached the witness with their prior convictions *and* the cash payments.[206] A juror might have been pushed over the edge to disbelieve a witness if they knew about not just the witness's prior convictions, but also that the witness had been paid by the government.

5. Payment Was Made Only After Trial

The least persuasive rationale for rejecting a *Brady* claim—thankfully only offered by one court—was that the hidden witness payment was only made *after* trial concluded. In a Texas death penalty case, two brothers testified against the defendant and subsequently received and split—along with one other person—a $1,000 reward.[207] Like many death penalty cases, the case involved multiple trials that stretched back decades.[208] The $1,000 reward—paid after the first trial in the late 1970s—would be worth several times more in 2026 dollars.[209]

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203 *See, e.g.*, United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10 (N.D. Ill. July 29, 2009) (detailing a witness given over $66,000 in relocation expenses), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010).

204 *See* Jonhson, *supra* note 5, at 497.

205 *See, e.g.*, Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 330 n.153 (2008) ("Rule 609(b) . . . prohibits impeachment with a prior conviction over 10 years old unless the probative value of the conviction 'substantially outweighs' its prejudicial effect . . . .").

206 As one court observed in finding a *Brady* violation,

> It makes little sense to argue that because [the defendant] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the key witness] because the most damning impeachment evidence in fact was withheld by the government.

Robinson v. Mills, 592 F.3d 730, 737 (6th Cir. 2010) (alterations in original) (quoting United States v. Serv. Deli Inc., 151 F.3d 938, 944 (9th Cir. 1998)).

207 *See* Pierce v. Thaler, 355 F. App'x 784, 789 (5th Cir. 2009).

208 *See id.* at 786–87.

209 U.S. Inflation Calculator, https://www.usinflationcalculator.com/ [https://perma.cc/5F-PG-FKUV] (last visited Feb. 15, 2026) (showing that an initial payment of $1,000 has at least quadrupled in value since the late 1970s).

Decades later, a federal habeas court found the hidden reward payment to be immaterial. The court adopted the lower court's finding, which determined that the payment was immaterial because the brothers identified the defendant as the shooter "shortly after the murder, provided testimony consistent with that identification at trial, and did not receive the reward money until after the first trial was complete."[210]

The most charitable way to interpret the court's very brief explanation is that the witnesses made their identification early in the investigation, never changed their story, and the reward was only given later. But the court did not say that, so one cannot be sure that is what the record reflects.

Moreover, the court did not acknowledge—or realize—that paying a reward *after* testimony is very suspicious. A payment after testimony looks like the reward was made in exchange for the testimony, and that withholding it until after testimony was intended to keep the witnesses in line and ensure that they identified the defendant.[211] A dissenting judge made this exact point, noting that "[t]he jury reasonably could have discredited the [witnesses'] testimony had it been informed that they received two-thirds of a $1,000 state-approved reward for their testimony."[212] The dissenting judge further explained that such impeachment evidence against two key witnesses "could have had a devastating effect upon the prosecution's entire case."[213]

6. Payment Occurred Well Before Trial

Section II.5 above described a court's conclusion that hidden payments were not material because they occurred *after* trial. One court used the exact opposite argument, insisting that hidden payments are not material if they happen far enough *before* trial.

Jeffrey Shockley was present in June 2002 when the defendant shot and killed the victim.[214] Later that year, "the St. Louis Circuit Attorney's Victim Services Unit . . . paid for Shockley to stay at a hotel for one week and later paid him just over $1,000 to help him relocate to an apartment in another neighborhood."[215] The case went to trial in January 2004, and Shockley testified.[216] On cross-examination, Shockley

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210 *Pierce*, 355 F. App'x at 789.

211 As Professor Vida Johnson has explained about crime victims funds, "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." Johnson, *supra* note 5, at 497.

212 *Pierce*, 355 F. App'x at 799 (Dennis, J., concurring in part and dissenting in part).

213 *Id.* at 800.

214 White v. Steele, 853 F.3d 486, 488 (8th Cir. 2017).

215 *Id.* at 489.

216 *See id.* at 488.

acknowledged that he had pending criminal charges for cocaine possession and unlawful use of a weapon.[217] On redirect, the prosecutor elicited from Shockley that "he had not received a deal from the State and did not expect to 'get anything' in exchange for his testimony."[218] Years later, the defense learned that Shockley received a one-week hotel stay, $1,000 in relocation payments, and food vouchers.[219] The prosecutor had not disclosed any of these payments.[220]

The Eighth Circuit rejected the defendant's *Brady* claim on materiality grounds.[221] The court took the position that "there is no evidence that this financial assistance provided Shockley with an incentive to testify."[222] To support that conclusion, the court pointed out that "Shockley received [the payments] in 2002, and [the defendant's] trial did not occur until January 2004."[223]

The court's conclusion that Shockley could not be biased because the government had paid him over a year before trial is unpersuasive. The court's decision said nothing about Shockley's life situation and how valuable the hotel stay, $1,000 in relocation payments, and food vouchers would be to him. Indeed, the record in the case reveals that around the time of his cooperation with the government, Shockley pleaded guilty to drug possession and weapons charges.[224] The transcript of his guilty plea hearing—which the Eighth Circuit never discussed—reveals that Shockley was a high school sophomore who had an eight-month-old baby and was out of work from his previous job at a convenience store.[225] Under those circumstances, the one-week hotel stay, the $1,000 in relocation payments, and the food vouchers were likely very valuable.[226] Those payments were no less valuable simply because they came a year before trial.[227]

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217 *See id.*

218 *Id.*

219 *See id.* at 489.

220 *Id.*

221 *See id.* at 492.

222 *Id.* at 492.

223 *Id.*

224 *See* First Amended Petition for Writ of Habeas Corpus at 1, White v. Larkins, No. 4:08-cv-00288 (E.D. Mo. Feb. 29, 2008), Dkt. No. 17-2.

225 *Id.* at 2–3.

226 *See id.*

227 The murder at issue in *White v. Steele* involved two defendants who were tried and convicted separately and who brought separate habeas petitions. *See* 853 F.3d at 488–89. Following the decision in *White* rejecting the *Brady* claim, the Eighth Circuit rejected the identical *Brady* claim raised by the other defendant. The panel parroted the same flawed logic about the timing of the payments: "The state made these payments more than a year before [the defendant's] trial, and nothing shows that they were made to encourage Shockley to change his testimony." Kennell v. Dormire, 873 F.3d 637, 640 (8th Cir. 2017).

7. Payment Was for Something Other than Cooperation

In two cases, courts found hidden witness payments to be immaterial in part because the payments were for something other than cooperation. In both cases, the courts never stopped to consider that the defense could challenge the claim that the money was for "other things."

First, in a drug trafficking case, the federal prosecutor "had been unaware of payments that [the] local police made to a cooperating witness and thus had failed to disclose that information to the defense."[228] The defendant's ex-girlfriend testified for the government.[229] After trial, the defendant's ex-girlfriend told defense counsel that the local police paid her in three installments, which added up to "$250 before trial, and $150 after the trial ended."[230] The payments were made in exchange for information.[231]

The defendant argued that law enforcement paying cash to a witness was valuable impeachment evidence, but the court concluded that "[t]he impeachment value of the payment information was not so devastating as to undermine the entire prosecution."[232] In addition to focusing on the "relatively small" size of the payments and the fact that there were other witnesses, the court explained that not all of the payments were in exchange for information about the defendant.[233] Specifically, the court stated that

> [t]he first payment was for information that [the witness] had provided over the course of four years about several drug dealers. The second payment was premised on information unrelated to [the defendant]. The third payment came after the trial was over, for more information unrelated to [the defendant], and there was no showing that [the witness] expected this payment as a reward for her testimony at trial.[234]

In short, the court's argument was that the hidden payments from the police to a witness were not material because some of the money was for information about other suspects. The defense, of course, would have very much liked to probe into the truth of that assertion on cross-examination. Were the police officers believable when they said that some of the cash payments were for other cases? What did the witness herself believe about why she was being paid? How much of the

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228 United States v. Dones-Vargas, 936 F.3d 720, 721 (8th Cir. 2019).

229 *See id.*

230 *Id.* at 723.

231 *See id.* at 721–22.

232 *Id.* at 723.

233 *Id.* at 722–23.

234 *Id.* at 723.

payments had to be related to the defendant before they became meaningful to the witness whom the court described as "strapped for cash"?[235] A skilled defense attorney could have made the payments seem quite nefarious.

The Seventh Circuit made a similar mistake in a federal drug trafficking conspiracy case. Prosecutors failed to disclose records showing payments to an informant who testified in the case.[236] Before trial, the judge conducted an in camera review of the payments and decided that the informant had been paid for information about other defendants.[237] The trial judge accordingly ruled that the payment documentation need not be disclosed.[238]

The appellate court had difficulty evaluating the trial judge's decision because the "docket order deeming the evidence irrelevant, coupled with the district court's decision to rely on that previous finding, do not provide a sufficient basis for evaluating the district court's decision to deny . . . discovery of the disputed information."[239] Nevertheless, the appellate court ultimately rejected the *Brady* claim because the defendant failed to show "that the district court's refusal to allow additional inquiry into the government payments received by [the witness] resulted in an unfair trial."[240] In other words, the Seventh Circuit lacked enough information about the documents to draw its own conclusion about their materiality, but then faulted the defendant for being unable to show the materiality of those same hidden documents.

Setting aside the circularity of the court's logic, the decision is flawed for a bigger reason. A capable defense attorney could have gone line by line through documents showing that a key informant in a drug prosecution case was paid by law enforcement. Whether the witness was paid for "other things" is, of course, a question of fact for the jury to decide and one that defense counsel could have put front and center.

8. Payments from Victims Funds or to Relocate a Witness Reinforced the Defendant's Guilt

The most persuasive reason courts gave for finding hidden payments to be immaterial was that the payments were made to relocate a witness who feared retaliation from the defendant. In six cases, courts rejected materiality claims because the witness was relocated. And in a seventh case, the court used similar reasoning when the hidden payment

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235 *Id.*

236 United States v. Cruz-Velasco, 224 F.3d 654, 661 (7th Cir. 2000). However, the informant did admit on cross-examination that he had been paid. *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 662.

240 *Id.* at 663.

came from a fund specifically earmarked for crime victims. All seven cases found the hidden payments immaterial because, to put it colloquially, what defense attorney in their right mind would highlight for the jury that a witness had to be relocated out of fear of being assaulted or murdered by the defendant?

Although this basic logic makes sense, some of the courts failed to account for the simple possibility that the witnesses could have been lying about feeling threatened. The witnesses could have manufactured their testimony in exchange for housing and living expenses. Moreover, some cases involved a considerable amount of money.

At the outset, it is worth noting that in some cases, it makes sense for courts to hold that undisclosed relocation expenses are immaterial. Two cases from the sample illustrate this point.

In the first case—a child sexual abuse prosecution—the government failed to disclose a $3,000 payment to a child from a victims fund.[241] The court found the hidden payment immaterial because it would have "open[ed] the door for the prosecution to bolster the witness's victim status."[242] In this instance, the argument was relatively persuasive because the victim did not know about the funds when she reported the sexual assault.[243]

In the second case, the court's immateriality finding was persuasive because defense counsel openly conceded that it would have been a bad strategy to tell the jury about the relocation expenses.[244]

But in other cases, courts jumped too quickly to the conclusion that relocation expenses cannot be material.[245] Consider first an Illinois murder case in which the prosecutor's office paid a whopping $66,000 in relocation expenses to a witness named Moore and his dependents.[246] Worse yet, "the majority of the money was paid to Moore after he testified . . . (about $7,000 before testimony and the rest afterwards)."[247] And to put the cherry on top, Moore misappropriated some of the money for things other than relocation.[248]

On habeas review, the federal district court found that the prosecutors did not pay Moore for his testimony, but instead paid him

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241 Breezee v. Perry, No. 17-cv-01207, 2023 WL 4353154, at *9, *12 (W.D. Tenn. July 5, 2023).

242 *Id.* at *13.

243 *See id.*

244 *See* People v. Tyler, 2015 IL App (1st) 123470, ¶ 217.

245 The sample also included two cases in which courts found hidden payments for relocation expenses to be immaterial, but the court's discussion was too brief to fully assess the accuracy of its conclusions. *See* White v. Steele, 853 F.3d 486, 492 (8th Cir. 2017); Ramirez v. Keyser, No. 20-cv-8445, 2024 WL 1076945, at *7 (S.D.N.Y. Mar. 12, 2024).

246 United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010).

247 *Id.*

248 *See id.* at *14.

relocation money because he was in danger.[249] The court found such payments immaterial because "[f]ew, if any, defense counsel would want to tell the jury that the witness is being paid to relocate for fear of what defendant or his allies might do to prevent the testimony or to extract vengeance."[250]

There is an inherent logic to the court's position. Yet the court ignored other facts that weakened that argument in this specific case. In the same opinion, the court considered perjury allegations against Moore and labeled him a "habitual liar."[251] Moreover, the court failed to focus on the enormous amount of money—$66,000—that prosecutors secretly paid Moore.[252] Although a defense attorney would surely not want to highlight that a witness was relocated for their safety, the defense attorney might be quite willing to highlight that a witness lied to shake down the government for a large amount of money. A witness who would lie to the government to extract relocation funds might very well lie to the jury about the defendant's guilt.

A second case, this one from New Jersey, also casts doubt on the argument that defense attorneys will never raise any discussion of relocation payments. Prosecutors failed to disclose that the government paid a witness more than $17,000 to relocate.[253] The court offered a litany of reasons why this hidden payment was not material, including that the defense counsel would not have highlighted the relocation to the jury.[254] The court explained that defense counsel got the witness to "admit that [the] defendant never threatened her or told her not to talk to anyone. To elicit that the State found it necessary to pay to relocate her would risk confirming that she was really afraid of retaliation by defendant."[255]

A capable defense lawyer who knew of a huge payment could have shown the exact opposite, however. After getting the witness to say she was not threatened, the defense attorney could have introduced the $17,000 in relocation expenses to show that the witness had lied to the government to extract a huge payment.

In sum, relocation payments are favorable to the defense under the *Brady* doctrine. In some cases—imagine gang threats against a third-party witness with no criminal history, for example—it is possible that

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249 *See id.*

250 *Id.* at *13.

251 *Id.* at *10.

252 *See id.*

253 State v. Ragland, No. A-0747-16T2, 2018 WL 3596376, at *4 (N.J. Super. Ct. App. Div. July 27, 2018).

254 For instance, the court noted that defense counsel "had ample ammunition for cross-examining" the witness, including "her gang membership; her long-held belief defendant was innocent; . . . [and] her repeated lying to [the] police in her earlier statements." *Id.* at *6.

255 *Id.*

such evidence would not create a reasonable probability of a different outcome. But just because *some* hidden relocation payments can be found to be immaterial does not mean *all* of them should be. In some instances—particularly when the payments are very large or there is a plausible case that the witness was lying about the threats—courts should be more reluctant to find immateriality.

9. The Witness Receiving the Benefit Did Not Testify

In one case in the sample, the court found a hidden witness payment to be immaterial because the payment was made to someone who did not end up testifying at trial. This logic makes sense in the abstract, but the specific details of the case make it less persuasive.

Charles Hartman was convicted of first-degree murder and sentenced to death.[256] Before trial, while Hartman was in jail, his cellmate, Kenny King, reached out to current and former prosecutors saying that Hartman had made incriminating statements and that King would relay the information and record future statements in exchange for $1,000.[257] The prosecutors agreed, and King shared information.[258] King was adamant that he would not testify at trial, and the prosecution paid him $1,000 anyway, as they had originally agreed.[259] The $1,000 payment was not disclosed to the defense.[260]

The Supreme Court of Tennessee expressed "grave misgivings" about the $1,000 payment but found it to be immaterial because "King did not testify; his credibility was not an issue at this trial."[261]

The problem with the court's reasoning is that another jailhouse witness—Frazier—did testify at trial about hearing incriminating statements from Hartman.[262] Prosecutors had met with Frazier at the jail *after* King said he would not testify.[263] Frazier then cooperated with prosecutors in exchange for "the promise of protection from reprisal by other inmates."[264]

A capable defense attorney could have offered the following explanation to the jury: "The prosecutors met with King and paid him for cooperation. But when he would not agree to testify, they moved on to another inmate—someone more vulnerable—who would play ball."

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256 Hartman v. State, 896 S.W.2d 94, 96 (Tenn. 1995).

257 *Id.* at 99.

258 *Id.* King also supposedly attempted to record Hartman, though he claimed the tape recorder broke. *Id.*

259 *Id.*

260 *Id.* at 96.

261 *Id.* at 101–02.

262 *See id.* at 98–99.

263 *See id.* at 99.

264 *Id.* at 101.

This story, of course, would look more nefarious to the jury if it learned that the prosecution had paid King $1,000.

Although the payment of the witness who *did not* testify can provide grounds for questioning the testimony of the witness who *did* testify, the Tennessee Supreme Court ultimately took a much narrower view of the relevance of the hidden $1,000 payment.

10. Procedural Default Because Defendant's Brady *Claim Was Inadequately Pleaded*

One *Brady* claim in the sample failed under state procedural default rules. In an Illinois case, the defendant was convicted of racketeering and conspiracy in part based on the testimony of a witness.[265] On postconviction review, the defendant presented an Illinois State Police receipt showing that the witness had been paid $145 *on the day of trial*.[266] The trial court rejected the *Brady* claim on the merits, finding that the jury was already told that the witness was "an unsavory character; involved in the drug trade; and for his testimony, the State reduced the maximum penalty for his crime from 60 years to 5 years."[267]

On appeal, the Illinois Court of Appeals refused to consider the *Brady* claim on the merits because even though the petitioner—who appeared pro se—discussed materiality in his briefs, he failed to plead it in his original petition.[268] The court offered a curt conclusion that "[s]ince defendant failed to plead one of the essential elements of a due-process claim under *Brady*, defendant did not make a substantial showing of a constitutional claim on his *Brady*-violation issue."[269]

A dissenting justice recognized the problem with summarily dismissing a viable *Brady* claim. As he explained:

> The State's cash payment to a key witness on the day of trial seems clearly material to guilt or innocence, and did not require a great deal of explanation by the petitioner. Why did the State make that payment? Were other payments or inducements to testify made? Those matters should not be decided on the pleadings, which are to be liberally construed . . . . [C]ash payments to prosecution witnesses are material to guilt or innocence.[270]

Of course, courts regularly reject viable legal claims on appeal and habeas review because issues have been procedurally defaulted or

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265 *See* People v. Felder, 2012 IL App (4th) 110419-U, ¶¶ 4, 7.

266 *Id.* ¶ 15; *id.* ¶ 22 (Cook, J., dissenting) (referencing the $145 payment).

267 *Id.* ¶ 7 (majority opinion).

268 *Id.* ¶ 16.

269 *Id.*

270 *Id.* ¶ 22 (Cook, J., dissenting).

inadequately briefed.[271] So on one level, the majority's decision is not surprising. It is nevertheless alarming, however, that the court never even paused to consider that the conviction was based on the testimony of a witness who was paid by the police on the day of trial and that the prosecution did not disclose that information.

11. Conclusory Reasoning

Two cases relied on conclusory reasoning to reject the materiality of hidden witness payments. In these cases, courts effectively said, "trust us, the evidence would not have mattered." These courts offered no real explanation for their immateriality determinations. It is thus impossible to have confidence that there is no reasonable probability that the withheld evidence would have changed the outcome of the trials.

In a federal drug case, prosecutors disclosed that they paid the star prosecution witness $40,000.[272] On habeas review, the petitioners presented evidence—from the witness herself—that the witness was actually paid $80,000 and that prosecutors reduced federal drug charges against her.[273] The additional $40,000 and charge reduction were not disclosed to the defendant.[274]

Even though prosecutors hid $40,000 in payments, the court quickly rejected the idea that it could be material, explaining in total:

> Petitioners have failed to show that the allegedly suppressed, allegedly exculpatory information was material. They fail to show how payments totaling of $80,000 materially differed from payments totaling $40,000 and failed to show how knowledge of the higher estimated dollar amount would have altered the outcome of the case. The jury was aware that [the witness] had a felony conviction. Petitioners received a fair trial resulting in a verdict worthy of confidence. There was no reasonable probability that, had the information of the allegedly higher payments and [sic] been disclosed to Petitioners that the result of the trial would have been different. In light of the overwhelming evidence of Petitioners' guilt, information regarding the amount of the payments to [the witness] and the status [of]

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271 *See* Mitchell J. Waldman, *When Will Federal Court of Appeals Review Issue Raised by Party for First Time on Appeal Where Legal Developments After Trial Affect Issue*, 76 A.L.R. Fed. 522, § 1[a] (1986).

272 Rodriguez Aguirre v. United States, cr No. 92-0486, 2000 WL 36740013, at *13 (D.N.M. May 23, 2000).

273 *See id.*

274 *Id.*

> her Oklahoma charges would not have altered the outcome of the proceedings.[275]

The court's reasoning was simply a string of conclusory statements that (1) "Petitioners received a fair trial," (2) "[t]here was no reasonable probability that . . . the result of the trial would have been different," and (3) "[i]n light of the overwhelming evidence[,] . . . information regarding the amount of the payments . . . would not have altered the outcome."[276]

All these statements are conclusions, not analyses. The only analysis was the brief statement pointing out that the jury was aware of the witness's prior felony conviction.[277] But that does not speak to the bias created by an additional $40,000 in payments to the witness.

In another case, the court offered a glib, conclusory rationale for the government's failure to disclose travel expenses. In a statutory rape case, the prosecutor never disclosed to defense counsel approximately $1,400 in transportation expenses for a witness and her husband to travel to a suburb of Nashville for the trial.[278] The court rejected the defendant's contention that this amounted to an "all-expenses-paid vacation" that the defense could have used as impeachment evidence.[279] The court's only explanation was that the witness was only in town for thirty-eight hours and most of the expenses were for airfare.[280] But, of course, weekend trips are typically that length and often involve airfare, so the court's dismissive statement proves too much.

C. Summary of Courts' Various Types of Reasoning

As Part II has demonstrated, courts have offered nearly a dozen reasons for refusing to find hidden witness payments to be material. To be sure, in some cases, courts have offered persuasive reasoning. When the government pays for a witness to move because there is strong evidence that the defendant has physically threatened the witness, there is little chance that a jury would have acquitted the defendant had it been aware of the relocation payment.[281]

In other instances, however, courts' materiality reasoning has been less persuasive. Indeed, when there are mountains of corroborating evidence or the defendant confessed to the crime, the hidden payment is

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275 *Id.*

276 *Id.*

277 *Id.*

278 *See* State v. Tice, No. M2021-00495-CCA-R3, 2022 WL 2800876, at *25 (Tenn. Crim. App. July 18, 2022). The State originally planned to call the husband as a witness, but never did. *Id.*

279 *Id.* at *30.

280 *See id.*

281 *See supra* Section II.B.8.

likely inconsequential. But some cases are close calls. If the jury had been on the fence, knowing about payments to a prosecution witness might have undercut the modest corroboration.[282]

In still other cases, courts relied on flawed reasoning. Some courts engaged in guilt-based analysis in which they harped on the inculpatory evidence presented at trial without considering how the withheld payments to witnesses would have factored into that evidence in the eyes of the jury.[283] And some courts conducted even weaker *Brady* "analysis" by using conclusory reasoning that made blanket assertions without explanation.[284]

Finally, and most alarming, some courts made arguments that are wholly unpersuasive. Most glaringly, one court suggested that a hidden witness payment was not material because it came after the witness testified, which makes no sense.[285] Paying a witness after they testified strongly suggests that the witness was paid for that particular testimony. Similarly, the idea that a witness was paid a year before trial does not minimize the persuasiveness of such impeachment evidence.[286] In both those scenarios, the defense surely could argue that the money was used as an enticement to make sure the witness testified "correctly."

Equally troubling, multiple courts brushed away hidden payments because they were only for a "small" amount of money, without considering how significant that money might be to a poorer person.[287] Indeed, one case involved hundreds of dollars in payments to an unhoused person.[288]

Other courts incorrectly focused on the fact that the witness was cross-examined on other issues, as if juries merely check a mental box acknowledging that cross-examination occurred rather than focusing on the cumulative total of the impeachment evidence.[289] Just because a jury was unpersuaded by one line of cross-examination does not mean it would have been unpersuaded by that cross-examination when supplemented with discussion about hidden payments.

And in multiple cases, courts unpersuasively parroted the prosecution's argument that the payments were for something other than cooperation.[290] These courts seemed not to realize that there was more than one possible explanation for the payments and that a jury might

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282 *See supra* notes 134–46 and accompanying text.

283 *See supra* Section II.B.3.

284 *See supra* Section II.B.11.

285 *See supra* Section II.B.5.

286 *See supra* Section II.B.6.

287 *See supra* Section II.B.1.

288 *See supra* notes 112–14 and accompanying text.

289 *See supra* Section II.B.3.

290 *See supra* Section III.B.7.

be persuaded that the purpose of the payments was different and more nefarious than the government claimed.

Often, when courts rejected the materiality of hidden witness payments, their rationales were unpersuasive. And in most of those cases, the rationales were unpersuasive because they underestimated what a competent defense attorney could have done with the hidden witness payments. Courts seemed to accept the prosecution's view of the evidence rather than thinking about how a capable defense attorney could convince a jury that the government paying a witness—often the key witness—would make their testimony unconvincing.

And it is not simply that defense attorneys are good at spinning a yarn that payments undercut credibility. As Part III describes below, a broad and longstanding body of social psychology literature demonstrates that when a person is paid money or given a benefit, they typically feel the need to reciprocate and help the person who gave the benefit. The reciprocity literature further undercuts the arguments made by courts that payments of a few hundred or thousand dollars would not cause a witness to change or shape their testimony.

III. The Reciprocity Principle

In this Part, this Article explores the psychological concept of reciprocity, which leads people who have received a benefit to act more favorably toward the person who conferred it. This Article then explains how the reciprocity principle can lead witnesses who have been paid by the prosecution to testify more favorably for the government.

A. Reciprocity Creates a Sense of Obligation to "Return the Favor" When a Person Receives a Benefit

For more than fifty years, psychologists have recognized the principle of reciprocity, by which a person responds more favorably after receiving a benefit.[291] The reciprocity principle creates a sense of obligation to respond favorably to those who have provided a benefit.[292] Furthermore, the principle operates whether the recipient requested the benefit or not.[293] As a leading scholar in the field explained, the reciprocity principle "possesses awesome strength, often producing a yes response to a request that, except for an existing feeling of indebtedness, would have surely been refused."[294]

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291 *See* Robert B. Cialdini, Influence, New and Expanded 23–72 (2021) (discussing the reciprocity principle).

292 *See id.* at 28–29.

293 *See id.* at 32.

294 *Id.* at 29.

A classic early study involved researchers sending Christmas cards to random people who did not know the sender.[295] The researchers found that after receiving a Christmas card from an unknown person, twenty percent of the subjects "responded by returning a Christmas card, letter, or telephone call to the unknown sender."[296] Additionally, the study found that the recipients were more likely to reciprocate when the unknown sender was high status and the recipient was "blue-collar."[297]

Another early study involved subjects being paired with a confederate who was working with the researcher.[298] The subjects thought they were rating artwork with the confederate, but in reality, the confederate was testing the reciprocity principle.[299] Half of the confederates gave the subjects a free soda during a break in their art-rating work, while the remaining subjects either received no soda or received one from the researcher.[300] Later, the confederates asked the subjects to do them a favor and buy raffle tickets so that the confederate could try to win a cash prize for selling tickets.[301] The subjects who had received the free soda bought twice as many raffle tickets as the subjects who did not receive a free gift.[302]

In the years since the early reciprocity studies, everyone from salespeople to waiters to marketing research companies has incorporated it into daily life. Researchers have continued to study the principle and have consistently found it to be a successful strategy for influencing human behavior. For instance, one study analyzed tipping amounts when restaurant servers gave diners a small piece of chocolate before they paid the bill.[303] The researchers found that diners left an eighteen percent larger tip if they had received free chocolate.[304] The researchers concluded that the most plausible explanation for diners paying more money to servers was "the norm of reciprocity . . . the sense of obligation

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295 Phillip R. Kunz & Michael Woolcott, *Season's Greetings: From My Status to Yours*, 5 SOC. SCI. RSCH. 269, 269 (1976).

296 *Id.* at 277.

297 *See id.* ("High status on the part of the sender increased the response rate to a very significant degree, especially for 'blue-collar' receivers."). Other studies have since replicated this study and reached similar results. *See, e.g.*, Jennifer Kunz, *Social Class Difference in Response to Christmas Cards*, 90 PERCEPTUAL & MOTOR SKILLS 573, 574–75 (2000).

298 *See* Dennis T. Regan, *Effects of a Favor on Liking and Compliance*, 7 J. EXPERIMENTAL SOC. PSYCH. 627, 629–31 (1971).

299 *See id.*

300 *See id.* at 631.

301 *See id.* at 632.

302 *See id.* at 633.

303 *See* David B. Strohmetz, Bruce Rind, Reed Fisher & Michael Lynn, *Sweetening the Till: The Use of Candy to Increase Restaurant Tipping*, 32 J. APPLIED SOC. PSYCH. 300, 302–04 (2002). The study was designed to control for the likability of the server and the benefits of candy itself. *See id.* at 302, 305.

304 *See id.* at 307.

that accompanies being the recipient of any act of generosity, expected or unexpected."[305]

Utilizing the reciprocity principle, grocery stores and other retailers, such as Costco, regularly provide free samples to customers because customers who receive something first are much more likely to purchase a product.[306] For instance, researchers operating out of a candy shop gave free samples when customers entered; the free samples increased purchases by forty-two percent.[307]

Notably, the reciprocity principle appears to be extremely powerful when recipients are provided with money. For example, marketers used to send small amounts of money through the mail when seeking survey responses from recipients.[308] Studies from the 1970s found that "a monetary incentive as small as twenty-five cents is sufficient to produce a response rate significantly higher than a no-incentive control condition."[309]

The reciprocity principle is also alarmingly top of mind for pharmaceutical companies when they buy meals for doctors, sponsor continuing education programs, or pay speaker fees. In 2022, for instance, pharmaceutical companies sponsored more than one million events for physicians, with more than 900,000 of those being a literal free lunch.[310] Pharmaceutical companies spend this money on doctors in the hopes of getting the doctors to prescribe more of their drugs—and it appears to work. A study of physician prescribing practices in Massachusetts found that for every $1,000 in pharmaceutical industry payments that a doctor received, the physicians' prescribing rate for brand-name cholesterol statin drugs increased by 0.1%.[311]

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305 *Id.* at 307. There is also some—albeit limited—research suggesting that gratitude, rather than obligation alone, contributes to increased restaurant tipping. *See* Gary Daniel Futrell, *Reciprocity as an Antecedent of Restaurant Tipping: A Look at Gratitude and Obligation*, 4 AM. J. TOURISM RSCH. 44, 49 (2015).

306 *See* CIALDINI, *supra* note 291, at 38–39.

307 *See id.* at 38. *See generally* H. Bruce Lammers, *The Effect of Free Samples on Immediate Consumer Purchase*, 8 J. CONSUMER MKTG. 31 (1991) (discussing this experiment).

308 *See* Jeannine M. James & Richard Bolstein, *The Effect of Monetary Incentives and Follow-Up Mailings on the Response Rate and Response Quality in Mail Surveys*, 54 PUB. OP. Q. 346, 348 (1990).

309 *See id.*; *see also* Andrew Mercer, Andrew Caporaso, David Cantor & Reanne Townsend, *How Much Gets You How Much? Monetary Incentives and Response Rates in Household Surveys*, 79 PUB. OP. Q. 105, 124 (2015) ("Consistent with prior research, the analysis found that prepaid incentives are more effective than promised incentives.").

310 *See* Quinn Grundy, Fabian Held, Meghan MacIsaac, Christine M. Baugh, Eric G. Campbell & Lisa Bero, *Quantifying Industry Spending on Promotional Events Using Open Payments Data*, JAMA HEALTH F., June 28, 2024, at 4.

311 James S. Yeh, Jessica M. Franklin, Jerry Avorn, Joan Landon & Aaron S. Kesselheim, *Association of Industry Payments to Physicians with the Prescribing of Brand-Name Statins in Massachusetts*, 176 JAMA INTERNAL MED. 763, 765 (2016).

More remarkably, a study of nearly 280,000 physicians found that receiving a single meal of less than twenty dollars that was used to promote a drug led the physicians to promote the drug at a higher rate.[312] Moreover, "the relationship was dose dependent, with additional meals and costlier meals associated with greater increases in prescribing of the promoted drug."[313]

A meta-analysis of thirty-six studies found that in thirty studies, there was a clear association between payments to physicians and increased prescribing of a drug.[314] Free meals and other payments lead physicians to prescribe more of a particular drug, whether the prescription is for Alzheimer's disease, multiple sclerosis, or even cancer.[315]

Small payments are also effective at producing a reciprocity effect. A British study found that giving investment bankers a package of chocolates before asking for a day's worth of their salary for a charitable donation resulted in eleven percent of bankers making the donation.[316]

In sum, a large body of reciprocity literature demonstrates that when someone receives a benefit—whether requested or not—they feel an obligation to give something in return.[317] As explained below, there is

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312 *See* Colette DeJong, Thomas Aguilar, Chien-Wen Tseng, Grace A. Lin, W. John Boscardin & R. Adams Dudley, *Pharmaceutical Industry-Sponsored Meals and Physician Prescribing Patterns for Medicare Beneficiaries*, 176 JAMA Internal Med. 1114, 1114–15, 1120 (2016) (studying "the most-prescribed brand-name drug in each of the 4 drug categories in Medicare Part D in 2013").

313 *Id.* at 1120; *see also* Frederick Y. Huang et al., *The Association of Pharmaceutical Company Promotional Spending with Resident Physician Prescribing Behavior*, 29 Acad. Psychiatry 500, 500 (2005) (finding a "strong positive correlation between pharmaceutical company sponsorship of resident conferences and the use of the corresponding antidepressant by patients in the adult outpatient clinic"). Perhaps more worrisome is evidence of a reciprocity effect in opioid prescribing. A study found that when doctors received payments from opioid manufacturers, their prescribing increased by 9.3% relative to physicians who did not receive such payments. Scott E. Hadland, Magdalena Cerdá, Yu Li, Maxwell S. Krieger & Brandon D. L. Marshall, *Association of Pharmaceutical Industry Marketing of Opioid Products to Physicians with Subsequent Opioid Prescribing*, 178 JAMA Internal Med. 861, 862 (2018).

314 Aaron P. Mitchell et al., *Are Financial Payments from the Pharmaceutical Industry Associated with Physician Prescribing? A Systematic Review*, 174 Annals Internal Med. 353, 356 (2021).

315 *See id.*; Aaron Mitchell & Deborah Korenstein, *Drug Companies' Payments and Gifts Affect Physicians' Prescribing. It's Time to Turn Off the Spigot*, Stat News (Dec. 4, 2020), https://www.statnews.com/2020/12/04/drug-companies-payments-gifts-affect-physician-prescribing/ [https://perma.cc/B4DW-96DG].

316 *See* Hugh Radojev, *Giving Bankers Sweets Makes Them Donate More, Nudge Unit Research Finds*, Civ. Soc'y Media (July 24, 2015), https://www.civilsociety.co.uk/news/giving-bankers-sweets-makes-them-donate-more--nudge-unit-research-finds.html [https://perma.cc/JVZ9-3VHN].

317 To be sure, there are limits to the significance of the reciprocity effect. Multiple studies have found that the effect fades over time. *See* Amanda Chuan, Judd B. Kessler & Katherine L. Milkman, *Field Study of Charitable Giving Reveals that Reciprocity Decays Over Time*, 115 PNAS 1766, 1767 (2018) (explaining that patients who have had a successful hospital stay are sometimes willing to donate to the hospital thereafter, but a delay in seeking the donation after receiving the medical care dramatically reduces the success of the donation request); *see also* Francis J. Flynn, *What Have*

every reason to think the reciprocity principle should operate the same for witnesses who were paid by prosecutors or the police.[318]

B. Reciprocity and Witnesses in Criminal Cases

The reciprocity research in Section III.A above focused on giving Christmas cards, sodas, chocolate samples, and small amounts of money. Does such research apply in the criminal context, when the stakes are much higher? There is every reason to think the answer is yes.

First, as described above, the reciprocity effect certainly works when a subject is paid cash.[319] Indeed, the hundreds or thousands of dollars in payments that witnesses receive are clearer benefits than the indirect benefits of receiving a Christmas card.

Second, the literature indicates that increasing the size or frequency of a benefit results in stronger reciprocity effects.[320] Put simply, hundreds or thousands of dollars in payments is likely to have a stronger effect than a piece of chocolate or receiving a few quarters in the mail.

You Done for Me Lately? Temporal Adjustments to Favor Evaluations, 91 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 38, 38 (2003) ("Favors were initially valued more by receivers than by givers . . . . However, givers increased their favor evaluations and receivers decreased their favor evaluations as time passed . . . ."). *See generally* Jerry M. Burger, Misa Horita, Lisa Kinoshita, Kris Roberts & Christopher Vera, *Effects of Time on the Norm of Reciprocity*, 19 BASIC & APPLIED SOC. PSYCH. 91 (1997) (utilizing the free soda experiment and finding that the reciprocity effect decreased when the request was one week, as opposed to a few minutes, after the gift).

318 There is, however, mixed literature on the question of whether jurors will fully appreciate the reciprocity effect if the payment is disclosed to them. Some scholars have found that jurors were affected by payments. *See, e.g.*, Evelyn M. Maeder & Emily Pica, *Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors' Perceptions of Informant Testimony*, 38 LAW & HUM. BEHAV. 560, 565–66 (2014). In one study, Robertson and Winkelman found that mock jurors believed a witness who had received a benefit would be willing to testify falsely forty percent of the time. Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 73 (2017). Notably, the Robertson and Winkelman study analyzed one instance in which a witness received an immunity agreement on the condition that he give testimony that favored the government and another instance in which the witness had an unconditional immunity grant prior to being interviewed as a witness. *See id.* at 72. The experiment thus did not measure the identical issue raised by this Article—the idea that any benefit creates an incentive, perhaps unconsciously, to shape a witness's testimony. By contrast, one study found that mock jurors did not discount the testimony of a jailhouse witness when they knew an incentive had been offered. *See* Jeffrey S. Neuschatz, Miranda L. Wilkinson, Charles A. Goodsell, Stacy A. Wetmore, Deah S. Quinlivan & Nicholaos J. Jones, *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE CRIM. PSYCH. 179, 188–89 (2012). Another study by the same lead author reached the same conclusion. *See* Jeffrey S. Neuschatz, Deah S. Lawson, Jessica K. Swanner, Christian A. Meissner & Joseph S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137, 142 (2008); *see also* JEFFREY S. NEUSCHATZ & JONATHAN M. GOLDING, JAILHOUSE INFORMANTS 103–04 (2022) (describing authors' findings that mock jurors found jailhouse informant testimony reliable even when the witness was paid for testifying).

319 *See supra* notes 308–16 and accompanying text.

320 *See supra* note 313 and accompanying text.

Third, researchers have found that the reciprocity effect is stronger when the subject is dealing with a person or entity of authority. Police officers wear a uniform, and their job often comes with perceived authority.[321] Thus, this effect would seem to apply to prosecutors as well, who, as lawyers and government officials, are similarly authoritative. Moreover, a lawyer's authority is likely at its zenith when they are in a courtroom in trial, where the witness will be in a position to reciprocate for the benefit they have received.

Fourth, the reciprocity effect sometimes operates without the subject knowing it. The subject does not say to themself, "the waiter gave me a piece of chocolate, so I have to give him a bigger tip." Nor does the subject think, "I just took a free sample, so now I must buy more of a product than I was planning to." The reciprocity effect often creates an unconscious desire to repay the favor.[322]

In short, the conditions that give rise to a reciprocity obligation are very present in cases in which prosecutors or the police have paid a witness.[323] That, of course, does not mean that a witness who was paid by the government will blatantly lie in court. As Professor Sheri Lynn Johnson has explained in discussing the related concept of motivated cognition, manufacturing a story out of whole cloth is implausible:

> What motivated cognition does not do is enable a decisionmaker to reach a completely unreasonable conclusion; this is because motivated decisionmakers attempt to be rational and find a justification that would persuade a neutral observer. Thus, this psychological process operates under an illusion of objectivity; people are unaware of the biases driving their decisionmaking and may not realize that "in the presence of different directional goals . . . they might even be capable of justifying opposite conclusions."[324]

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321 *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 2001 (2019) (finding that the explanation for people "voluntarily" consenting to police searches is obedience to authority).

322 *See, e.g.*, CIALDINI, *supra* note 291, at 52.

323 This conclusion is supported by a mock jury study in which, inter alia, researchers put subjects in the shoes of witnesses and studied whether granting them a benefit would change the substance of their testimony. Robertson & Winkelman, *supra* note 318, at 71. In a finding that they described as "disconcerting" and "worrisome," the researchers found that more than fifty percent of witnesses were willing to testify falsely when they had been granted immunity in exchange. *Id.* at 72–73, 75. As a matter of fact, more than half of *those* witnesses would have testified falsely even if immunity were unconditional, suggesting that the reciprocity condition was at work even when the witnesses had no direct incentive to lie. *See id.* at 72.

324 Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 107 (2019) (alteration in original) (citation omitted).

Instead, it is more likely that a witness who was paid by the government might take their original story and shape some of the details more favorably toward the government. And slight changes to a witness's story can have a big impact in criminal cases. Take a simple assault case as an illustration. An eyewitness, who had previously been paid by prosecutors or the police, could exaggerate how menacing the defendant seemed. Perhaps the eyewitness will remember the defendant screaming when he did not. Or the eyewitness could remember the defendant striking the victim three times instead of two. Or the eyewitness could testify about the victim stepping backward away from the defendant when in fact the victim did not move. The possibilities for small changes in a witness's testimony are endless.

When *Brady* evidence about a hidden witness payment comes to light—often years or even decades after trial[325]—the small changes to a witness's testimony will be almost impossible for a judge to appreciate. Judges may have difficulty imagining how a witness might have subtly—and even unconsciously—changed their story because of the cash payment. Further, judges may have trouble appreciating how such testimonial differences might have affected the jury. As such, courts will likely underestimate how the trial may have gone differently had the witness payment been disclosed. As this Article explains in Part IV, an automatic prejudice rule would respond to the reciprocity problem. Moreover, there is already a doctrinal basis for an automatic prejudice rule; it has long existed for conflict-of-interest cases under the ineffective assistance of counsel doctrine.

IV. Automatic Prejudice in Ineffective Assistance of Counsel Cases as a Guide for Hidden Witness Payments

Two of the most common appellate and postconviction claims are *Brady* claims and ineffective assistance of counsel claims.[326] The two doctrines are similar not just in that they are frequently litigated, but also in that they both have a rigorous prejudice prong that the defense must satisfy. A defendant asserting a *Brady* claim cannot have their conviction reversed without demonstrating materiality—a reasonable probability that the outcome would have been different.[327] And, in most ineffective assistance of counsel claims, the defendant must show not just deficient performance by their lawyer, but also prejudice—"a reasonable

325 The mean length of time from conviction to a successful *Brady* claim is ten years. Garrett et al., *supra* note 15, at 215.

326 *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 600–01 (2009).

327 United States v. Bagley, 473 U.S. 667, 682 (1985).

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[328]

The materiality standard under the *Brady* doctrine and the prejudice standard for ineffective assistance claims are largely identical. Yet there is one major difference between the two types of claims: the existence of exceptions. The *Brady* doctrine's materiality prong is ironclad; there are no exceptions.[329] A defendant simply cannot win a *Brady* claim without showing materiality—that is, prejudice. By contrast, as explained below, the Supreme Court has recognized narrow exceptions to the prejudice prong for ineffective assistance of counsel claims. Under these exceptions, prejudice is automatic so long as the defendant has demonstrated deficient performance.

In this Part, this Article explains the prejudice doctrines for *Brady* and for "regular" ineffective assistance claims. This Article then describes the narrow automatic prejudice exceptions that exist only for ineffective assistance claims. These exceptions are longstanding but narrow. After describing the automatic prejudice cases for ineffective assistance claims, this Article argues that the same rationale should apply to allow automatic prejudice in *Brady* claims based on hidden witness payments.[330]

A. "Regular" Prejudice and Automatic Prejudice in Ineffective Assistance of Counsel Claims

The *Brady* prejudice standard is very simple to describe. A defendant must show that the withheld evidence was favorable and that had it been disclosed, it would have created "a reasonable doubt that did not otherwise exist."[331] Although the Court has given very little guidance on how lower courts should go about the actual task of assessing materiality,[332] two things are very clear: (1) the defendant needs to show a reasonable probability of a different outcome, and (2) there are

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328 Strickland v. Washington, 466 U.S. 668, 694 (1984).

329 A handful of federal districts go further than *Brady* and require the disclosure of favorable evidence without regard to materiality. *See* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 81 (2017). And a few states have also adopted more expansive discovery rules. *See* Covey, *supra* note 26, at 190–91 (discussing Texas's statutory obligations).

330 To be sure, there are other avenues to deal with hidden witness payments. For instance, as Professor Alexandra Natapoff has explained, nine states have enacted laws requiring, inter alia, prosecutors to collect and disclose benefits to some witnesses. *See* NATAPOFF, *supra* note 9, at 200–01. Such laws are certainly helpful, but do not diminish the need for an automatic prejudice framework for hidden witness payments.

331 United States v. Agurs, 427 U.S. 97, 112–13 (1976).

332 Garrett & Gershowitz, *supra* note 31, at 3–4.

no exceptions to the prejudice rule.[333] Put simply, the defendant must always demonstrate materiality.

The traditional ineffective assistance of counsel doctrine—famously enunciated in *Strickland v. Washington*[334]—has a parallel structure. Traditional ineffective assistance of counsel claims require the petitioner to demonstrate not just deficient performance, but also prejudice—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[335] In other words, just like *Brady*, the traditional ineffective assistance of counsel claim requires the petitioner to show that the jury would have found him not guilty.

Unlike *Brady*, the ineffective assistance of counsel doctrine has long recognized a narrow exception for automatic prejudice. A few years before the Court's landmark ineffective assistance decision in *Strickland*, the Court decided *Cuyler v. Sullivan*,[336] a case in which a pair of defense lawyers had an actual conflict of interest. The lawyers represented multiple defendants in a murder case in which the defendants were tried separately.[337] Sullivan was tried first, and the defense lawyer put on no evidence; the other defendants were tried later and acquitted.[338]

In *Sullivan*, the Supreme Court held that a defendant could demonstrate a constitutional violation without proving prejudice. If "an actual conflict of interest adversely affected his lawyer's performance," that would be sufficient to reverse a conviction without inquiring into prejudice.[339] The Court explained that it was unnecessary "'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict" because "[t]he conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'"[340] The Court thus held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[341]

In the decades since *Sullivan* was decided, lower courts have relied on it to reverse convictions based on actual conflicts of interest.[342] The

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333 *See* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 285–87 (2020).

334 466 U.S. 668 (1984).

335 *Id.* at 694.

336 446 U.S. 335 (1980).

337 *See id.* at 337–38.

338 *Id.* at 338.

339 *Id.* at 348–50.

340 *Id.* at 349 (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

341 *Id.* at 349–50.

342 *See, e.g.*, Hall v. United States, 371 F.3d 969, 973–76 (7th Cir. 2004) (applying *Sullivan* to reverse and remand a conviction for the potential presence of an actual conflict of interest from representation of multiple defendants).

most common situation—as in *Sullivan* itself—is a case involving representation of multiple defendants.[343] Courts have also found actual conflicts of interest in other situations, such as instances in which a defendant had filed a meritorious disciplinary complaint against his lawyer.[344]

At the same time, courts have cabined the scope of *Sullivan*'s automatic prejudice doctrine by typically being reluctant to find conflicts of interest in the first place. For instance, as Professor Sherri Lynn Johnson has described, courts have rejected the argument that a defense attorney's pending employment application for a job in the district attorney's office, or even running for the position of elected district attorney, is enough to create a conflict of interest.[345] Courts have also held that unusual fee arrangements or defense attorney contracts for media rights in high-profile cases do not constitute an actual conflict.[346] Courts have even found a defense attorney's sexual relationship with the defendant's wife or even the defendant themselves not to be a conflict of interest.[347] So although the *Sullivan* automatic prejudice rule has existed for nearly half a century, courts' hesitation to find conflicts of interest that invoke automatic prejudice has limited the doctrine's effectiveness.

The conflict-of-interest doctrine is not the only line of cases that eliminates the prejudice prong for ineffective assistance of counsel claims. In *United States v. Cronic*,[348] the Supreme Court recognized that some ineffective assistance of counsel circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[349] The Court identified three such circumstances. First, the Court noted that prejudice need not be proven when there has been a complete denial of counsel at a critical stage of the trial—for example, if no lawyer were present in the courtroom at all.[350] Second, the Court pointed to circumstances in which counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."[351] This

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343 *See, e.g.*, *id.* at 973; Gregory G. Sarno, Annotation, *Circumstances Giving Rise to Prejudicial Conflicts of Interest Between Criminal Defendant and Defense Counsel—Federal Cases*, 53 A.L.R. Fed. 140, §§ 2[a], 3[i] (1981).

344 *See, e.g.*, Mathis v. Hood, 937 F.2d 790, 795–96 (2d Cir. 1991).

345 Johnson, *supra* note 324, at 90.

346 *See id.* at 90–91; Beets v. Collins, 986 F.2d 1478, 1488 (5th Cir. 1993) (concluding that a "media rights contract was almost surely unethical" but did not create an actual conflict of interest).

347 *See* Johnson, *supra* note 324, at 91–92.

348 466 U.S. 648 (1984).

349 *Id.* at 658.

350 *Id.* at 659; *see also* Mitchell v. Mason, 325 F.3d 732, 744 (6th Cir. 2003) ("When counsel is appointed but never consults with his client and is suspended from practicing law for the month preceding trial, and the court acquiesces in this constructive denial of counsel by ignoring the defendant's repeated requests for assistance, *Cronic* governs.").

351 *Cronic*, 466 U.S. at 659.

circumstance refers to cases in which the lawyer is physically present but does absolutely nothing.[352] Third, the Court referenced the infamous "Scottsboro Boys" case—*Powell v. Alabama*[353]—in which poor, out-of-state Black defendants were "represented" by an out-of-town lawyer who had no time to prepare for a capital rape prosecution.[354] The Court explained that such cases involve situations in which, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[355]

The Court has been even stingier with the *Cronic* doctrine than they have with *Strickland*.[356] A quarter century after *Cronic*, the Supreme Court described the doctrine as "a narrow exception to *Strickland*'s holding that a defendant . . . must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense."[357] Lower courts have gotten the message. In the years after *Strickland* and *Cronic*, courts dealt with outrageous cases in which lawyers suffered from alcohol abuse[358] or drug addiction.[359] Courts largely rejected claims that these cases should be decided under the presumed-prejudice rule of *Cronic* and instead subjected them to the traditional *Strickland* test.[360]

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352 *See, e.g.*, Phillips v. White, 851 F.3d 567, 580–81 (6th Cir. 2017) (presuming prejudice when a defense attorney neglected to make an opening statement, failed to investigate or present evidence, and offered a "potentially off-putting and self-deprecating remark" that "gave the [prosecution] carte blanche at the sentencing hearings").

353 287 U.S. 45 (1932).

354 *Cronic*, 466 U.S. at 660–61. For a particularly readable account of the lawyer's situation, see Michael J. Klarman, Powell v. Alabama*: The Supreme Court Confronts "Legal Lynchings," in* Criminal Procedure Stories (Carol S. Steiker ed., 2006).

355 *Cronic*, 466 U.S. at 659–60.

356 *See* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1607 (2020) (lamenting the lack of focus on structural ineffective assistance claims and noting that "*Cronic* is often ignored, and when it is mentioned, scholars typically note its limited effect and emphasize that it is a small exception to the generally applicable *Strickland* regime"); Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 Tex. Tech L. Rev. 163, 209 (2012) ("As *Cronic* is a narrow exception to *Strickland*, references to it as precedent are infrequent.").

357 Florida v. Nixon, 543 U.S. 175, 190 (2004).

358 *See* Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (analyzing ineffectiveness claim about counsel's alcohol use under *Strickland*).

359 *See* Berry v. King, 765 F.2d 451, 454–55 (5th Cir. 1985) (rejecting counsel's drug use as an ineffective assistance of counsel claim under the *Strickland* standard).

360 *See, e.g.*, *id.* There are exceptions, however. *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (affirming the district court's finding that "sleeping counsel is equivalent to no counsel at all"); Tippins v. Walker, 77 F.3d 682, 685 (2d Cir. 1996).

And in 2002, the Supreme Court, in *Bell v. Cone*,[361] solidified the narrowness of the *Cronic* doctrine when it refused to apply the automatic prejudice rule to a capital case in which the defense lawyer failed to present any mitigating evidence or make a closing argument at sentencing.[362] The Court reasoned that the automatic prejudice rule of *Cronic* was for cases in which "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing,'" not cases in which "counsel failed to do so at specific points."[363] The *Cone* decision reinforced that the *Cronic* presumed-prejudice exception is a narrow one.

More than four decades after *Cronic* and *Sullivan* were decided, one can draw some basic principles. First, the Court indicated that there are situations in which petitioners need not prove prejudice to demonstrate an ineffective assistance of counsel claim. The Court has never strayed from this basic principle. Second, for better or worse, courts have consistently—in the face of multiple opportunities for expansion[364]—maintained the "automatic prejudice" exception as a narrow carve out to the traditional *Strickland* rule. Put differently, the automatic prejudice exceptions in *Sullivan* and *Cronic* were narrow when they were created, and they have remained narrow for more than four decades, even in the face of plausible cases for expansion.

As explained in Section IV.B below, the existence of narrow exceptions to the prejudice prong for ineffective assistance claims and the fact that those exceptions have remained narrow for decades suggest that they are justifiable and workable in the *Brady* context as well.

B. Applying the Conflict-of-Interest Prejudice Rule to Brady *Cases Involving Hidden Payments*

There is a strong case that there should be an automatic prejudice exception under the *Brady* doctrine, just as there is under the ineffective assistance doctrine.

As noted in Section IV.A, the Supreme Court also recognized an automatic prejudice doctrine in *Cronic* for extreme cases in which there is no lawyer present, the lawyer fails to subject the government's case to meaningful adversarial testing, or the lawyer has no time to prepare.[365] Because the subjective motivation of the prosecutor is irrelevant for *Brady* claims,[366] and the motivations of the defense lawyer are similarly

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361 535 U.S. 685 (2002).

362 *Id.* at 697–98.

363 *Id.* at 697 (quoting United States v. Cronic, 466 U.S. 648, 659 (1984)).

364 For example, the Washington Supreme Court has refused to presume either deficient performance or prejudice when a defendant's lawyer suffered from "severe" mental illness. *See* State v. Lopez, 410 P.3d 1117, 1120, 1124 (Wash. 2018).

365 *See supra* Section IV.A.

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

irrelevant in ineffective assistance of counsel cases,[367] the *Cronic* doctrine does not transfer easily to the *Brady* context. As such, this Article limits its comparison to the *Sullivan* actual conflict-of-interest cases, which is a far better fit for hidden witness payments under the *Brady* doctrine.

Sullivan holds that an actual conflict of interest is automatically prejudicial.[368] Thus, when a lawyer represents two defendants who have conflicting interests—when vigorous advocacy for one client undercuts the interests of the other client—there is no need to consider prejudice.[369]

Of course, witnesses in a criminal case do not represent either of the parties. A witness owes no duty to the defendant nor the State; the witness's only duty is to tell the truth.[370] But when a witness has been paid by the government, the situation closely resembles the conflict-of-interest situation in *Sullivan*. The witness may feel like they owe something to the government actors who pay them and thus be reluctant to offer testimony that is unfavorable to the government's position.[371] This situation is even more pronounced when the government is withholding payment until after the witness testifies.

Certainly, the mere existence of a payment to a testifying witness does not mean the witness will be dishonest. Many witnesses who take relocation funds or other payments from prosecutors or the police will still tell the truth at trial. But they have a conflict of interest because they have received money from the very same entity that is now eliciting their testimony. Indeed, in any other context, paying a witness would violate bribery statutes.[372] Thus, there is a compelling rationale to

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367 *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (stating that to succeed on an ineffective assistance of counsel claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness").

368 Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980).

369 *See id.*

370 *See* FED. R. EVID. 603.

371 *See supra* Section III.B.

372 *See* 18 U.S.C. § 201(c)(2) (making it a felony when someone, "directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court"). As Professors Joy and McMunigal have explained, "Despite the simplicity and clarity of Model Rule 3.4(b)'s prohibition of witness inducements, prosecutors have long been granted de facto exemption from this rule by ethics authorities and judges." Peter A. Joy & Kevin C. McMunigal, *Different Rules for Prosecutors?*, 31 CRIM. JUST. 48, 48 (2016); *see also* Robertson & Winkelman, *supra* note 318, at 37 ("[T]he rule against giving inducements to witnesses does not seem to be enforced against prosecutors."); H. Lloyd King Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 172 (1999) (explaining a Tenth Circuit decision in which "the majority found [the defendant's] argument that Congress intended to subject government prosecutors to the provisions of § 201(c)(2) to be 'patently absurd'" (quoting United States v. Singleton, 165 F.3d 1297, 1299 (10th Cir. 1999) (en banc))).

see hidden witness payments and an attorney with an actual conflict of interest as comparably problematic situations.

Importantly, the *Sullivan* conflict of interest decision and hidden witness payments are similar in another highly practical way. Both are unusual circumstances that allow courts to maintain the standard prejudice prongs in the typical cases. As noted above, the Court has not expanded the *Sullivan* automatic prejudice rule in the forty-five years since it was announced.[373] Although petitioners frequently raise ineffective assistance of counsel claims, relatively few involve conflicts of interest, and only a small number of those are successful. Thus, the automatic prejudice exception under *Sullivan* is a very limited exception to the traditional *Strickland* rule.

Creating an automatic prejudice exception for hidden witness payment cases in the *Brady* context would similarly be a very narrow exception. Although there are surely many hidden witness payment cases that have never come to light, the universe of such cases that do come before courts is relatively small.[374] If the Court were to create an automatic prejudice exception for cases in which the government failed to disclose payments to witnesses, it would amount to a small exception to the traditional *Brady* doctrine.

Conclusion

Prosecutors and the police pay witnesses in multiple ways—simple cash, rewards for information, relocation expenses, transportation, and crime victims funds.[375] Some of the payments are small,[376] while others involve tens of thousands of dollars.[377] Whether the payment is large or small, however, prosecutors must disclose it under the *Brady* doctrine.[378] Yet prosecutors are sometimes unaware of the existence of the payments or unaware that the *Brady* doctrine requires disclosure. As such, witness payments are sometimes hidden until after trial.[379]

Most prosecutors are ethical; if they were aware of the witness payments or their *Brady* obligations, they would likely turn over the evidence. But once a defendant has been convicted, even the most

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373 *See supra* notes 342–47 and accompanying text.

374 *See* Meares, *supra* note 21, at 909.

375 *See supra* notes 1–8 and accompanying text.

376 *See, e.g.*, Weissman v. Clark, No. 22-cv-04005, 2023 WL 8853715, at *17 (N.D. Cal. Dec. 21, 2023), *aff'd*, No. 23-4407, 2025 WL 1177521 (9th Cir. Apr. 23, 2025) (witness given fifty-dollar gift card).

377 *See, e.g.*, United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238, at *10 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010) (witness given $60,000 in cash).

378 *See* Brady v. United States, 373 U.S. 83, 87 (1963).

379 *See supra* notes 17–22 and accompanying text.

ethical prosecutors can become deeply opposed to seeing defendants' convictions reversed.[380] Prosecutors do not deny that the hidden payments are favorable evidence under the *Brady* doctrine, nor could they. Instead, prosecutors contend that the defendant cannot meet *Brady*'s high burden of showing materiality—a reasonable probability of a different outcome.[381]

One might assume that courts would be skeptical of the argument that jurors would be unaffected by learning that the government paid the key witness. Yet this Article has established that in nearly eighty percent of cases, courts reject materiality challenges to hidden witness payments.[382]

Courts' reasoning for finding hidden witness payments to be immaterial ranged from the plausible to the absurd. On the logical end, when the defendant or his accomplices threatened a witness, defense counsel would have been disinclined to highlight the relocation expenses that prosecutors and the police paid to hide the witness.[383] Similarly, when the witness was only a minor part of the case, it is logical for courts to see the hidden payments as immaterial.[384]

But courts' reasoning in most cases was far less persuasive. Multiple courts dismissed hidden payments for "small" amounts of money without considering how valuable those payments would be to poor informants who lived on the street.[385] Other courts explained away hidden payments because the defense was able to cross-examine the witness about other matters, without appreciating that cross-examination is cumulative, rather than a binary choice of whether some type of cross-examination happened or not.[386] A few courts engaged in conclusory analysis without providing any actual reasoning for rejecting materiality.[387] And, worst of all, one court concluded that a hidden payment was immaterial because it was withheld until after the witness testified, ignoring that the witness could have shaped their testimony to get the payment.[388]

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380 *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 How. L.J. 475, 475 (2006); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 129 (2004).

381 *See* Gershowitz, *supra* note 18, at 539–40.

382 *See supra* Section II.A.

383 Even this reasoning is not persuasive in all relocation cases—sometimes a witness lies to the government and hustles the police or prosecutor into making unnecessary relocation payments. *See supra* notes 245–50 and accompanying text.

384 *See supra* Section II.B.2.

385 *See supra* Section II.B.1.

386 *See supra* Section II.B.3.

387 *See supra* Section II.B.11.

388 *See supra* Section II.B.5.

Although courts' reasons for rejecting materiality have varied from case to case, they all ignored the powerful psychological principle of reciprocity. Decades of social psychology research indicate that when people receive a benefit, they feel compelled to reciprocate, whether they realize it or not.[389] People tip more when their server gives them a free dessert, and they buy more from stores that give out free samples.[390] People are more likely to return a survey questionnaire when they have been paid first.[391] And doctors prescribe more of a pharmaceutical company's drugs after receiving a free lunch.[392]

When a person receives a benefit, even a small one, they are more likely to reciprocate and behave favorably to the person who gave it to them.[393] It is completely logical to conclude that witnesses who receive money from prosecutors and the police will testify more favorably at trial, whether they intend to or not. Rather than recognizing this reality, courts say the exact opposite, frequently noting that a witness will not change their story for a small amount of money.[394]

To remedy the problem of hidden witness payments, the Supreme Court should adopt an automatic prejudice rule for cases in which prosecutors failed to disclose that a witness was paid. In other words, the defendant should have to demonstrate that the government withheld favorable evidence, but not that the evidence was material. This narrow, automatic prejudice exception aligns perfectly with the approach the Supreme Court has taken for nearly fifty years for conflict-of-interest cases under the ineffective assistance of counsel doctrine.[395] The Supreme Court has required defendants to show prejudice in almost all ineffective assistance of counsel cases, but not those in which the defense lawyer had an actual conflict of interest.[396] An automatic prejudice rule for hidden witness payments would be narrow, yet effective, and it would make the *Brady* and ineffective assistance of counsel doctrines symmetrical.

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389 *See supra* Section III.A.

390 *See supra* notes 303–07 and accompanying text.

391 *See supra* notes 308–09 and accompanying text.

392 *See supra* notes 310–11 and accompanying text.

393 *See supra* Section III.A.

394 *See supra* Section II.B.1.

395 *See supra* Section IV.

396 *See supra* Section IV.A.

Appendix: Summary of Hidden Witness Payment Cases

Case Citation	Category of Payment	Was the Evidence Material?	Courts' Reasons for Finding Evidence Not to Be Material
Ramirez v. Keyser, No. 20-cv-8445, 2024 WL 1076945 (S.D.N.Y. Mar. 12, 2024)	Relocation Assistance	No	Provided Minimal Evidence Relocation of Witness Reinforced Guilt
Weissman v. Clark, No. 22-cv-04005, 2023 WL 8853715 (N.D. Cal. Dec. 21, 2023), *aff'd*, No. 23-4407, 2025 WL 1177521 (9th Cir. Apr. 23, 2025)	Cash	No	Impeached on Other Issues
Breezee v. Perry, No. 17-cv-01207, 2023 WL 4353154 (W.D. Tenn. July 5, 2023)	Crime Victims Funds	No	Testimony Was Corroborated Payment from Victims Fund Reinforced Guilt
State v. Tice, No. M2021-00495-CCA-R3, 2022 WL 2800876 (Tenn. Crim. App. July 18, 2022)	Travel	No	Conclusory Reasoning
Alvarez v. Montgomery, No. sacv 15-0987, 2022 WL 868889 (C.D. Cal. Jan. 27, 2022), *report and recommendation adopted*, 2022 WL 860804 (C.D. Cal. Mar. 23, 2022)	Cash	Yes	N/A
United States v. Dones-Vargas, 936 F.3d 720 (8th Cir. 2019)	Cash	No	Small Amount of Money Provided Minimal Evidence Payments Were for Something Other Than Testimony
State v. Butler, 263 So. 3d 195 (Fla. Dist. Ct. App. 2019)	Reward Relocation Assistance	No	Provided Minimal Evidence
State v. Ragland, No. A-0747-16T2, 2018 WL 3596376 (N.J. Super. Ct. App. Div. July 27, 2018)	Relocation Assistance	No	Impeached on Other Issues Testimony Was Corroborated Relocation of Witness Reinforced Guilt

Case Citation	Category of Payment	Was the Evidence Material?	Courts' Reasons for Finding Evidence Not to Be Material
Hernandez v. Lewis, No. 12-cv-01661, 2018 WL 1870449 (E.D. Cal. Apr. 18, 2018), *report and recommendation adopted sub nom.*, Cianez Hernandez v. Lewis, 2020 WL 2216562 (E.D. Cal. May 7, 2020)	Cash	No	Small Amount of Money Cross Examined About Benefits Generally
Kennell v. Dormire, 873 F.3d 637 (8th Cir. 2017)	Relocation Assistance	No	Reward Paid After Trial
White v. Steele, 853 F.3d 486 (8th Cir. 2017)	Relocation Assistance	No	Cross Examined About Benefits Generally Relocation of Witness Reinforced Guilt Reward Paid Well Before Trial
Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017)	Cash	Yes	N/A
Williams v. Davis, No. cv 00-10637, 2016 WL 1254149 (C.D. Cal. Mar. 29, 2016)	Cash Relocation Assistance	No	Testimony Was Corroborated
People v. Tyler, 2015 IL App (1st) 123470	Relocation Assistance	No	Small Amount of Money Relocation of Witness Reinforced Guilt
Austin v. Harrington, No. 10 C 6474, 2014 WL 2725985 (N.D. Ill. June 16, 2014)	Relocation Assistance	No	Relocation of Witness Reinforced Guilt Guilt-Based Evidence
Salcedo v. Hedgpeth, No. cv 10-3882, 2013 WL 5230807 (C.D. Cal. Sep. 13, 2013), *aff'd sub nom.*, Salcedo v. Davey, 672 F. App'x 735 (9th Cir. 2017)	Relocation Assistance	No	Cross Examined About Benefits Generally
United States v. Nagle, No. 09-cr-384-01, 2013 WL 3894841 (M.D. Pa. July 26, 2013)	Cash	No	Small Amount of Money
United States v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013)	Cash	Yes	N/A

Case Citation	Category of Payment	Was the Evidence Material?	Courts' Reasons for Finding Evidence Not to Be Material
Williams v. Swarthout, No. cv 09-6645, 2012 WL 6552147 (C.D. Cal. Sep. 25, 2012), *report and recommendation adopted*, 2012 WL 6554741 (C.D. Cal. Dec. 14, 2012)	Travel	No	Small Amount of Money Testimony Was Corroborated Cross Examined About Benefits Generally
People v. Felder, 2012 IL App (4th) 110419-U	Cash	No	Procedurally Defaulted
Jalowiec v. Bradshaw, 657 F.3d 293 (6th Cir. 2011)	Cash	No	Testimony Was Corroborated
Garnett v. Morgan, 462 F. App'x 706 (9th Cir. 2011)	Reward	No	Provided Minimal Evidence
Guzman v. Sec'y, Dep't of Corr., 663 F.3d 1336 (11th Cir. 2011)	Reward	Yes	N/A
Robinson v. Mills, 592 F.3d 730 (6th Cir. 2010)	Cash	Yes	N/A
Pierce v. Thaler, 355 F. App'x 784 (5th Cir. 2009)	Reward	No	Paid Only After Trial
United States *ex rel.* Griffin v. Mathy, No. 98 C 5024, 2009 WL 2252238 (N.D. Ill. July 29, 2009), *aff'd in part, rev'd in part sub nom.*, Griffin v. Pierce, 622 F.3d 831 (7th Cir. 2010)	Relocation Assistance	No	Impeached on Other Issues Testimony Was Corroborated Relocation of Witness Reinforced Guilt
Hooper v. Schriro, No. cv 98-2164, 2008 WL 4542782 (D. Ariz. Oct. 10, 2008)	Cash Relocation Assistance	No	Testimony Was Corroborated Impeached on Other Issues
United States v. Taylor, No. cr97-0001, 2005 WL 984519 (N.D. Iowa Apr. 28, 2005)	Cash Relocation Assistance	No	Impeached on Other Issues Guilt-Based Reasoning
People v. Blackman, 836 N.E.2d 101 (Ill. App. Ct. 2005)	Relocation Assistance	Yes	N/A
Banks v. Dretke, 540 U.S. 668 (2004)	Cash	Yes	N/A

Case Citation	Category of Payment	Was the Evidence Material?	Courts' Reasons for Finding Evidence Not to Be Material
United States v. Sipe, 388 F.3d 471 (5th Cir. 2004)	Cash	Yes	N/A
Cauthern v. State, 145 S.W.3d 571 (Tenn. Crim. App. 2004)	Relocation Assistance	No	Provided Minimal Evidence
Rodriguez Aguirre v. United States, 30 F. App'x 803 (10th Cir. 2002)	Cash	No	Conclusory Reasoning
United States v. Joelson, No. 98-50619, 2000 U.S. App. LEXIS 5929 (9th Cir. Mar. 29, 2000)	Cash	No	Guilt-Based Reasoning
Mastracchio v. Vose, No. CA 98-372T, 2000 U.S. Dist. LEXIS 3766 (D.R.I. Mar. 15, 2000), *aff'd*, 274 F.3d 590 (1st Cir. 2001)	Cash	No	Cross-Examined About Benefits Generally Impeached on Other Issues
Johns v. Bowersox, 203 F.3d 538 (8th Cir. 2000)	Reward	No	Provided Minimal Evidence Impeached on Other Issues
United States v. Cruz-Velasco, 224 F.3d 654 (7th Cir. 2000)	Cash	No	Payment Was for Something Other Than Testimony
Quintana v. Comm'r of Correction, 739 A.2d 701 (Conn. App. Ct. 1999)	Reward	No	Testimony Was Corroborated
United States v. Cheely, No. 95-30248, 1997 WL 265000 (9th Cir. May 19, 1997)	Reward	No	Cross-Examined About Benefits Generally Impeached on Other Issues
State v. Marshall, 690 A.2d 1 (N.J. 1997)	Relocation Assistance	No	Cross Examined About Benefits Generally
Kopycinski v. Scott, 64 F.3d 223 (5th Cir. 1995)	Reward	No	Testimony Was Corroborated
Hartman v. State, 896 S.W.2d 94 (Tenn. 1995)	Cash	No	Witness Did Not Testify
United States v. Price, 13 F.3d 711 (3d Cir. 1994)	Cash	No	Testimony Was Corroborated
United States v. Thornton, 1 F.3d 149 (3d Cir. 1993)	Cash	No	Testimony Was Corroborated

Case Citation	Category of Payment	Was the Evidence Material?	Courts' Reasons for Finding Evidence Not to Be Material
United States v. Andrews, 824 F. Supp. 1273 (N.D. Ill. 1993)	Cash	Yes	N/A
United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993)	Cash	Yes	N/A
United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990)	Cash	No	Cross Examined About Benefits Generally