

BRADY & THE MICHAEL MORTON ACT

BEYOND THE BASICS

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***Brady* Compendium**

Beyond the Basics

QUESTION PRESENTED

Since the passage of the Michael Morton Act, one of the recurring issues has been what level of access should a defendant have to the record of a juvenile probation department, particularly in the instance of an alleged offense involving victim with a juvenile history. Additionally, if there is an entitlement to access to those records, what mechanism should be followed to give that access, given that the records are confidential by law?

How do juvenile prosecutors, District Court judges, probation departments, and juvenile law practitioners manage *Brady* obligations, juvenile confidentiality provisions, and the Michael Morton Act?

HYPOTHETICAL

Your teenage son is walking home from high school after being dropped off from the school bus. You live in South Austin. Your neighborhood is a few blocks away from the juvenile detention center. There is also an outpatient drug treatment center nearby. Many of the participants are also teenagers.

A group of 3 kids taunts him as he walks in front of them. He ignores them. They follow. They get close to him and tease him for his backpack being overstuffed with books. They push on his backpack. He ignores this and keeps walking. But your son is scared, and he starts to walk faster. They give chase.

As he nears the busy street of South Congress, he knows that he cannot run across the street. One of the kids is right on his heels. Your son turns, swings his backpack, which has a metal Sigg water bottle (full of water) on a carabineer, and catches the pursuing kid on the bridge of his nose. There is a lot of blood, and the other two kids stop the chase to tend to their friend.

Because your child has never been in trouble before, he runs straight home. The other kids follow, bang on the door, and your son does not answer. By the time you arrive home, your son has explained what happened. The police knock on your door several hours later. He is arrested for assault.

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I represent your son.

In reviewing the offense reports, the 3 kids tell slightly different stories than your son. But all three of them tell the same story: they were minding their own business, your son made a disparaging comment about them being “hoodlums,” and they had words. They say your son started the fight and sucker punched them and ran away.

How much information do you want to know about the three other kids?

SCENARIOS

1. Co-respondent is charged with same offense and has a prior adjudication history
2. Co-respondent is charged with same offense and has a prior referral history
3. Co-respondent is charged with same offense and is on probation
4. Complainant has pending juvenile offense
5. Complainant is on juvenile probation / deferred prosecution
6. Complainant has previous juvenile adjudication
7. Complainant has previous juvenile referral
8. Complainant has sealed juvenile adjudication
9. Complaint / co-respondent school disciplinary records are in the probation file
10. Complaint / co-respondent positive drug tests are in the probation file
11. Complaint / co-respondent psychological report is in the probation file

THE OFT-REPEATED BRADY LANGUAGE

In *Brady*, this Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

The duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, (1985). Such evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.*, at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 433–434 (1995). Moreover, the rule encompasses evidence “known only to police investigators and not to the prosecutor.” *Id.*, at 438. In order to comply with *Brady*, therefore, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” *Kyles*, 514 U.S., at 437.

These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

This special status explains both the basis for the prosecution’s broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term “Brady violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence²⁰—that is, to any suppression of so-called “Brady material”—although, strictly speaking, there is never a real “Brady violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
2. that evidence must have been suppressed by the State, either willfully or inadvertently; and
3. prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 280–82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999)

ISSUES ADDRESSED IN PRESENTATION

What is the prosecutor's obligation to disclose information under 3.09(d)?

What is the prosecutor's obligation to disclose information under *Brady / Giglio / Bagley*?

What is the prosecutor's obligation to disclose information pursuant to a general Morton request?

What is the prosecutor's obligation to disclose information pursuant to a specific Morton request?

May a defense attorney subpoena these records?

If the State objects to a Morton request, how should the Court rule?

JUVENILE LAW SPECIFIC CASES

Case	Category	Summary
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	Impeachment: juvenile probation	Refusal to allow defendant to cross-examine key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied defendant his constitutional right to confront witnesses, notwithstanding state policy protecting anonymity of juvenile offenders.
<i>Irby v. State</i> , 327 S.W.3d 138 (Tex.Crim.App. 2010)	Impeachment; causal connection	A defendant must show some causal connection or logical relationship between a witness's probationary status and his potential bias to testify favorably toward the State before the witness may be cross-examined with that status. ¹ Evidence that a witness with a juvenile record might be testifying because of a need to “curry favor” with the State or shift suspicion away from himself is constitutionally relevant and admissible under the Confrontation Clause. But the mere fact that a witness is on probation is not sufficient, by itself, to establish a potential bias or motive to testify.
<i>Harris v. State</i> , 642 S.W.2d 471 (Tex.Crim.App.1982)	Impeachment; pending juvenile charges	Defendant has an “unqualified right” to ask the only witness about whether person had been accused of the same offense; jury was entitled to the “whole picture” in order to evaluate and judge the witness’ credibility.
<i>In re: E.C.</i> , 444, S.W.3d 760 (Ct.App.-Ft.Worth 2014)	Limits of confidentiality of juvenile records / proceeding	Therapist hired by respondent waived privilege once he testified in disposition hearing; his notes are discoverable even though they may not be admissible. Analysis of Texas Family Code Sec. 51.13(b)
<i>Loving v. City of Houston</i> , 282 S.W.3d 555, 557 (Tex. App. Houston - 2009)	Confidentiality of juvenile law enforcement records	Open Records Request by criminal defense lawyer to City of Houston for a copy of all incident/offense reports and witness statements involving a juvenile complainant. Court followed the statute in denying mandamus relief for release of the records. No analysis under <i>Brady</i> , <i>Morton</i> , or during cross-examination at trial.

MOST IMPORTANT

Case	Category	Summary
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	Impeachment	Where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration, and Assistant State's Attorney did nothing to correct false testimony of witness, petitioner was denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution, though jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner. Judgment reversed.
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	Exculpatory	Newly discovered evidence that had been suppressed by the prosecution entitles Brady to a new punishment hearing.
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	Impeachment	If Assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.
<i>United States v. Agurs</i> , 427 U.S. 97, (1976)	Disclosure	<p>Duty to disclose <i>Brady</i> material is applicable even though there has been no request by the accused.</p> <p>After a brief interlude in an inexpensive motel room, respondent repeatedly stabbed James Sewell, causing his death. She was convicted of second-degree murder. The question before us is whether the prosecutor's failure *99 to provide defense counsel with certain background information about Sewell, which would have tended to support the argument that respondent acted in self-defense, deprived her of a fair trial under the rule of <i>Brady v. Maryland</i>, 373 U.S. 83.</p> <p>The answer to the question depends on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged.</p> <p>Prosecutor's failure to tender the murder victim's criminal record to the defense did not deprive defendant of a fair trial where it appeared that the record was not requested by defense counsel and gave no rise to an inference of perjury.</p>

		Under <i>Brady</i> an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”
<i>States v. Bagley</i> , 473 U.S. 667 (1985)	Impeachment & Mitigation	<i>Brady duty</i> encompasses impeachment evidence as well as exculpatory evidence.
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	Custody	<i>Brady duty</i> encompasses evidence known only to police investigators – even if the prosecutor did not have actual knowledge.
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	Impeachment	Undisclosed documents impeaching eyewitness testimony as to circumstances of abduction of victim were favorable to petitioner for purposes of <i>Brady</i> .
<i>Youngblood v. W. Virginia</i> , 547 U.S. 867 (2006)	Impeachment	Re-affirms <i>Brady, Bagley</i> as to impeachment information. The trial court denied <i>Youngblood</i> a new trial, saying that a note written by a complainant provided only impeachment, but not exculpatory, evidence. The trial court did not discuss <i>Brady</i> or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with <i>Youngblood's</i> counsel.
<i>Smith v. Cain</i> , 565 U.S. 73 (2012)	<i>Brady</i> violation	The State of Louisiana charged petitioner Juan Smith with killing five people during an armed robbery. At Smith's trial a single witness, Larry Boatner, linked Smith to the crime. In court Boatner identified Smith as the first gunman to come through the door. He claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith in the crime. The habeas lawyer obtained files from the police investigation of his case, including those of the lead investigator, Detective John Ronquillo. Ronquillo's notes contain statements by Boatner that conflict with his testimony identifying Smith as a perpetrator. The notes from the night of the murder state that Boatner “could not ... supply a description of the perpetrators other than [sic] they were black males.” Ronquillo also made a handwritten account of a conversation he had with Boatner five days after the crime, in which Boatner said he “could not ID anyone because [he] couldn't see faces” and “would not

		know them if [he] saw them.” And Ronquillo's typewritten report of that conversation states that Boatner told Ronquillo he “could not identify any of the perpetrators of the murder.”
<i>Wearry v. Cain</i> , 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016)		Reinforces <i>Giglio</i> : Brady violation applies to evidence that undermines witness credibility. State's failure to disclose material evidence including inmates' statements casting doubt on credibility of State's star witness violated defendant's due process rights.

BOARD OF DISCIPLINARY APPEALS

Case	Category	Summary
<i>Schultz v. Commission for Lawyer Discipline</i>	Rule 3.09(d)	Materiality determination should not be made in prosecutorial decision not to disclose information
<i>Sebesta v. Commission for Lawyer Discipline</i>	Rule 3.09(d)	Upholding disbarment for failure to disclose impeachment material in capital murder trial

FEDERAL BRADY/GIGLIO/BAGLEY & CROSS-EXAMINATION CASES

Case	Category	Summary
<i>United States v. Sipe</i> , 388 F.3d 471 (5th Cir. 2004)	Impeachment	Cumulative effect of government's suppression of evidence that its star witness personally disliked defendant, the criminal history of one of the government's testifying witnesses, and complete description of the benefits accorded the testifying aliens constituted a Brady violation warranting a new trial.
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	Impeachment	“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination...”
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	Impeachment: Motive	We have recognized that the exposure of a witness’ motivations in testifying is a proper and important function of the constitutionally protected right of cross-examination.
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	Impeachment: limits to cross-examination	“[T]rial judges retain wide latitude” under the Confrontation Clause to impose restrictions on cross-examination based on such criteria as “harassment, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”
<i>Alford v. United States</i> , 282 U.S. 687 (1931)	Impeachment; pending charge	<p>Three purposes of cross:</p> <ol style="list-style-type: none"> 1. To identify the witness with his community so that independent testimony may be sought and offered concerning the witness’ reputation for veracity in that community 2. To allow the jury to assess the credibility of the witness; and 3. Allows facts to be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. <p>Although the extent of cross-examination is subject to the sound discretion of the trial judge, the trial judge abuses that discretion when he/she prevents appropriate cross-examination.</p>

		Defendant entitles to cross-examine witness on unrelated pending felony case as the testimony could be “affected by fear or favor growing out of the witness’ detention.”
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TEXAS CASES: BRADY, IMPEACHMENT & CROSS-EXAMINATION

Case	Category	Summary
<p><i>Ex parte Temple</i>, No. WR-78,545-02, 2016 WL 6903758, at *3 (Tex. Crim. App. Nov. 23, 2016) (unpublished)</p>	<p><i>Brady</i>: pretrial materiality determination results in reversal</p>	<p>Applicant claims that the State failed to timely produce favorable evidence to the defense. Most of the Brady evidence about which Applicant complains was contained within the several hundred pages of police offense reports that were not provided to defense counsel until some time during the trial. There was a clear discrepancy between the defense counsel's recollection of what information he received prior to trial and the prosecutor's recollection of what information she gave to defense counsel prior to trial. The prosecutor maintained that she timely gave the defense all of the Brady evidence they were entitled to get. The prosecutor believed, as evidenced by her testimony at the writ hearing, that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, "ridiculous." She claimed that, when it came to what constituted Brady evidence, her opinion is what mattered. The prosecutor stated, when asked, that if information does not amount to anything, the defense is not entitled to it. However, although the prosecutor does have the initial responsibility to assess whether evidence may be favorable to the defense, the prosecutor is not the final arbiter of what constitutes Brady evidence. A prosecutor who errs on the side of withholding evidence from the defense runs the risk of violating Brady if the reviewing court ultimately decides that it should have been turned over. The habeas judge found, and we agree, that this prosecutor's misconception regarding her duty under Brady was "of enormous significance."</p>
<p><i>Johnson v. State</i>, 433 S.W.3d 546 (Tex.Crim.App. 2014)</p>	<p>Cross-examination; impeachment</p>	<p>Post-conviction capital murder conviction; trial court's refusal to allow defendant to impeach state's witnesses during cross-examination with evidence of specific pending felony charges against them did not violate defendant's right to confrontation.</p> <p>"Given that our "causal connection" requirement is ultimately rooted in the concept of relevance, however, it must also be borne in mind that '[t]he failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility.' This sensibility is aptly expressed in an oft-repeated legal aphorism: 'A brick is not a wall. To be considered 'relevant,' the proffered evidence need not definitively prove the bias alleged—it need only "make the existence" of bias 'more probable or less probable than it would be without the evidence.' The</p>

		question in this case is whether the Confrontation Clause guarantees that the accused be permitted to use every brick at his disposal—no matter how incrementally it may serve to reinforce the wall.”
<i>Ex parte Ghahremani</i> , 332 S.W.3d 470 (Tex. Crim. App. 2011)	False testimony claim	<p>Testimony of child victim's parents regarding victim's behavior after she was sexually assaulted by defendant was false; evidence supported conclusion that state knew that testimony of child victim's parents regarding victim's behavior after she was sexually assaulted by defendant was false; there was a reasonable likelihood that state's knowing presentation of false testimony of child victim's parents resulted in a harsher punishment of defendant and, thus, violated defendant's due process rights; and defendant was entitled to habeas relief without making a showing that the due process violation was not harmless.</p> <p>The knowing use of false testimony violates due process when there is a “reasonable likelihood” that the false testimony affected the outcome. This standard is more stringent (i.e., more likely to result in a finding of error) than the standard applied to <i>Brady</i> claims of suppressed evidence, which requires the defendant to show a “reasonable probability” that the suppression of evidence affected the outcome. The “reasonable likelihood” standard is equivalent to the standard for constitutional error, which “requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”</p>
<i>Hammer v. State</i> , 296 S.W.3d 555 (Tex.Crim.App. 2009)	Impeachment: Motive, bias	<p>In prosecution for sexual abuse against stepfather, trial court should have allowed cross-examination on bias and retaliation on the following topics:</p> <ul style="list-style-type: none"> -retaliation for her stepfather taking her to nurse to receive sexual assault exam -prior outcry of sexual abuse by uncle -prior false outcry of sexual abuse “because I didn’t want my dad to know about which is why I blamed my uncle.” -medical records which indicate anger at her father
<i>Carroll v. State</i> , 916 S.W.2d 494 (1996)	Impeachment: pending charges	After providing a historical account of cross-examination and confrontation, the Court explains why impeachment on pending charges is allowed
<i>Sambrano v. State</i> , 754 S.W.2d 768 (Tex.App.-San Antonio, 1988)	<i>Giglio</i>	Delivery of methamphetamine case where key witness was paid \$100.00 by the State every time he purchased drugs, was provided gas money and a room, was a convicted felon on drug charges, and was purchasing his own heroin and using at the time of trial.

<i>McDonald v. State</i> , 77 Tex.Cr.Rep. 612 (1915)	Impeachment: Motive	“The motives which operate on the mind of a witness while he testifies should never be regarded as immaterial or irrelevant.”
<i>Wood v. State</i> , 486 S.W.2d 359 (Tex.Crim.App.1972)	Impeachment: Motive	“Great latitude should be allowed the accused in showing any fact which would tend to establish...motive..upon the part of any witness testifying against him. The jury should be given the opportunity to judge for themselves the witness’s ...motive for testifying.
<i>Lopez v. State</i> , 18 S.W.3d 220 (Tex.Crim.App.2000)	Cross-Examination	Citing Texas Rule of Evidence 101(c) (Hierarchical Governance in Criminal Proceedings) “We have previously indicated that the Confrontation Clause will prevail if there is a conflict between it and the Rules of Evidence.”
<i>Hurd v. State</i> , 725 S.W.2d 249 (Tex.Cr.App. 1987)	Cross-Examination	Confrontation is violated when appropriate cross-examination is limited.
<i>Lewis v. State</i> , 815 S.W.2d, 560 (Tex.Crim.App.1991)	Impeachment: lighter sentence	A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias, or interest for the witness to testify. Defendant entitled to question witness about pending indictment and any benefit expected or promised in return for testifying
<i>Jackson v. State</i> , 482 S.W.2d 864 (Tex.Crim.App.1972)	Cross-Examination	When discussing the breadth of the scope of cross-examination evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.
<i>Miller v. State</i> , 741 S.W.2d 382 (Tex.Crim.App.1987)	Impeachment: lighter sentence	Defendant may question whether witness is testifying to receive a lighter sentence
<i>Shelby v. State</i> , 819 S.W.2d 544 (Tex.Crim.App.1991)	Impeachment: financial interest	Defendant entitled to question child victim’s mother concerning her pecuniary interest in a lawsuit filed against the apartment complex where child was sexually assaulted.
<i>Spain v. State</i> , 585 S.W.2d 705 (Tex.Crim.App.1979)	Cross-examination	... an effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. The cross-examiner should be allowed to: -expose the limits of the witness' knowledge of relevant facts,

		<p>-place the witness in his proper setting, and -test the credibility of the witness.</p> <p>The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility.</p>
	<p>Impeachment – pending criminal charge</p>	<p>There exists a long line of federal and state authority holding a pending criminal charge is an appropriate area of cross-examination. Davis, 415 U.S. at 316–317, 94 S.Ct. at 1110–1111; Callins v. State, 780 S.W.2d 176, 196 (Tex.Cr.App.1986); Carmona v. State, 698 S.W.2d 100, 102–103 (Tex.Cr.App.1985); Harris v. State, 642 S.W.2d 471, 476 (Tex.Cr.App.1982) (citing Randle v. State, 565 S.W.2d 927 (Tex.Cr.App.1978)); Evans v. State, 519 S.W.2d 868 (Tex.Cr.App.1975); Lewis, 815 S.W.2d at 565; and, Miller, 741 S.W.2d at 389.</p>
	<p>Impeachment – rule 608(b) distinguished</p>	<p>First, appellant's cross-examination concerning Russell's incarceration was not an inquiry into a specific instance of conduct. Instead, appellant's cross-examination focused on Russell's possible motive, bias or interest in testifying for the State. To understand this distinction we draw upon our decisional authority, namely, Ramirez v. State, 802 S.W.2d 674 (Tex.Cr.App.1990), and Moody v. State, 827 S.W.2d 875 (Tex.Cr.App.1992), which involved the interpretation and application of Rule 608(b). In Ramirez, the mother of an eight-year-old victim testified she did not believe appellant sexually assaulted the victim. The State cross-examined the mother regarding her prior use of heroin suggesting that, at the time of the offense, she was under its influence and unaware of what happened to her child. The State offered no evidence to show the mother either previously used heroin, or was under its influence at the time of the incident. Id., 802 S.W.2d at 676. Relying on Rule 608(b), we held the State was improperly allowed to question the mother about a specific instance of conduct. Ibid.</p> <p>Likewise, in Moody the defendant sought to cross-examine a deputy sheriff with evidence of a civil suit in which the deputy was *501 sued for civil rights violations. Moody contended the suit was relevant to the deputy's character for truth and veracity and was a reflection of his “testimony” and “credibility.” Moody, 827 S.W.2d at 891. However, Moody never explained how a civil suit, involving an anonymous prisoner, indicated any possible motive or bias of the deputy against the appellant. Ibid. We held the cross-examination was an attack on the deputy's credibility using a specific instance of conduct and, therefore, prohibited under Rule 608(b).</p>

		<p>In the instant case the Court of Appeals improperly relied upon Rule 608(b) because appellant did not try to cross-examine Russell about a specific instance of conduct. In other words, appellant did not seek to cross-examine Russell about the underlying facts which gave rise to the aggravated robbery charge. Rather, appellant attempted to inform the jury that Russell had a vulnerable relationship with the State at the time of his testimony. <i>Alford</i>, 282 U.S. at 692, 51 S.Ct. at 219; and, <i>Harris</i>, 642 S.W.2d at 480. Consequently, the Court of Appeals erred in relying on Rule 608(b) to uphold the trial judge's limitation on appellant's cross-examination of Russell.</p> <p>Second, although we see no conflict between the right to cross-examine a witness about a pending charge and Rule 608(b), if such a conflict existed, the constitutional right of confrontation would prevail.¹³ In fact, the Supreme Court was confronted with such a conflict in <i>Davis</i> where a state statute prohibited the defendant from cross-examining a prosecution witness in an effort to show possible bias deriving from the witness' probationary status. The <i>Davis</i> Court held the defendant's right of confrontation was paramount and Alaska's interest in protecting the witness' privacy had to yield to such a vital constitutional right as the effective cross-examination for bias of an adverse witness. <i>Davis</i>, 415 U.S. at 319–320, 94 S.Ct. at 1112. See also, <i>Kirby v. United States</i>, 174 U.S. at 55–56, 19 S.Ct. at 577 (Any legislative or judicial action which seeks to limit the accused's fundamental right to confrontation must not circumvent the Sixth Amendment.); and, <i>State v. McPherson</i>, 851 S.W.2d 846, 850 (Tex.Cr.App.1992) (holding that under the Supremacy Clause, the Eighth Amendment prevails over Tex.Code Crim.Proc. Ann. art. 37.07, § 1(a)).¹⁴</p> <p><i>Carroll v. State</i>, 916 S.W.2d 494, 500–01 (Tex. Crim. App. 1996)</p>
<p><i>Little v. State</i>, 991 S.W.2d 864 (Tex.Crim.App.1999)</p>	<p>Giglio</p>	<p>In DWI trial, State's chemist lost graph of underlying data. In determining that this was not a <i>Brady</i> violation, the Court reasons that the inability to object to an exhibit is not the same as <i>Brady</i> or <i>Giglio</i> information:</p> <p>Little is not arguing that the loss of the graph was exculpatory in that it justified, excused, or cleared him from guilt. Nor is he claiming the loss of the graph was impeaching in that it disputed, disparaged, denied, or contradicted other evidence. Instead, Little says he could have used the fact that the graph had been lost to exclude testimony or evidence. He claims the favorable nature of the information was its use in keeping inculpatory facts out</p>

		<p>of evidence.</p> <p>If the blood test results or the chemist's opinion were inadmissible without the graph, Little could have, and should have, objected to their admission at trial. The State did not introduce the graph before introducing the blood test results or the chemist's testimony. So under Little's theory, he could have objected at the time the blood test results were offered by the State, either on the grounds that the predicate for their admissibility had not been laid or that there was no sufficient basis for the chemist's opinion. Also, immediately upon learning about the missing graph, he could have taken the chemist on voir dire to ascertain the basis for his opinion. Then he could have lodged a hearsay objection to the blood test results' admission. (We express no opinion on this objection's validity.)</p> <p>To prevail under Brady, Little must show not only a failure to timely disclose favorable evidence. He must also show he was prejudiced by the tardy disclosure. He did not object to the admission of the blood test results or attempt to take the chemist on voir dire after the loss of the graph was disclosed. So he cannot show that the outcome of the proceeding would have been different had that fact been disclosed earlier. And he cannot show that the trial was unfair, since he had every opportunity to object to the blood test results before and after the State disclosed the fact that the graph had been lost. Little received the information in time to put it to effective use at trial, under his theory. He just neglected to do so.</p>
<p><i>U.S. v. Binker</i>, 795 F.2d 1218 (5th Cir.1986); <i>California v. Trombetta</i>, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); <i>Arizona v. Youngblood</i>, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).</p>		<p>The government is constitutionally required to preserve evidence that might be expected to play a significant role in the suspect's defense</p>
<p><i>Harm v. State</i>, 183 S.W.3d 403 (Tex. Crim. App. 2006)</p>	<p><i>Brady</i></p>	<p>Tardy production of Child Protective Services (CPS) reports did not warrant reversal under <i>Brady</i> as records were neither exculpatory or material.</p>
<p><i>Wyatt v. State</i>, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000)</p>	<p><i>Brady</i>, custody of state</p>	<p>Relief denied: materiality.</p> <p>The information about which appellant complains was</p>

		<p>never in the possession of the State, but was in an investigator's file in the pathologist's office. The investigator's report, which was made prior to the pathologist's receipt of the victim's body, stated that the "next of kin denies boyfriend ever hurt deceased or would sexually assault him."</p> <p>Even if we assume, arguendo, that this was evidence the State was required to turn over under Brady as favorable to the accused, appellant still cannot show the outcome of the proceedings would have been different had the statement been disclosed. During trial, the victim's mother testified on direct examination that, prior to the instant crime, she trusted appellant and did not believe appellant would have hurt her child. This information is materially the same as that contained in the pathologist's report. The defense was able to cross-examine the victim's mother with the knowledge that she previously trusted appellant with the care of her child. Therefore, we conclude that there is no reasonable probability that, had the complained-of evidence been disclosed to the defense, the outcome of the proceeding would have been different.</p>
<p><i>Jackson v. State</i>, 552 S.W.2d 798, 803-04 (Tex. Crim. App. 1976)</p>	<p>"In custody of the State"</p>	<p>In his twelfth ground of error, appellant contends that the trial court erred in not granting a new trial upon the post-trial disclosure of several affidavits in the possession of welfare worker Nancy Ramsey. These affidavits related various instances of child abuse by Mary Frances. They were taken in conjunction with a hearing called to determine the custody of Mary Frances' four-year-old daughter. These papers were in existence at the time of the trial in *804 question, and the appellant had asked to obtain any facts that might be favorable to him in conjunction with this case under <i>Brady v. Maryland</i>, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He contends that the prosecution knew of the existence of these affidavits but failed to show it to him.</p> <p>The record of the hearing on the motion for new trial indicates that the appellant had, at the time of the trial, issued a subpoena duces tecum for the records held by Mrs. Ramsey. Mrs. Ramsey testified at the hearing that she thought her entire file to be available to the appellant by virtue of the subpoena. She testified that the affidavits would have been available to the appellant had he taken advantage of his subpoena. We cannot conclude that the prosecutor violated his duty to disclose favorable evidence to the appellant when the evidence was already available to him.</p>

<p><i>Brown v. State</i>, 513 S.W.2d 35, 36 (Tex. Crim. App. 1974)</p>	<p>Known to state</p>	<p>Appellant argues that the State had an affirmative duty to account for all possible witnesses, that the State owed a duty to pursue the whereabouts of the unknown witness, and that this fact should raise an inference that the witness would have testified favorably to appellant and unfavorably to the State. He argues that by its failure to seek out the unknown witness the State has suppressed evidence just the same as if they had covered up tangible evidence in their possession that was favorable to appellant.</p> <p>The record does not show that the identity of the unidentified man was known to the State. Nor does it show that the State did not attempt to find him. It appears that his identity and whereabouts were as available to appellant as to the State. There is absolutely no evidence in the record that evidence favorable to appellant was suppressed.</p>
<p><i>Ex parte Mares</i>, Not Reported in S.W.3d, 2010 WL 2006771 (Tex.Crim.App. 2010),</p>	<p><i>Giglio</i></p>	<p>State's failure to disclose victim's statements regarding shooter's characteristics constituted <i>Brady</i> violation.</p> <p>Even evidence that may not be admissible may be material to preparation of the defendant's case and could become admissible as impeachment evidence under appropriate circumstances. <i>Id.</i> Wisdom and best practices, then, encourage a prosecutor to disclose all exculpatory and impeachment evidence. Here, because Yao's statements were not revealed to applicant until eight years after trial and over eight years after Yao's death, it is difficult to know whether the withheld evidence would have led to other admissible evidence if it had been timely disclosed. In the instant case, applicant need not establish what other evidence or witnesses he might have discovered. If the evidence had been timely disclosed, Yao's statements, or the implication that, while applicant was involved in the robbery, he may not have been the shooter, would have been available at trial.</p> <p>The withheld evidence does not exonerate applicant of his participation in the robbery, but had the state timely disclosed Yao's statements, as required by <i>Brady</i>, the statements could have been used by the defense to persuade the jury that applicant was not the shooter. In light of all the evidence, including the highly favorable disposition of Whitlock's charges, the absence of the withheld evidence undermines confidence in the jury's determination of punishment.</p>

BRADY RESOURCES

Title
<p><i>Benchbook for U.S. District Court Judges 5th ed.</i></p> <p>Draft of Section 5.06: Duty to Disclose Information Favorable to Defendant (Brady and Giglio Material)</p> <p>Advisory Committee on Criminal Rules</p> <p>2012</p>
<p><i>Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies.</i></p> <p>Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.</p> <p>October 2004</p>
<p><i>Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process</i></p> <p>NYU Law Review</p> <p>2006</p>
<p><i>Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team</i></p> <p>Stanford Law Review</p> <p>2015</p>
<p><i>Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material</i></p> <p>Cornell Law Review</p> <p>2003</p>
<p><i>List of Every Successful Brady/Napue Case by Jurisdiction</i></p> <p>Habeas Assistance and Training</p> <p>2017</p>
<p><i>Brady v. Maryland Outline</i></p> <p>Public Defender Service for the District of Columbia</p> <p>2013</p>

RELEVANT JUVENILE LAW STATUTES

Sec. 51.13. EFFECT OF ADJUDICATION OR DISPOSITION.

- (a) Except as provided by Subsections (d) and (e), an order of adjudication or disposition in a proceeding under this title is not a conviction of crime. Except as provided by Chapter 841, Health and Safety Code, an order of adjudication or disposition does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.
- (b) The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent:
- (1) proceedings under this title in which the child is a party;
 - (2) sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965; or
 - (3) civil commitment proceedings under Chapter 841, Health and Safety Code.
- (c) A child may not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of crime, except:
- (1) for temporary detention in a jail or lockup pending juvenile court hearing or disposition under conditions meeting the requirements of Section 51.12;
 - (2) after transfer for prosecution in criminal court under Section 54.02, unless the juvenile court orders the detention of the child in a certified juvenile detention facility under Section 54.02(h);
 - (3) after transfer from the Texas Juvenile Justice Department under Section 245.151(c), Human Resources Code; or
 - (4) after transfer from a post-adjudication secure correctional facility, as that term is defined by Section 54.04011.
- (d) An adjudication under Section 54.03 that a child engaged in conduct that occurred on or after January 1, 1996, and that constitutes a felony offense resulting in commitment to the Texas Juvenile Justice Department under Section 54.04(d)(2), (d)(3), or (m) or 54.05(f) or commitment to a post-adjudication secure correctional facility under Section 54.04011 for conduct that occurred on or after December 1, 2013, is a final felony conviction only for the purposes of Sections 12.42(a), (b), and (c)(1) or Section 12.425, Penal Code.
- (e) A finding that a child engaged in conduct indicating a need for supervision as described by Section 51.03(b)(6) is a conviction only for the purposes of Sections 43.261(c) and (d), Penal Code.

Sec. 58.005. CONFIDENTIALITY OF FACILITY RECORDS.

(a) This section applies only to the inspection, copying, and maintenance of a record concerning a child and to the storage of information from which a record could be generated, including personally identifiable information, information obtained for the purpose of diagnosis, examination, evaluation, or treatment of the child or for making a referral for treatment of the child, and other records or information, created by or in the possession of:

(1) the Texas Juvenile Justice Department;

(2) an entity having custody of the child under a contract with the Texas Juvenile Justice Department; or

(3) another public or private agency or institution having custody of the child under order of the juvenile court, including a facility operated by or under contract with a juvenile board or juvenile probation department.

(a-1) Except as provided by Article 15.27, Code of Criminal Procedure, the records and information to which this section applies may be disclosed only to:

(1) the professional staff or consultants of the agency or institution;

(2) the judge, probation officers, and professional staff or consultants of the juvenile court;

(3) an attorney for the child;

(4) a governmental agency if the disclosure is required or authorized by law;

(5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(6) the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(b) This section does not affect the collection, dissemination, or maintenance of information as provided by Subchapter B or D-1.

Sec. 58.007. CONFIDENTIALITY OF PROBATION DEPARTMENT, PROSECUTOR, AND COURT RECORDS.

(a) This section applies only to the inspection, copying, and maintenance of a record concerning a child and the storage of information, by electronic means or otherwise, concerning the child from which a record could be generated and does not affect the collection, dissemination, or maintenance of information as provided by Subchapter B or D-1. This section does not apply to a record relating to a child that is:

- (1) required or authorized to be maintained under the laws regulating the operation of motor vehicles in this state;
- (2) maintained by a municipal or justice court; or
- (3) subject to disclosure under Chapter 62, Code of Criminal Procedure.

(b) Except as provided by Section 54.051(d-1) and by Article 15.27, Code of Criminal Procedure, **the records**, whether physical or electronic, of a juvenile court, a clerk of court, a juvenile probation department, or a prosecuting attorney relating to a child who is a party to a proceeding under this title **may be inspected or copied only by:**

- (1) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (2) a juvenile justice agency as that term is defined by Section 58.101;

(3) an attorney representing a party in a proceeding under this title;

(4) a person or entity to whom the child is referred for treatment or services, if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(5) a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or

(6) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(b-1) A person who is the subject of the records is entitled to access the records for the purpose of preparing and presenting a motion or application to seal the records.

(c) Repealed by Acts 2017, 85th Leg., R.S., Ch. 746 (S.B. 1304), Sec. 21(4), eff. September 1, 2017.

(d) Repealed by Acts 2017, 85th Leg., R.S., Ch. 746 (S.B. 1304), Sec. 21(4), eff. September 1, 2017.

(e) Repealed by Acts 2017, 85th Leg., R.S., Ch. 746 (S.B. 1304), Sec. 21(4), eff. September 1, 2017.

(f) Repealed by Acts 2017, 85th Leg., R.S., Ch. 746 (S.B. 1304), Sec. 21(4), eff. September 1, 2017.

(g) For the purpose of offering a record as evidence in the punishment phase of a criminal proceeding, a prosecuting attorney may obtain the record of a defendant's adjudication that is admissible under Section 3(a), Article 37.07, Code of Criminal Procedure, by submitting a request for the record to the juvenile court that made the adjudication. If a court receives a request from a

prosecuting attorney under this subsection, the court shall, if the court possesses the requested record of adjudication, certify and provide the prosecuting attorney with a copy of the record. **If a record has been sealed under this chapter, the juvenile court may not provide a copy of the record to a prosecuting attorney under this subsection.**

(h) **The juvenile court may disseminate to the public** the following information relating to a child who is the subject of a directive to apprehend or a warrant of arrest and who cannot be located for the purpose of apprehension:

(1) **the child's name**, including other names by which the child is known;

(2) the child's physical description, including sex, weight, height, race, ethnicity, eye color, hair color, scars, marks, and tattoos;

(3) a photograph of the child; and

(4) a description of the conduct the child is alleged to have committed, including the level and degree of the alleged offense.

(i) In addition to the authority to release information under Subsection (b)(6), a juvenile probation department may release information contained in its records without leave of the juvenile court pursuant to guidelines adopted by the juvenile board.

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

(1) any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child; and

(2) any information that is excepted from required disclosure under Chapter 552, Government Code, or other law.

Sec. 58.008. CONFIDENTIALITY OF LAW ENFORCEMENT RECORDS.

(a) This section applies only to the inspection, copying, and maintenance of a record concerning a child and to the storage of information, by electronic means or otherwise, concerning the child from which a record could be generated and does not affect the collection, dissemination, or maintenance of information as provided by Subchapter B. This section does not apply to a record relating to a child that is:

- (1) required or authorized to be maintained under the laws regulating the operation of motor vehicles in this state;
- (2) maintained by a municipal or justice court; or
- (3) subject to disclosure under Chapter 62, Code of Criminal Procedure.

(b) Except as provided by Subsection (d), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult records;
 - (2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and
 - (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.
- (c) The law enforcement records of a person with a determinate sentence who is transferred to the Texas Department of Criminal Justice may be transferred to a central state or federal depository for adult records after the date of transfer and may be shared in accordance with the laws governing the adult records in the depository.

(d) Law enforcement records concerning a child may be inspected or copied by:

- (1) a juvenile justice agency, as defined by Section 58.101;
- (2) a criminal justice agency, as defined by Section 411.082, Government Code;
- (3) the child; or
- (4) the child's parent or guardian.

(e) Before a child or a child's parent or guardian may inspect or copy a record concerning the child under Subsection (d), the custodian of the record shall redact:

- (1) any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child; and
- (2) any information that is excepted from required disclosure under Chapter 552, Government Code, or any other law.

(f) If a child has been reported missing by a parent, guardian, or conservator of that child, information about the child may be forwarded to and disseminated by the Texas Crime Information Center and the National Crime Information Center.

Sec. 58.005. CONFIDENTIALITY OF FACILITY RECORDS.

(a) This section applies only to the inspection, copying, and maintenance of a record concerning a child and to the storage of information from which a record could be generated, including personally identifiable information, information obtained for the purpose of diagnosis, examination, evaluation, or treatment of the child or for making a referral for treatment of the child, and other records or information, created by or in the possession of:

(1) the Texas Juvenile Justice Department;

(2) an entity having custody of the child under a contract with the Texas Juvenile Justice Department; or

(3) another public or private agency or institution having custody of the child under order of the juvenile court, including a facility operated by or under contract with a juvenile board or juvenile probation department.

(a-1) Except as provided by Article 15.27, Code of Criminal Procedure, the records and information to which this section applies may be disclosed only to:

(1) the professional staff or consultants of the agency or institution;

(2) the judge, probation officers, and professional staff or consultants of the juvenile court;

(3) an attorney for the child;

(4) a governmental agency if the disclosure is required or authorized by law;

(5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(6) the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(b) This section does not affect the collection, dissemination, or maintenance of information as provided by Subchapter B or D-1.

Sec. 58.258. ORDER SEALING RECORDS.

(a) An order sealing the records of a person under this subchapter must include either the following information or the reason one or more of the following is not included in the order:

(1) the person's:

(A) full name;

(B) sex;

(C) race or ethnicity;

(D) date of birth;

(E) driver's license or identification card number; and

(F) social security number;

(2) each instance of conduct indicating a need for supervision or delinquent conduct alleged against the person or for which the person was referred to the juvenile justice system;

(3) the date on which and the county in which each instance of conduct was alleged to have occurred;

(4) if any petitions relating to the person were filed in juvenile court, the cause number assigned to each petition and the court and county in which each petition was filed; and

(5) a list of the entities believed to be in possession of the records that have been ordered sealed, including the entities listed under Subsection (b).

(b) Not later than the 60th day after the date of the entry of the order, the court shall provide a copy of the order to:

(1) the Department of Public Safety;

(2) the Texas Juvenile Justice Department, if the person was committed to the department;

(3) the clerk of court;

(4) the juvenile probation department serving the court;

(5) the prosecutor's office;

(6) each law enforcement agency that had contact with the person in relation to the conduct that is the subject of the sealing order;

(7) each public or private agency that had custody of or that provided supervision or services to the person in relation to the conduct that is the subject of the sealing order; and

(8) each official, agency, or other entity that the court has reason to believe has any record containing information that is related to the conduct that is the subject of the sealing order.

(c) On entry of the order, all adjudications relating to the person are vacated and the proceedings are dismissed and treated for all purposes as though the proceedings had never occurred. The clerk of court shall:

(1) seal all court records relating to the proceedings, including any records created in the clerk's case management system; and

(2) send copies of the order to all entities listed in the order.

Sec. 58.259. ACTIONS TAKEN ON RECEIPT OF ORDER TO SEAL RECORDS.

(a) An entity receiving an order to seal the records of a person issued under this subchapter shall, not later than the 61st day after the date of receiving the order, take the following actions, as applicable:

(1) the Department of Public Safety shall:

(A) **limit access** to the records relating to the person in the juvenile justice information system to only the Texas Juvenile Justice Department for the purpose of conducting research and statistical studies;

(B) **destroy any other records** relating to the person in the department's possession, including DNA records as provided by Section 411.151, Government Code; and

(C) send written verification of the limitation and destruction of the records to the issuing court;

(2) the Texas Juvenile Justice Department shall:

(A) seal all records relating to the person, other than those exempted from sealing under Section 58.252; and

(B) send written verification of the sealing of the records to the issuing court;

(3) a public or private agency or institution that had custody of or provided supervision or services to the person who is the subject of the records, the juvenile probation department, a law enforcement entity, or a prosecuting attorney shall:

(A) **seal all records relating to the person;** and

(B) send written verification of the sealing of the records to the issuing court; and

(4) any other entity that receives an order to seal a person's records shall:

(A) send any records relating to the person to the issuing court;

(B) delete all index references to the person's records; and

(C) send written verification of the deletion of the index references to the issuing court.

(b) Physical or electronic records are considered sealed if the records are not destroyed but are stored in a manner that allows access to the records only by the custodian of records for the entity possessing the records.

(c) If an entity that received an order to seal records relating to a person later receives an inquiry about a person or the matter contained in the records, the entity must respond that no records relating to the person or the matter exist.

(d) If an entity receiving an order to seal records under this subchapter is unable to comply with the order because the information in the order is incorrect or insufficient to allow the entity to identify the records that are subject to the order, the entity shall notify the issuing court not later than the 30th day after the date of receipt of the order. The court shall take any actions necessary and possible to

provide the needed information to the entity, including contacting the person who is the subject of the order or the person's attorney.

(e) If an entity receiving a sealing order under this subchapter has no records related to the person who is the subject of the order, the entity shall provide written verification of that fact to the issuing court not later than the 30th day after the date of receipt of the order.

Sec. 58.260. INSPECTION AND RELEASE OF SEALED RECORDS.

(a) **A juvenile court may allow, by order**, the inspection of records sealed under this subchapter or under Section 58.003, as that law existed before September 1, 2017, **only by**:

(1) a person named in the order, on the petition of the **person who is the subject of the records**;

(2) **a prosecutor**, on the petition of the prosecutor, for the purpose of reviewing the records for possible use:

(A) in a capital prosecution; or

(B) for the enhancement of punishment under Section 12.42¹, Penal Code; or

(3) **a court**, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department for the purposes of Article 62.007(e)², Code of Criminal Procedure.

(b) After a petitioner inspects records under this section, the court may order the release of any or all of the records to the petitioner on the motion of the petitioner.

¹ (f) For the purposes of Subsections (a), (b), and (c)(1), an adjudication by a juvenile court under Section 54.03, Family Code, that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony offense for which the child is committed to the Texas Juvenile Justice Department under Section 54.04(d)(2), (d)(3), or (m), Family Code, or Section 54.05(f), Family Code, or to a post-adjudication secure correctional facility under Section 54.04011, Family Code, is a final felony conviction.

² (e) Records and files, including records that have been sealed under Chapter 58, Family Code, relating to a person for whom a court, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department is required under this article to determine a level of risk shall be released to the court, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department, as appropriate, for the purpose of determining the person's risk level.

Sec. 58.261. EFFECT OF SEALING RECORDS.

(a) **A person whose records have been sealed** under this subchapter or under Section 58.003, as that law existed before September 1, 2017, **is not required to state in any proceeding** or in any application for employment, licensing, admission, housing, or other public or private benefit **that the person has been the subject of a juvenile matter.**

(b) If a person's records have been sealed, the information in the records, the fact that the records once existed, or the person's denial of the existence of the records or of the person's involvement in a juvenile matter may not be used against the person in any manner, including in:

- (1) a perjury prosecution or other criminal proceeding;
- (2) a civil proceeding, including an administrative proceeding involving a governmental entity;
- (3) an application process for licensing or certification; or
- (4) an admission, employment, or housing decision.

(c) A person who is the subject of the sealed records may not waive the protected status of the records or the consequences of the protected status.

KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by [Morgan v. State](#), Iowa, April 17, 1991

94 S.Ct. 1105
Supreme Court of the United States

Joshaway DAVIS, Petitioner,
v.
State of ALASKA.

No. 72—5794.
|
Argued Dec. 12, 1973.
|
Decided Feb. 27, 1974.

Synopsis

By a judgment of the Superior Court, Third Judicial District, Anchorage, the defendant was convicted of burglary and grand larceny, and he appealed. The [Alaska Supreme Court, 499 P.2d 1025](#), affirmed and certiorari was granted. The Supreme Court, Chief Justice Burger, held that refusal to allow defendant to cross-examine key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied defendant his constitutional right to confront witnesses, notwithstanding state policy protecting anonymity of juvenile offenders.

Reversed and remanded.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Rehnquist joined.

****1106 Syllabus***

***308** Petitioner was convicted of grand larceny and burglary following a trial in which the trial court on motion of the prosecution issued a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to a burglary and his probation status at the time of the events as to which he was to testify. The trial court's order was based on state provisions protecting the anonymity of juvenile offenders. The Alaska Supreme

Court affirmed. Held: Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments, Pp. 1110—1112.

(a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 1110—1111.

(b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 1111—1112.

****1107** [499 P.2d 1025](#), reversed and remanded.

Attorneys and Law Firms

Robert H. Wagstaff, Anchorage, Alaska, for the petitioner.
Charles M. Merriner, Anchorage, Alaska, for the respondent. ***309**

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

(1)

When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970, well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square

and weighing several hundred pounds, had been removed from the premises.

Later that afternoon the Alaska State Troopers received word that a safe had been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he had seen and spoken with two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage *310 police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute, Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February 18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

At trial, evidence was introduced to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe.

Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with 'something like a crowbar' in his hands. Green identified petitioner at the trial as the man with the 'crowbar.' The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in the course of cross-examination. At the time of the *311 trial and at the time of the events Green testified to, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at **1108 the time of the Polar Bar burglary but had turned 17 prior to trial.

In opposing the protective order, petitioner's counsel

made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23,¹ and Alaska Stat. s 47.10.080(g) (1971).²

*312 Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about any suspicions the police might have been expected to harbor against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

Defense counsel cross-examined Green in part as follows: 'Q. Were you upset at all by the fact that this safe was found on your property?

'A. No, sir.

'Q. Did you feel that they might in some way suspect you of this?

'A. No.

'Q. Did you feel uncomfortable about this though?

'A. No, not really.

'Q. The fact that a safe was found on your property?

'A. No.

'Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

‘A. I thought they might ask a few questions is all.

‘Q. Did that thought ever enter your mind that you—the police might think that you were somehow connected with this?

*313 ‘A. No, it didn’t really bother me, no.

‘Q. Well, but . . .

‘A. I mean, you know, it didn’t—it didn’t come into my mind as worrying me, you know.

‘Q. That really wasn’t—wasn’t my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had **1109 something to do with this, that they might have that in their mind, and that you . . .

‘A. That came across my mind, yes, sir.

‘Q. That did cross your mind?

‘A. Yes.

‘Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

‘A. Yes, sir.

‘Q. And then went into the investigators’ room with Investigator Gray and Investigator Weaver?

‘A. Yeah.

‘Q. And they started asking you questions about—about the incident, is that correct?

‘A. Yeah.

‘Q. Had you ever been questioned like that before by any law enforcement officers?

‘A. No.

‘MR. RIPLEY: I’m going to object to this, Your Honor, it’s a carry-on with rehash of the same thing. He’s attempting to raise in the jury’s mind . . .

‘THE COURT: I’ll sustain the objection.’

inquiry as to the witness’ being on probation under a juvenile court adjudication, Green’s protestations of unconcern over possible police suspicion that he might *314 have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged. The tension between the right of confrontation and the State’s policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable that Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court’s ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold ‘No’ answer would have been given by Green absent a belief that he was shielded from traditional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of his February 16 confrontation with the two men on the road.

The Alaska Supreme Court affirmed petitioner’s conviction,³ concluding that it did not have to resolve the potential conflict in this case between a defendant’s right to a meaningful confrontation with adverse witnesses and the State’s interest in protecting the anonymity of a juvenile offender since ‘our reading of the trial *315 transcript convinces us that counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive.’ 499 P.2d 1025, 1036 (1972). Although the court admitted that Green’s denials of any sense of anxiety or apprehension upon the safe’s being found close to his home were possibly self-serving, ‘the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the youth and **1110 pass on his credibility.’ Ibid. The court concluded that, in light of the indirect references permitted, there was no error.

Since we granted certiorari limited to the question of whether petitioner was denied his right under the Confrontation Clause to adequately cross-examine Green, 410 U.S. 925, 93 S.Ct. 1392, 35 L.Ed.2d 586 (1973), the essential question turns on the correctness of the Alaska court’s evaluation of the ‘adequacy’ of the scope of cross-examination permitted. We disagree with that

Since defense counsel was prohibited from making

court's interpretation of the Confrontation Clause and we reverse.

(2)

[1] [2] The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is to secure for the opponent the opportunity of *316 cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' (Emphasis in original.) 5 J. Wigmore, *Evidence* s 1395, p. 123 (3d ed. 1940).

[3] [4] [5] [6] Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, *Evidence* s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a

witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-*317 examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).⁴

**1111 In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.⁵

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas v. Alabama*, 380 U.S., at 419, 85 S.Ct., at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was *318 admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931),⁶ as well as of Green's possible concern that he might be a suspect in the investigation.

[7] We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

*319 (3)

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender **1112 to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

^[8] We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault*, 387 U.S. 1, 25, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In *Alford v. United States*, supra, we upheld the right *320 of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the *United States*.' 282 U.S., at 693, 51 S.Ct., at 220. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

'(N)o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect

him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' *Id.*, at 694, 51 S.Ct., at 220.

As in *Alford*, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is *321 remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice STEWART, concurring.

The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case in order 'to show the existence of possible bias and prejudice . . .,' ante, at 1111. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a **1113 right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

As I see it, there is no constitutional principle at stake

here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a state appellate court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to the defense. Yet the Court insists on second-guessing the state courts and in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone for enough. I would not undertake this task, if for no other reason than that I have

little faith in our ability, in fact-bound cases and on a cold record, to improve on the judgment of trial judges and of the state appellate courts who agree with them. I would affirm the judgment.

All Citations

415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Rule 23 provides:
'No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.'
- 2 [Section 47.10.080\(g\)](#) provides in pertinent part:
'The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . .'
- 3 In the same opinion the Alaska Supreme Court also affirmed petitioner's conviction, following a separate trial, for being a felon in possession of a concealable firearm. That conviction is not in issue before this Court.
- 4 In *Greene* we stated:
'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . .' [360 U.S.](#), at 496, [79 S.Ct.](#), at 1413.
- 5 '(A) partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.' 3A J. Wigmore, *Evidence* s 940, p. 776 (Chadbourn rev. 1970). (Emphasis in original; footnotes omitted.)
- 6 Although *Alford* involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt. In [Smith v. Illinois](#), [390 U.S. 129, 132—133, 88 S.Ct. 748, 750—751, 19 L.Ed.2d 956 \(1968\)](#), we relied, in part, on *Alford* to reverse a state criminal conviction on confrontation grounds.

Declined to Extend by [Johnson v. State](#), Tex.Crim.App., June 18, 2014

327 S.W.3d 138
Court of Criminal Appeals of Texas.

Christopher IRBY, Appellant,
v.
The STATE of Texas.

No. PD-1097-08.
|
June 16, 2010.

Synopsis

Background: Defendant was convicted in the 195th Judicial District Court, Dallas County, [Fred Tinsley, J.](#), of sexually assaulting a child under the age of 17 and sentenced to life in prison. The Court of Appeals, [Mazzant, J.](#), [2008 WL 2469275](#), affirmed. Defendant petitioned for review which was granted.

Holdings: The Court of Criminal Appeals, [Cochran, J.](#), held that:

^[1] constitutional right of confrontation did not confer upon defendant an automatic right to cross-examine victim about his status as a probationer; overruling [Maxwell v. State](#), 48 S.W.3d 196, and

^[2] trial judge did not abuse his discretion in excluding evidence of victim’s status as probationer.

Affirmed.

[Holcomb, J.](#), dissented and filed opinion in which [Womack](#) and [Hervey, JJ.](#), joined.

[Price, J.](#), dissented.

Attorneys and Law Firms

*140 Katherine A. Drew, Asst. Public Defender, Dallas, for Appellant.

Christine Womble, Asst. Dist. Atty., Dallas, [Jeffrey L. Van Horn](#), State’s Atty., Austin, for State.

Opinion

OPINION

[COCHRAN, J.](#), delivered the opinion of the Court in which [KELLER, P.J.](#), and [MEYERS, JOHNSON](#), and [KEASLER, JJ.](#), joined.

In this case we hold that a defendant must show some causal connection or logical relationship between a witness’s probationary status and his potential bias to testify favorably toward the State before the witness may be cross-examined with that status.¹ Evidence that a witness with a juvenile record might be testifying because of a need to “curry favor” with the State or shift suspicion away from himself is constitutionally relevant and admissible under the Confrontation Clause.² But the mere fact that a witness is on probation is not sufficient, by itself, to establish a potential bias or motive to testify. We therefore affirm the court of appeals.³

I.

A. Trial Proceedings.

Appellant was charged with the sexual assault of W.P., a sixteen-year-old child, enhanced with a prior conviction for indecency with a child.

Before trial, appellant’s counsel told the trial judge that he wanted to cross-examine W.P. about the fact that he was on deferred-adjudication probation for aggravated assault with a deadly weapon. He stated that W.P.’s “vulnerable status” was relevant to show bias and motive under [Davis v. Alaska](#).⁴ The trial judge deferred his ruling because he had not yet heard any of the facts. During the trial, the judge gave the defense two more hearings outside the presence of the jury to show a plausible connection between W.P.’s “vulnerable status” and a possible bias or motive to fabricate his story, but the judge ultimately disallowed the proposed cross-examination. He concluded that W.P.’s “juvenile records” were irrelevant to show a possible motive to fabricate because the two matters were “completely separate.”

W.P. testified that he was sixteen years old in January of 2005. He worked part-time for his contractor-father, Bobby, after he was expelled from school.⁵ W.P. first met

appellant sometime around January 8th, when his friend, James, asked appellant *141 if the boys could do some cleaning work for him. Appellant agreed and put W.P. and James to work cleaning blinds at a lady's house. Afterwards, appellant had the boys spend the night in his apartment. James had appellant buy some "Apple Pucker" alcohol to celebrate James's birthday. W.P. had never drunk much alcohol before, but he thought it was "cool" to sit around drinking with James and appellant. W.P. and James got drunk and threw up. Afterwards, W.P. lay down on a futon, while James stretched out on the floor. After James fell asleep, appellant put a "hardcore porno" videotape in the TV and came over to W.P. and asked if he could "help" him. W.P. didn't know what he meant. But then appellant "kind of pulled the covers off of me and he came down and started to mess with my penis.... He eventually sucked my penis." W.P. pushed him away, turned over, and went to sleep.

The next morning W.P. did not say anything to appellant because he "was freaked out and [he] didn't know what to do." He waited around for his money for washing the blinds the day before. Appellant paid W.P. for the blinds and then gave him some extra money "for what he had done and that [W.P.] should not tell James or anyone." But that very afternoon W.P. did tell James. James made W.P. feel bad because he "was talking down on me like that I was gay and like I was wrong and I shouldn't have done it." W.P. was hurt by James's reaction, so he did not tell anyone else about what had happened.

About three or four weeks later, appellant started calling and asking if W.P. could come over and let appellant watch him masturbate. At first, W.P. did not want to see appellant, but he later called and asked to borrow some money. Appellant said that if W.P. "came over there and let him watch [W.P.] masturbate that he would pay [him] some money and [he] wouldn't have to borrow it." W.P. figured that this was "easy money," so he went over to appellant's apartment. Appellant gave him oral sex, then paid him \$100. This happened again one or two more times. The last time it happened—in March or April—appellant said that he would pay W.P. \$200, but he only gave him \$100.

On April 6th, W.P. told William, a lifelong family friend, what he and appellant had done and how appellant owed him money. At first, William didn't believe W.P., but when he did, he was "shocked" and angry: "Oh, man, it tore me up," but W.P. told him to "keep his cool whenever he came over" to appellant's apartment.

W.P. spent the night of April 6th at appellant's house, along with William, another friend, Marcus, and Jason

Dennis, a friend of Marcus's. They were all drinking and smoking marijuana.⁶ The four boys left around noon and walked back to W.P.'s house because he was supposed to work for his father that day. After Marcus and his friend left, W.P. and William decided to go back to appellant's apartment to get the \$100 that appellant owed him. They told W.P.'s father that appellant owed W.P. money and they were going to go get it. When the two boys did not immediately return, W.P.'s father drove over to appellant's apartment to collect them. Appellant opened the door and *142 told Bobby that W.P. was not there. Bobby then drove back home, and about ten minutes later W.P. and William returned. W.P. seemed "perplexed," and both boys were "agitated." W.P. said that he wanted his money from appellant, so Bobby said that he would drive him over to appellant's apartment to "check on" the money, and then they would go to work.

William, however, had already started back to appellant's apartment to get W.P.'s money. He was angry at appellant. W.P. told his mother that William was going to "jack" appellant for some money.⁷ W.P.'s mother told Bobby that William was angry and going to appellant's to collect W.P.'s money, so all three of them drove toward appellant's apartment and found William along the way. William got into the truck with them. Bobby stopped at appellant's apartment complex, saw him in the parking lot, and asked him if he would have W.P.'s money later that day. Appellant said that "more than likely he would," so Bobby said that they would come back later.

Meanwhile, W.P. whispered to his mother, telling her what he and appellant had been doing. As Bobby drove down the street, W.P.'s mother told him that she and W.P. had something to tell him. Bobby pulled into a washateria parking lot, and W.P. told his father exactly why appellant owed him the \$100 and why William was angry and ready to "jack" appellant. Bobby called 911 on his cell phone, but the dispatcher told him to come to the police station to make a statement.

Officer Burke, a patrol officer, happened to be driving by the washateria, and he stopped because he saw the family arguing.⁸ They were relieved to see him and said that the reason they were upset was because W.P.'s father had just found out that his son had been receiving oral sex from an adult man. W.P. told him that some videotapes in Jason Dennis's car might contain footage of the "sex acts."⁹ Officer Burke radioed other officers to go to appellant's apartment¹⁰ while he escorted W.P. and his family to the police station. They met with Debbie Rule, a 20-year veteran with the Balch Springs Police Department, who investigated crimes against children. They all gave written statements.

Finally, the State called Dr. Ellen J. Elliston, a psychologist, who testified that teen-agers who experience instability in their lives, such as the death of a family member, may be “more vulnerable to victimization.” She also stated that teen-age boys are reluctant to report sexual abuse and usually do not tell their parents about it. Further, their traumatization may affect their ability to provide details or tell a coherent version of events.

Appellant called Cheryl Anderson, a TXU Energy employee, who testified that she had been requested to search the TXU electricity records for appellant’s apartment address between December 1, 2004, and April 7, 2005. Ms. Anderson found no *143 TXU service records for that apartment during that time frame. She did not know whether electricity had been stopped at that apartment or if it had ever been restored. She did not know whether TXU had records for electricity to any of the other apartments in that complex or whether other electricity companies provided service.

Appellant also presented an alibi defense for January 8, 2005, from his aunt and uncle. They both testified that they met with appellant at the uncle’s house that evening at about 8:30 p.m. to decide whether to loan him \$500 to pay his apartment rent. Appellant’s aunt wrote him a check on that day for his rent, with the notation “Rent, Chris Irby, F1, December 23 through January 31.” She lent him the rent money because appellant was going to go to work for his uncle’s company and the repayment would be subtracted from his paycheck.

Phil Blackstone testified that he owned the “four-plex” building in the apartment complex where appellant lived. Appellant gave him the \$500 rent check from appellant’s aunt, and he deposited it on January 13, 2005. Because appellant did not pay the February or March rent, Mr. Blackstone had him evicted on April 14th.

Final arguments by both the prosecution and defense centered on whether W.P. fabricated the entire story of a sexual relationship with appellant. The prosecutor argued that W.P. had no motive to fabricate such a self-damaging sex-for-money story.¹¹ The defense argued that W.P. and his friends were liars who had conspired to rob appellant and, when that fell through, made up a tale of sexual exploitation. Defense counsel pointed to numerous inconsistencies and contradictions in the witnesses’ testimony and listed seven specific “lies.”¹² He summed up the defense position as follows:

repeatedly.... And the problem with the testimony that you’ve heard from [W.P.] and all of those lies is that in that same breath he told you he got sexually assaulted and none of you saw any change in his demeanor between when he was lying and we know he was lying and when he said he was sexually assaulted. He didn’t start to stutter, give you any clue that he was lying. It flowed from him like water. The lies came right along with the allegation of sexual assault.

...

Motive. I told you in opening I can’t tell you what the motive is. I think you heard from some bad people. I think William Flowers is a bad person. I think when you’re 19 and you have decided to tattoo your neck and hands, you’ve made a statement to the world—

The defense then compared the inconsistencies of the State’s witnesses with the consistency of appellant’s alibi witnesses:

And I don’t think you should have any doubts about the credibility of our witnesses, because unlike the State’s witnesses, when you are telling the truth it is easy to tell a coherent consistent story.

In rebuttal, the State admitted to various inconsistencies by W.P. and his friends and family: “There are going to be some differences. Does that mean they’re lying? Does that mean that there is some conspiracy against this defendant brought on by [W.P.] and his friends? No.” The prosecutor reminded the jury of the psychologist’s testimony concerning emotional problems brought on by high stress events and of how W.P. had been affected by finding his big brother after he had committed suicide.

The jury convicted appellant and, because he had a prior sex-offense conviction, the trial judge was required to sentence him to life in prison.

B. Proceedings in the Court of Appeals.

On appeal, appellant complained that the trial judge denied him his constitutional right to confrontation and cross-examination by not permitting defense counsel to cross-examine W.P. about his juvenile deferred-adjudication probation.¹³ The court of appeals upheld the trial judge’s ruling. It first noted that “evidence of a juvenile adjudication, outside the realm of a juvenile proceeding, is not admissible for impeachment unless

*144 Ladies and gentlemen, you’ve been lied to

required by the Texas or United States Constitutions.”¹⁴ It then acknowledged that the confrontation clause may require the admission of such evidence “if the cross-examination is reasonably calculated to expose a motive, bias, *145 or interest for the witness to testify.”¹⁵ But the mere fact that a juvenile had been placed on probation or had some other “vulnerable relationship” with the State is not enough to establish bias or prejudice; the cross-examiner must show some “causal connection” between the witness’s “vulnerable relationship” and the witness’s testimony.¹⁶ The court of appeals concluded that appellant had failed to show any such connection between W.P.’s juvenile record and his testimony at trial, thus the trial judge did not abuse his discretion in forbidding such cross-examination.¹⁷

On discretionary review in this Court, appellant argues that the court of appeals incorrectly held that *Davis v. Alaska* mandates a “causal connection” between the witness’s “vulnerable relationship” with the State and the potential bias or prejudice of that witness. He also asserts that our decision in *Carpenter v. State*,¹⁸ which had held that the proponent of the evidence of a pending charge must establish “some causal connection or logical relationship” between the pending charges and the witness’s potential bias before it is admissible,¹⁹ was “wrongly decided.”²⁰

II.

[1] [2] [3] [4] The constitutional right of confrontation includes the right to cross-examine the witnesses and the opportunity to show that a witness is biased or that his testimony is exaggerated or unbelievable.²¹ Nonetheless, the trial judge retains wide latitude to impose reasonable limits on such cross-examination “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”²² The constitutional right to cross-examine concerning the witness’s potential bias or prejudice does not include “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”²³

Appellant relies upon *Davis v. Alaska* and its Texas progeny for the proposition that any witness, including a juvenile, who is on probation may be cross-examined *146 about that status to show a potential bias or motive to testify for the State.²⁴ Appellant reads these cases too broadly.

In *Davis*, the evidence showed that someone burglarized the Polar Bar and stole its safe, which contained over a thousand dollars in cash.²⁵ The same day, police received a tip that a safe had been discovered 26 miles outside Anchorage near the home of Jess Straight. When questioned by the police at the scene, Mr. Straight’s stepson, Richard Green, told them that he had seen and spoken with “two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered.”²⁶ Serendipitously, Richard Green was on juvenile probation for burglarizing two cabins.²⁷ He identified the defendant as one of the two men he had met in a photographic show-up the next day and, after the defendant’s arrest, identified him in a live line-up.²⁸

At trial, the defendant argued that, although juvenile records were confidential under Alaska law, he should have been allowed to cross-examine Richard about his probation because Richard might (1) have felt that he was a suspect himself; and (2) have been subjected to undue pressure from police, fearing possible probation revocation.²⁹ The trial judge refused to allow the cross-examination, but the Supreme Court held that, “[o]n these facts,” the defendant’s constitutional right to cross-examine the witnesses against him for bias and motive was violated. The Supreme Court carefully distinguished between the “introduction of evidence of a prior crime [as] a general attack on the credibility of the witness” and “[a] more particular attack on the witness’ credibility by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.”³⁰ That is, Richard may have felt that the police would suspect him of the burglary both because he had a prior burglary adjudication and because the emptied safe was found on his family’s property. Based upon these particular facts, Richard had a possible motive to divert suspicion from himself to another. Further, the police might also have brought undue pressure upon Richard to make an identification of someone—anyone—because he was in “a vulnerable relationship” by virtue of being on probation for burglary, a fact that the investigating officers may also have known and used in questioning him. Richard’s possible motives were directly related and connected “to issues or personalities in the case at hand.”

[5] The Supreme Court found that the state’s policy interest in protecting the confidentiality of a juvenile offender’s record could not require the defendant to *147 yield his right to cross-examine a witness for a particular bias.³¹ But the Court carefully tailored its decision to the very specific facts before it.³² As Justice Stewart

emphasized in his concurring opinion, *Davis* neither “holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his [or her] past delinquency adjudications or criminal convictions.”³³ And, as we recently held in *Hammer v. State*, neither *Davis* nor the Confrontation Clause require that courts permit the use of prior juvenile acts of misconduct or adjudications for general impeachment of credibility.³⁴

[6] In Texas, as in most jurisdictions, juvenile criminal records and adjudications are not admissible to impeach the general credibility of a testifying witness, even though the juvenile may be on probation and is technically in a “vulnerable relationship” with the State throughout that probationary period. Rule 609(d) of the Texas Rules of Evidence explicitly prohibits their use for attacking the general credibility of the witness.³⁵ But Rule 609(d) also contains an explicit exception that such evidence may be admissible when it is required by the United States Constitution,³⁶ such as in the *Davis* scenario.

[7] [8] [9] In *Carpenter v. State*,³⁷ this Court held that, in the context of cross-examination of a witness with pending charges, “[f]or the evidence to be admissible, the proponent must establish some causal connection or logical relationship between the pending charges and the witness’ ‘vulnerable relationship’ or potential bias or prejudice for the State, or testimony at trial.”³⁸ That is, a “vulnerable relationship” *148 based on a witness’s pending charges or probationary status does not hover cloud-like in the air, ready to rain down as impeachment evidence upon any and all such witnesses. There must be some logical connection between that “vulnerable relationship” and the witness’s potential motive for testifying as he does.³⁹ *149 As Judge Meyers explained in *Carpenter*, this “causal connection” or logical relationship is a matter of simple relevance under Rule 401.⁴⁰ Evidence that a witness is on probation, is facing pending charges, or has a prior juvenile record is not relevant for purposes of showing bias or a motive to testify absent some plausible connection between that fact and the witness’s testimony. *Carpenter* is a prime example of when and why a logical connection is necessary. A long line of cases hold that a witness may be cross-examined for bias concerning a pending charge because his testimony may be “given under a promise or expectation of immunity, or under the coercive effect of his detention by officers ... conducting the present prosecution.”⁴¹ But, in *Carpenter*, we did not follow that general rule because the pending charges were in federal court and the witness was testifying in state court. Thus, absent additional facts of some potential “deal” between state and federal authorities, there was no logical

connection between the federal pending charges and the witness’s possible motive to “curry favor” with state authorities. The pending federal charge was therefore irrelevant as a possible source of bias.⁴² The reasoning and result in *Carpenter* is in accord with numerous Texas cases in which the cross-examiner failed to show a logical connection between the fact or condition that *could* give rise to a potential bias or motive and the existence *150 of any bias or motive to testify.⁴³

Appellant relies on this Court’s opinion *151 in *Maxwell v. State*⁴⁴ for the proposition that the mere fact of probation status is always and inevitably sufficient to establish a witness’s potential bias and motive to “curry favor” with the authorities. Indeed, *Maxwell* could be read that broadly, but that would be inconsistent with *Carpenter* and our other Texas cases which require some logical relevance of the pending charge, probation or immigration status, or other alleged source of bias to the witness’s testimony.⁴⁵ In *Maxwell*, the Court relied upon two earlier Texas cases, in which the cross-examiner had, in fact, shown a logical relationship between the witness’s pending charge, probation, or other alleged source of bias and his testimony.⁴⁶ We said that Texas and Supreme Court cases “have indicated that a witness’s deferred adjudication probation status is sufficient to show a bias or interest in helping the State.”⁴⁷ Some of our cases might, at first blush, have “indicated” such a possibly broad brush, but they all use qualifiers such as “may be”⁴⁸ or “under certain circumstances,”⁴⁹ or “under these facts.”⁵⁰ And the cross-examiner must still show the relevance of the “vulnerable *152 status” or other alleged source of bias to the witness’s testimony. It is not enough to say that all witnesses who may, coincidentally, be on probation, have pending charges, be in the country illegally, or have some other “vulnerable status” are automatically subject to cross-examination with that status regardless of its lack of relevance to the testimony of that witness. Thus, to the extent that *Maxwell* is inconsistent with *Carpenter*, we overrule it.⁵¹

Furthermore, Texas, like other states, has an important interest in “protecting the anonymity of juvenile offenders[.]”⁵² Our Family Code and Rules of Evidence explicitly protect that anonymity.⁵³ To hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense.

In sum, *Davis v. Alaska* is not a blunderbuss that decimates all other evidentiary statutes, rules, and relevance requirements in matters of witness impeachment. It is a rapier that targets only a specific

mode of impeachment—bias and motive—when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness’s testimony. We therefore reject appellant’s absolutist position that “[a] probationer, particularly a probationer whose guilt has not yet been adjudicated, is always in a vulnerable relationship with the State” and that mere status is always automatically relevant to show a witness’s possible bias and motive to testify favorably for the State as inconsistent with Texas and United States Supreme Court precedent.

***153 III.**

^[10] Appellant also argues, as he did in the trial court, that he had shown a logical connection between W.P.’s probation status and his testimony. We therefore turn to that issue. At trial, it was appellant’s position that W.P. made up the story of sexual assault: It was a false allegation. Obviously, then, any evidence showing that W.P. had a motive to make up this story is relevant and admissible for impeachment purposes. The timing of this purportedly false allegation was crucial. If W.P. had a motive to make up the accusatory story, he had that motive at the time that he first told others about it.

When did he purportedly “make it up,” and whom did he tell? W.P. said that the first sexual encounter occurred on or about January 10, 2005, and that there were several more encounters in March and early April. The first person W.P. told was his friend James, the day after the first encounter. But James made W.P. feel bad about himself, so he did not tell anyone else for two months. The second person he told was his friend William on April 6th. The two boys were in a parking lot “just chillin’ ” at the time. According to W.P., William did not believe him at first, but when he did, it came as a “shock.” William testified that he believed W.P. “100 percent” because he would have “no reason to conjure up something like that.” The third person to whom W.P. related the story was his mother. He told her on April 7th, right after she, W.P., and his father had intercepted William on his way to demand \$100 from appellant—the unpaid half of the \$200 appellant had purportedly promised W.P. for their most recent sexual encounter. The fourth person W.P. told was his father, shortly after he told his mother. Finally, W.P. told the police the very same story that he had already told James, William, his mother, and his father. Thus, the motive to fabricate existed (if it did) at or before the time W.P. told James, William, his mother, and his father.

So how does the fact that W.P. was a juvenile on deferred-adjudication probation for aggravated assault provide a motive for him to make up this story? The trial judge gave appellant’s attorney three different hearings outside the presence of the jury to show a plausible connection. Appellant cited *Davis* and explained that, on the day that W.P. told the police about the sexual encounters, W.P. believed that he could get into trouble because William had planned to rob appellant. He elaborated:

I would state that the relevance is that the complaining witness has testified that one of the reasons he told his mother about this allegation, the first adult family member about it, was because of his fear of potentially getting in trouble over the circumstances surrounding William Flowers and any potential crime committed by William Flowers against Christopher Irby. Based on that, I believe that it is particularly relevant and there is a causal relationship.... And that he was either on bond or probation at that time, which would give him greater motivation to lie, greater motivation towards bias and to lie about the allegation given the fact that he was looking at charges ... should there have been a crime committed against Christopher Irby. And I believe the testimony bears out that that was his state of mind.⁵⁴

***154** But this argument is not logical. First, W.P. had already told two other people about the sexual encounters, so he did not make up the story at the time he told it to his mother. Second, W.P.’s act of telling his mother this story is totally unconnected to his later act of telling the police. Third, William had already been deterred from accosting appellant at the time W.P. told his mother this story, so any anticipated “robbery” by William had already been foiled.⁵⁵ Fourth, even if William had succeeded in “robbing” appellant, appellant fails to suggest how William’s conduct would be attributable to W.P. or how a false story of W.P.’s consensual sexual encounters would exonerate or ameliorate the conduct of either of them. Fifth, if W.P. felt that he had a “vulnerable relationship” with law enforcement or the State, the very last thing that he would logically do is invite their scrutiny by filing a criminal complaint against someone else for sexual

assault.⁵⁶ That act would make a “vulnerable relationship” much more vulnerable.⁵⁷

In this case, we agree with the trial judge and court of appeals that appellant failed to make a logical connection between W.P.’s testimony concerning his sexual encounters with appellant and his entirely separate probationary status. Thus, the trial judge did not abuse his discretion in excluding this impeachment evidence because it was irrelevant. We affirm the judgment of the court of appeals.

HOLCOMB, J., filed a dissenting opinion, in which WOMACK and HERVEY, JJ., joined.

PRICE, J., dissented.

*155 HOLCOMB, J., filed a dissenting opinion, in which WOMACK and HERVEY, JJ., joined.

I believe that we cast a dark shadow on the constitutional right of confrontation by requiring a defendant to establish the kind of “logical relationship” the majority requires before allowing cross-examination of a juvenile witness on his pending probationary record to show his possible bias or motive in testifying for the same prosecutorial authority which also supervises his probation. The majority, in my view, misapplies *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), which clearly held that the constitutional right to question a juvenile witness regarding his pending probationary status trumps any State interest in protecting such juvenile offenders.¹ Denying the defendant any opportunity to cross-examine a critical juvenile witness regarding his possible bias stemming from his probationary relationship with the State constitutes a denial of the right to effective cross-examination.²

I. *Davis v. Alaska*

A. *The Scope of the Holding*

The majority focuses on the fact that the witness in *Davis* was on probation for an offense that made him a likely suspect for the offense with which Davis had been charged. But the Supreme Court stated at the very beginning of its opinion:

We granted certiorari in this case to consider whether the *Confrontation Clause* requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness’ probationary status as a juvenile delinquent when such an impeachment would conflict with a State’s asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

Id. at 309, 94 S.Ct. 1105. Thus, the issue that the Supreme Court granted in *Davis* was the same as the one before us, and there is nothing in *Davis* to suggest that the Court decided less than it had agreed to decide, limiting its decision to the bare facts of the case before it. The Court took those facts into consideration, of course. But it was careful to always refer to the facts in conjunction with the larger issue before it. These references show that the Court was concerned not only with the fact that the witness in *Davis* was likely to become a suspect himself for the offense with which Davis was charged, but also with the fact that the witness was on probation.³ The Court made it quite clear *156 that it took a separate account of the fact that the witness was on probation, in reaching its decision.

The Supreme Court itself has interpreted *Davis* as I do. See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In recounting the *Davis* facts, the Court stated, “[t]he defense sought to suggest that Green may have slanted his account in the State’s favor either to shift suspicion away from himself or to avoid revocation of probation for failing to ‘co-operate.’ ” *Id.* at 683, 106 S.Ct. 1431 (emphasis added) (citing *Davis*, 415 U.S. at 310–11, 94 S.Ct. 1105). This “either ... or ...” language contradicts any assertion that the *Davis* holding is applicable only if the witness himself is likely to be suspected of the offense with which the defendant is charged. On the contrary, the Court’s language in cases following *Davis* makes it clear that the *Davis* rule applies whether the witness is likely to become a suspect or might be just trying to avoid revocation of probation. In either case, it is error to exclude the impeachment evidence when a witness’s “testimony [is] ‘crucial’ and ... there [is] a ‘real possibility’ that pursuit of the excluded line of impeachment evidence would [do] ‘(serious) damage to the strength of the State’s case.’ ” *Id.* (quoting *Davis*, 415 U.S. at 319, 94 S.Ct. 1105).

The above reasoning applies with greater force in the present case in which there was no physical evidence nor any eyewitnesses to corroborate W.P.'s allegations against appellant, and we have only W.P.'s own word that appellant had made any sexual advances towards him. As such, W.P. was a "crucial witness," *Davis*, 415 U.S. at 310, 94 S.Ct. 1105, and anything likely to impact his credibility was critical to the State's case. *Id.* at 319, 94 S.Ct. 1105 ("Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry."). See also *Van Arsdall*, 475 U.S. at 683, 106 S.Ct. 1431 (same). Under these circumstances, *Davis* mandated that the defense should have been allowed to cross-examine W.P. about his probation, that relationship with the State itself being the very source of his possible bias or motive to falsely testify against appellant in the hope of pleasing the State which supervised his own probation. See *Davis*, 415 U.S. at 319, 94 S.Ct. 1105 ("Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.").⁴

*157 B. General Impeachment

The majority discusses at some length the prohibition in most jurisdictions against impeachment of a witness's general credibility. See Maj. Op. at 146–47. It seems to consider the cross-examination on a witness's probation itself as impeachment of his general credibility unless the record shows that the witness was on probation for an offense similar to the one for which the defendant had been charged. But, as the Supreme Court explained:

The introduction of evidence of a prior crime is ... a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible *biases, prejudices, or ulterior motives* of the witness as they may relate directly to issues or personalities in the case at hand.

Davis, 415 U.S. at 316, 94 S.Ct. 1105 (emphasis added).

In other words, cross-examining the witness on his

pending probationary record is not a general, but rather a "particular attack" in the sense that it is specifically "*directed* toward revealing *possible* biases, prejudices, or ulterior motives of the witness as they may relate *directly* to issues or personalities in the case at hand." *Id.* (emphasis added). Thus, the focus is not on the witness's character (the so-called propensity evidence, *i.e.*, "once a criminal, always a criminal," so to speak), but rather on the relationship between the witness and the State, and the "possible biases, prejudices, or ulterior motives" that the witness may have by reason of that relationship in testifying for the State, because the State is also one of the "personalities [*i.e.*, a party] in the case at hand." *Id.*

The Supreme Court made this point even clearer when it stated:

[P]etitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show *specifically* that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation.

Id. at 311, 94 S.Ct. 1105 (emphasis added).

As the Court added, "[t]he partiality of a witness is subject to exploration at trial, and is '*always* relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* at 316, 94 S.Ct. 1105 (emphasis added) (citation omitted). This partiality, once again, stems from the relationship between the witness and the State, having in effect nothing to do with the particular basis of that relationship, *i.e.*, the nature of the offense for which the witness is on probation. Rather, it is the relationship itself which raises questions about the witness's possible partiality to the State and his possibly questionable motives in testifying for that State; and, according to the Supreme Court, it has always "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* (citation omitted).

*158 C. Protection of Juvenile records

The majority states,

Texas, like other states, has an important interest in “protecting the anonymity of juvenile offenders[.]” Our Family Code and Rules of Evidence explicitly protect that anonymity. To hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense.

Maj. Op. at 152 (citations omitted). I agree and respect that a juvenile’s prior juvenile adjudication ordinarily should not be used to attack the juvenile’s credibility in either a civil or criminal trial. Because the complainant in this case was on deferred probation, he could not be impeached with the *offense* for which he was on probation, since there was no final conviction. Also, the details of that offense could not be revealed. But the Rules of Evidence specifically provide an exception to the above rules in cases where evidence of juvenile adjudications is “required to be admitted by the Constitution of the United States or Texas.” See [Tex.R. Evid. 609\(d\)](#). The exception in the present case is mandated by the Supreme Court’s decision in [Davis v. Alaska](#). In fact, the majority’s argument, in the above quote, is quite similar to the one that was offered by the State in [Davis](#). See 415 U.S. at 319, 94 S.Ct. 1105 (“[t]he claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation.”). But the Supreme Court summarily dismissed that claim, stating:

[P]etitioner sought to introduce evidence of Green’s probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State’s case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State’s policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the

prosecution insisted on using him to make its case—is outweighed by petitioner’s right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. The same situation exists in the case before us. Appellant “sought to introduce evidence of [W.P.’s] probation for the purpose of suggesting that [W.P.] was biased and, therefore, that his testimony was either not to be believed ... or at least very carefully considered in that light.” *Id.* “Serious damage to the strength of the State’s case would have been a real possibility had [appellant] been allowed to pursue this line of inquiry.” *Id.* “In this setting,” as the Supreme Court concluded, “the right of confrontation is paramount to the State’s policy of protecting a juvenile offender.” *Id.*

As the Court further emphasized,

The State’s policy interest in protecting the confidentiality of a juvenile offender’s record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, *159 require the petitioner to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records.

Id. at 320, 94 S.Ct. 1105. Again, the same is true in the present case. In fact, this reasoning applies with even greater force in this case. Davis was convicted of burglary and grand larceny. *Id.* There were numerous lines of investigation available to the police, which could have provided the State with the necessary evidence, short of using Green’s testimony, to prosecute Davis. But, given the nature of the allegations in the present case, W.P.’s testimony was the only possible evidence that the State could have obtained to prosecute appellant. The bottom line is that appellant was sentenced to life imprisonment based on the testimony of this one witness. Thus, W.P. was, if anything, an even more “crucial witness” for the State than Green was in [Davis](#). *Id.* at 310, 94 S.Ct. 1105.

As such, his credibility was even more critical than that of Green; and appellant was, therefore, entitled to at least as much latitude in his cross-examination of W.P. about W.P.'s possible source of bias as Davis was provided by the Supreme Court under the protection of the Confrontation Clause.

D. The Defense Theory

The majority discusses at length the merits of the defense theory. *See* Maj. Op., Section III, at 153–54. According to the Supreme Court, however, it is within the jury's exclusive province to determine the credibility of the purported defense:

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [the defense's] line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof ... of petitioner's act." *Douglas v. Alabama*, [380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)]. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, *cf. Alford v. United States*, 282 U.S. 687 [51 S.Ct. 218, 75 L.Ed. 624] (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

415 U.S. at 317–18, 94 S.Ct. 1105 (footnote omitted).⁵

In the present case, appellant was completely denied an opportunity to present to the jury his defense theory based on W.P.'s probationary record. As the above quote shows, it was for the jury—not the *160 trial judge, nor this Court—to evaluate the merits of that theory. This reasoning is perfectly in line with the *Davis* Court's holding that the defendant is allowed to cross-examine a "crucial witness" about his probationary record because of the relationship such probation establishes between him and the State, which in turn raises a question about his partiality in testifying for the State which also supervises him as a probationer. The jury, and only the jury, then takes that relationship into consideration, as it would take any other element of a witness's credibility, in deciding how much weight to give to that witness's testimony. Thus, according to the Supreme Court, the

Confrontation Clause entitles the defendant an opportunity to present his defense theory directly to the jury under such circumstances.

Moreover, as the above quote shows, *Davis* did not require that appellant's defense theory should be so persuasive that we could be sure it would have been accepted by the jury. *See id.* at 317, 94 S.Ct. 1105. It required only that the trial court give appellant an opportunity to fully present his theory, and to present it directly to the jury itself, who could then "make an informed judgment as to the weight to place on" the testimony of the witness in question, in light of that theory. *Id.* As the majority admits, there were "numerous inconsistencies and contradictions in the witnesses' testimony." Maj. Op. at 143. Given that most of the State's own witnesses contradicted W.P.'s account of events in which they had themselves participated, and given that the jury itself had difficulty believing W.P.'s story,⁶ there was "a real possibility" that the State's case might have suffered "[s]erious damage" had appellant been allowed to "pursue []his line of inquiry." 415 U.S. at 319, 94 S.Ct. 1105. It was, therefore, a violation of appellant's confrontation right to completely prevent him from cross-examining the one critical witness against him on a subject that he so desperately sought to examine throughout the trial, to help him answer that one critical question which the State repeatedly asked during its closing arguments, and that the majority in the present case likewise emphasizes in its opinion: why would W.P. lie anyway? In other words, appellant had the right to answer that one critical question which no doubt sealed his fate.

In the present case, we know W.P. was placed on *adult* deferred probation (about which the jury never learned) for aggravated assault with a deadly weapon. This occurred shortly before he made the initial outcry accusing appellant of the offense at issue in this case. The jury heard evidence relating to W.P.'s use of alcohol and controlled substances at appellant's house, all of which in possible violation of his adult probation. Under these circumstances, appellant should have been allowed to cross-examine W.P. to show how the State was treating these violations to establish W.P.'s possible bias or even motive to make the initial accusation against appellant.

II. The Post–Davis Texas Progeny

The majority states that there must be "some logical relationship" between a witness's *161 "vulnerable relationship" with the State by virtue of his probation, and that "witness's potential motive for testifying as he

does” for the State. Maj. Op. at 148. But we have stated in the past that such a logical relationship stems from the very fact that the witness is testifying for the same entity, the State, which also supervises his probation. *See, e.g., Woods v. Texas*, 152 S.W.3d 105 (Tex.Crim.App.2004):

The proponent of evidence to show bias must show that the evidence is relevant. The proponent does this by demonstrating that a nexus, or logical connection, exists between the witness’s testimony and the witness’s potential motive to testify in favor of the other party. *We have found a nexus* when a witness has been indicted or is serving a period of community supervision. In such cases, the witness is placed in a vulnerable position and may have a motive to testify in favor of the State.

Id. at 111 (emphasis added) (citations omitted).

A. *Carpenter*

The majority states that “[e]vidence that a witness is on probation, is facing pending charges, or has a prior juvenile record is not relevant for purposes of showing bias or a motive to testify absent some plausible connection between that fact and the witness’s testimony.” Maj. Op. at 149. The majority relies on *Carpenter v. State*, 979 S.W.2d 633 (Tex.Crim.App.1998), as “a prime example of when and why a logical connection is necessary.” *Id.* But *Carpenter* is clearly distinguishable from the present case.

In *Carpenter*, the defense sought to cross-examine the State’s witness regarding federal conspiracy charges then pending against him. 979 S.W.2d at 633–34. The majority held that, “[f]or the evidence to be admissible, the proponent must establish some causal connection or logical relationship between the pending charges and the witness’ ‘vulnerable relationship’ or potential bias or prejudice for the State, or testimony at trial.” *Id.* at 634. But the “causal connection” that the majority mentioned, and failed to find, in *Carpenter* was the fact that Carpenter sought to impeach the witness’s credibility at a State trial with the federal charges then pending against that witness. As the Court stated:

Appellant has not established a

causal connection or logical relationship between the pending federal charges and the witness’ testimony at trial. Appellant does not argue, and the record does not demonstrate, why prosecution by the *federal* government for theft and conspiracy to possess and distribute controlled substances would tend to show that the witness’ testimony in this unrelated *state* prosecution for tampering with government documents might be biased.

Id. at 635 (emphasis added). In other words, there was no “causal connection” between the charges against the witness and his testimony at trial because it was the federal government, and not the State for whom he was testifying, that was going to prosecute him on the impending charges. Thus, he was in a “vulnerable relationship” with the federal government, but not with the State. The federal government stood to gain nothing from, and he in turn stood to gain nothing from the federal government for, his testimony for the State.⁷

*162 A simple example illustrates the point. If John slaps his sister, Suzy, and Suzy threatens to tell their parents, John cannot hope to appease her by bringing some ice cream for his other sister, Mary. But he might persuade Suzy not to tell their parents by promising to bring some ice cream for her if she did not tell. Substitute John for the witness, Suzy for the federal government, and Mary for the State, and we have the *Carpenter* scenario.

In short, there was no realistic basis to attack the witness’s testimony for one prosecutorial authority because of the impending charges against him from the other. As the concurrence explained, “appellant’s right to cross-examine a State’s witness concerning pending charges against the witness is implicated *only* where the pending charges have been brought by the *same prosecutorial authority* (or, perhaps, another *nonfederal* prosecutorial authority in Texas) which is prosecuting appellant.” *See id.* at 635 (Mansfield, J., concurring) (emphasis added) (citations omitted). Thus, the holding in *Carpenter* was grounded primarily on the fact that there were two separate prosecutorial authorities at work in that case. That is simply not the case before us.

B. *Carroll*

The majority asserts that “Judge Keller’s dissent in

[*Carroll v. State*, 916 S.W.2d 494 (Tex.Crim.App.1996)] laid the groundwork for the Court’s reasoning in *Carpenter*.” Maj. Op. at 149 n. 42. But, while the *Carpenter* Court repeatedly referred to the *Carroll* majority, it did not even mention the *Carroll* dissent. Moreover, there is nothing in *Carpenter* to indicate that we limited the *Carroll* decision in any way. If anything, it was Judge Meyers’ concurrence in *Carroll* that laid the groundwork for his majority opinion in *Carpenter*. He wrote separately in *Carroll* only to make the following comment:

In this case the charges pending against the State’s witness originated in the same jurisdiction and were brought by the identical authorities as those for which the appellant stands accused. I therefore agree with the decision of our lead opinion to allow the defendant to use these charges for impeachment on cross-examination of this witness. However, *in future contexts, should these charges emanate from another jurisdiction or authority*, I would hold that release of the information to the jury is subject to a discretionary ruling of the trial court under [Rule 403 of the Texas Rules of Criminal Evidence](#).

916 S.W.2d at 501 (Meyers, J., concurring) (emphasis added). *Carpenter* involved precisely the scenario of the two different prosecutorial authorities that Judge Meyers had mentioned in his concurrence in *Carroll*; and he reaffirmed the position he had taken in *Carroll* as he authored the majority opinion in *Carpenter*, affirming the court of appeals’ holding that Carpenter *163 had been properly excluded from cross-examining the State’s witness about pending charges from one prosecutorial authority when testifying for an altogether different prosecutorial authority.

C. *Maxwell*

The majority seeks to overrule *Maxwell v. State*, 48 S.W.3d 196 (Tex.Crim.App.2001), “to the extent that [it] is inconsistent with *Carpenter*.” See Maj. Op. at 152. But a careful examination of *Maxwell* shows that *Carpenter* was not even applicable to that case, which is probably why this Court did not even mention *Carpenter* in *Maxwell*.

In *Maxwell*, appellant was charged with aggravated robbery. At trial, he wanted to introduce evidence that Tiger, a key witness for the State, was on deferred adjudication probation for possession of a controlled substance. Appellant also wanted to introduce evidence that Tiger had been convicted of another crime during the course of that probation. The State objected, and the trial court did not allow any of the above evidence to be admitted before the jury. We granted appellant’s petition to consider whether “the trial court committed reversible error in failing to permit appellant to impeach a key state witness by showing that at the time of trial he was serving deferred adjudication probation.” 48 S.W.3d at 197. After examining several Supreme Court cases, including *Davis*, as well as cases from our own Court, we concluded that “[b]oth prior and later opinions from this Court and the Supreme Court have indicated that a witness’s deferred adjudication probation status is sufficient to show a bias or interest in helping the State.” *Id.* at 199–200 (citations omitted). We therefore held that “a defendant is permitted to cross-examine a State’s witness on the status of his deferred adjudication probation in order to show a potential motive, bias or interest to testify for the State.” *Id.* at 200.

In light of the above, it is clear to see that *Carpenter* was distinguishable from *Maxwell* for the same reason that it is distinguishable from the present case—because it involved two separate prosecutorial authorities: the State for which the witness sought to testify, and the federal government which had filed the charges pending against that witness. Thus, *Carpenter* fails to support the majority’s asserted justification for overruling *Maxwell*, *i.e.*, that *Maxwell* should be overruled because it is inconsistent with *Carpenter*.

The majority would like to overrule *Maxwell* because it clearly held that the fact that the witness is on probation is itself “sufficient” to allow the defense to cross-examine the witness about that probation. *Id.* But other decisions from this Court have reached the same conclusion. See, *e.g.*, *Woods*, 152 S.W.3d at 111 (“We have found a nexus when a witness has been indicted or is serving a period of community supervision. In such cases, the witness is placed in a vulnerable position and may have a motive to testify in favor of the State.”); *Carroll*, 916 S.W.2d at 500–01 (“A defendant is permitted to elicit any fact from a witness intended to demonstrate that witness’ vulnerable relationship with the state”; “it is possible, even absent an agreement, that [the witness] believed his testimony in this case would be of later benefit”; “appellant did not try to cross-examine [the witness] about a specific instance of conduct.... Rather, appellant attempted to inform the jury

that [the witness] had a vulnerable relationship with the State at the time of his testimony.”). Thus, this Court would have to overrule, not only *Maxwell*, but also *Woods*, *Carroll*, *Carpenter* itself, and all the cases that have followed these decisions.

*164 Finally, the majority cites that portion of *Callins v. State*, 780 S.W.2d 176, 196 (Tex.Crim.App.1989) (op. on reh’g), see Maj. Op. at 150–51 n. 43, that *Maxwell* implicitly overruled by disapproving of a case specifically because of its reliance on that particular portion of *Callins*. See 48 S.W.3d at 198. *Callins* is the only case cited by the majority that even comes close to supporting its position. Thus, by overruling *Maxwell* and relying on *Callins* for support, the majority in effect seeks to reinstate the portion of *Callins* that was overruled by *Maxwell*. While *Maxwell* relied on at least two Supreme Court decisions (*Davis* and *Alford*) and at least three Texas cases (*Evans*, *Carroll*, and *Moreno*), *Callins* cited only *Davis*, barely discussed its application, and merely noted *Evans* as a “Cf.” See *Callins*, 780 S.W.2d at 196.

Thus, the majority in the present case seeks to overrule *Maxwell*—which, in my view, was a thoroughly researched, well-reasoned, almost-a-decade-old decision, devoted exclusively to the issue presently before us—and reinstate *Callins*, which does not even discuss that issue to any appreciable length. In my view, this does not constitute sound and stable jurisprudence.

* * * * *

For all of the above reasons, I respectfully dissent.

All Citations

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Footnotes

- 1 The appellant’s sole ground for review reads as follows:
Whether the Court of Appeals properly applied the Sixth Amendment, as interpreted by the United States Supreme Court, to the question of whether the trial court’s refusal to permit the victim to be cross-examined about a case for which he was on probation violated Appellant’s constitutional rights to confrontation.
- 2 *Davis v. Alaska*, 415 U.S. 308, 317–18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).
- 3 *Irby v. State*, No. 05–07–00958–CR, 2008 WL 2469275, 2008 Tex.App. LEXIS 4544 (Tex.App.-Dallas 2008) (not designated for publication).
- 4 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).
- 5 W.P. and his father both testified that W.P. had a traumatic time dealing with his older brother’s suicide in 2004. W.P. had found his brother, who had hung himself outside their home.
- 6 Marcus said that he met appellant on April 6th when appellant peered out of his apartment window at him and a group of boys who were being “smart alecs” and waving at appellant. Appellant came out and asked the boys if they drank beer. They sat in appellant’s apartment smoking marijuana, and some of the boys drank beer. He left the next morning with W.P. and William, but then returned and was present when the police came to arrest appellant.
- 7 W.P. denied that either he or William were planning to rob appellant; he said that William was going to “jack with” appellant—meaning harass him—to get W.P.’s money. William testified that he wanted to go to appellant’s apartment alone because “he owed my friend money” and was “jacking around with my best friend.”
- 8 Officer Burke was called by the defense.
- 9 Two videotapes were obtained from Dennis’s car, but Officer Burke did not know what they showed.
- 10 The responding officers found appellant, Marcus, and Jason Dennis at appellant’s apartment. They arrested appellant, obtained the videotapes from Jason Dennis, and took all three men to the police station.

- 11 The prosecutor argued,
And how do we know that [W.P.] is telling the truth, we, as reasonable people? We know because no 16-year-old boy ever is going to make up that story. Do 16-year-olds lie? Absolutely. Do they lie about accepting money for sexual favors for no reason? What is the motive?
You heard the defense attorney talk in his opening statement and the promises he made you about some conspiracy to commit a robbery. There is no evidence that there was a conspiracy to commit a robbery. William was going to go over and take the money that was owed to [W.P.] I'll give you that. Did the defendant know anything about that? No. Marcus says, we're all sitting around, everything is cool, everybody is hanging out, no problems, no arguments, no problems, no conflicts. Until the police arrive, everything is fine.
They weren't about to get caught. Were the police investigating [W.P.] and William for anything? No. So why is it then that this 16-year-old with nothing to gain would say to his father and his mother and police officers and for two years to continue to say it until he has to come into a courtroom and say it in front of 12 strangers, I allowed the defendant, a grown man, to pay me money and perform oral sex on me?
Is that the story he's going to make up? If there is some motive to get Christopher Irby, is that the story he's going to say? Or is he going to say, I was forced. Is he going to say he had a gun. He had a knife. I saw him do all sorts of things to everybody.
That's not what he says.
I accepted money.
And he has absolutely no reason to come in here and lie to you. Use your common sense.
In addressing the issue of the boys being unreliable witnesses because they drank and smoked marijuana with appellant, the prosecutor stated, "He provided it. He took advantage of vulnerable kids in vulnerable situations, and he comes into this courtroom and calls them liars. Isn't that easy? Isn't that easy? What a better victim to choose."
- 12 These included the defense counsel's statements that (1) W.P. said that he did tell his friend James about the first sexual encounter and then said he did not; (2) W.P. said that he and William did spend the night of April 6th at appellant's apartment and others suggested that they did not do so; (3) Marcus said that he did not see William or W.P. at appellant's apartment on April 6th and other witnesses suggested that he did; (4) W.P.'s testimony that he told his mother first about the sexual encounters and Officer Burke testified that someone told him that W.P. had told his father first.
- 13 Appellant did not make an offer of proof by questioning W.P. The only evidence of W.P.'s juvenile record is contained in the "State's Response to Defense's Motion for Criminal History of State's Witnesses." The pertinent entry reads: "Aggravated Assault/Deadly Weapon, January 30, 2005, juvenile offense transferred to adult probation—F0699715." Defense counsel questioned W.P.'s father about this matter outside the presence of the jury, but Bobby knew very little about it except that W.P. had been given one to two years of probation and was still on probation at the time of trial.
- 14 *Irby*, 2008 WL 2469275, at *7, 2008 Tex.App. LEXIS 4544, at *18.
- 15 *Id.* (citing *Davis*, 415 U.S. at 317–18, 94 S.Ct. 1105; *Hoyos v. State*, 982 S.W.2d 419, 421 (Tex.Crim.App.1998); *Carroll v. State*, 916 S.W.2d 494, 497 (Tex.Crim.App.1996)).
- 16 *Id.* at *7, 2008 Tex.App. LEXIS 4544, at *19.
- 17 *Id.* at *7–8, 2008 Tex.App. LEXIS 4544, at *20 (noting that the defense had failed to show that (1) any motion to revoke probation was pending, either at the time W.P. made the allegations against appellant or at the time of testifying; or (2) W.P. had some bias to testify favorably for the State because of his juvenile deferred-adjudication status).
- 18 979 S.W.2d 633 (Tex.Crim.App.1998).
- 19 *Id.* at 634–35.
- 20 Appellant's Brief at 23 & 27.
- 21 *Pennsylvania v. Ritchie*, 480 U.S. 39, 51–52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); see *United States v. Abel*, 469 U.S. 45, 50, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (evidence that both defendant and defense witness belonged to same prison gang, whose tenets required its members to lie, cheat, steal, and kill to protect each other was admissible because it was probative of defense witness's possible bias toward a bank-robbery defendant); *Delaware v. Van*

- Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (error to prohibit any cross-examination of State’s witness concerning possibility that he might be biased in favor of State because of dismissal of his pending public-drunkenness charge).
- 22 *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. 1431.
- 23 *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (*per curiam*)).
- 24 Appellant’s Brief at 21 (“This Court has clearly held, under *Davis v. Alaska*, that a defendant is permitted to cross-examine a State’s witness on the status of his deferred adjudication probation in order to show a potential motive, bias, or interest to testify for the State.”).
- 25 *Davis*, 415 U.S. at 309, 94 S.Ct. 1105.
- 26 *Id.*
- 27 *Id.* at 311, 94 S.Ct. 1105.
- 28 *Id.* at 310, 94 S.Ct. 1105.
- 29 *Id.* at 317–18, 94 S.Ct. 1105 (“The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green’s vulnerable status as a probationer, as well as of Green’s possible concern that he might be a suspect in the investigation.”) (internal citation omitted).
- 30 *Id.* at 316, 94 S.Ct. 1105.
- 31 See *id.* at 319, 94 S.Ct. 1105.
- 32 See *Carmona v. State*, 698 S.W.2d 100, 104 (Tex.Crim.App.1985) (stating that the *Davis* decision “is limited by its facts. The opinion in *Davis* is replete with references to ‘on the facts of this case,’ ‘in this setting,’ and other such references which indicate that Joshaway Davis was denied the right of *effective cross-examination*.”) (emphasis in original).
- 33 *Davis*, 415 U.S. at 321, 94 S.Ct. 1105 (Stewart, J., concurring).
- 34 *Hammer v. State*, 296 S.W.3d 555, 562 (Tex.Crim.App.2009) (“[T]he *Davis* Court did not hold that a defendant has an absolute constitutional right to impeach the general credibility of a witness in any fashion that he chooses. But the constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory.”).
- 35 TEX.R. EVID. 609(d) (“Juvenile Adjudications. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.”); see also TEX. FAM.CODE § 51.13(b); see *Gilmore v. State*, 871 S.W.2d 848, 850–51 (Tex.App.-Houston [14th Dist.] 1994, no pet.) (excluding cross-examination by defendant of complaining witness about witness’s prior juvenile record was not error); see also *United States v. Decker*, 543 F.2d 1102, 1105 (5th Cir.1976) (distinguishing *Davis* as a case involving bias and not one allowing a constitutional right to impeach a witness’s general credibility with juvenile adjudications); see generally, Daniel E. Feld, Annotation, *Use of Judgment in Prior Juvenile Court Proceeding to Impeach Credibility of Witness*, 63 A.L.R.3d 1112, § 3 (collecting cases setting out the general rule that a juvenile court adjudication may not be used to impeach the credibility of a witness).
- 36 TEX.R. EVID. 609(d).
- 37 979 S.W.2d 633 (Tex.Crim.App.1998).

- 38 *Id.* at 634–35 & n. 4 (Tex. Crim. App. 1998) (not error to exclude impeachment of witness with pending federal charges; “Naked allegations which do no more than establish the fact that unrelated federal charges are pending do not, in and of themselves, show a potential for bias”; stating that the defendant failed to demonstrate why prosecution by the federal government for theft and conspiracy would tend to show that the witness’s testimony in this unrelated state prosecution for tampering with government documents might be biased); see also *id.* at 636 (Price, J., concurring) (“there is nothing in the record which would establish how the [witness’s] pending federal charges were relevant to his testimony at appellant’s trial” and “nothing in the record to show that he was aware of the [federal] sentencing guidelines or that he had any type of ‘deal’ with the federal prosecutors in charge of his case.”).
- 39 Numerous other state cases have held that when there is a logical connection between the juvenile witness’s prior convictions or juvenile probation status and the factual basis for a potential bias, the defendant is entitled, under *Davis*, to impeach that witness with that status or those convictions under the Sixth Amendment. See, e.g., *Wood v. State*, 837 P.2d 743, 747 (Alaska Ct.App.1992) (at time police interrogated juvenile about defendant’s purported sexual molestation, juvenile was on a form of deferred prosecution for an unrelated incident in which the juvenile was accused of sexual molestation of another minor; defendant was entitled to cross-examine juvenile concerning that charge because the victim might have been motivated to fabricate the charges of abuse against defendant to “curry favor” with the interrogating officer who might use any lack of cooperation as a basis to terminate the deferred-prosecution agreement); *People v. Bowman*, 669 P.2d 1369, 1374 (Colo.1983) (in arson/murder prosecution, defendant was entitled to cross-examine stepson about his pending juvenile probation status and pending robbery charges to show that he was “resentful toward his parents for placing restrictions on him due to his trouble with the law” and that he might therefore have had a motive to start the fatal fire himself); *Gillespie v. United States*, 368 A.2d 1136, 1136–37 (D.C.1977) (defendant was entitled to cross-examine one of three juvenile witnesses against him about his robbery probation status as all three witnesses against defendant were related and had a motive to shift possible blame from themselves to defendant and to protect their relative from probation revocation if they were accused as defendant’s accomplices); *People v. Triplett*, 108 Ill.2d 463, 92 Ill.Dec. 454, 485 N.E.2d 9, 15 (1985) (defendant entitled to cross-examine juvenile about his in-custody status at the time of trial and about his prior “contacts” with police to show that he had a motive to cooperate with police at time he was interrogated about incident; “It was only after the police had threatened him with jail that he told police that [defendant] had shot the victim.”); *State v. Russell*, 625 S.W.2d 138, 139–40 (Mo.1981) (defendant was properly permitted to impeach juvenile, who was defendant’s co-defendant in robbery, with fact that he had pled guilty to the robbery, was sent to a juvenile facility for his role in that offense, and had been released on probation the day before trial; trial court did not err in otherwise limiting cross-examination of juvenile’s other crimes and stating that *Davis* “permits proof of the bias which could result from the juvenile witness’s motive to lie because he is a suspect and subject to control of the juvenile authorities. It does not hold that a state court must permit the general credibility of a juvenile to be attacked by a record of juvenile adjudication or unrestrained cross-examination concerning such adjudication or acts of misconduct.”); *Livingston v. State*, 907 P.2d 1088, 1092 (Okla.Crim.App.1995) (trial court improperly limited defendant’s cross-examination of his son regarding potential bias based on the fact that defendant had testified against his son in a prior juvenile proceeding); *State v. Sparkman*, 287 S.C. 489, 339 S.E.2d 865, 867 (1986) (defendant was entitled to cross-examine juvenile witness—defendant’s accomplice—concerning juvenile’s plea to housebreaking and arson charges which included an agreement to testify against defendant); *Hannon v. State*, 84 P.3d 320, 332 (Wyo.2004) (defendant in sexual-assault prosecution was entitled to cross-examine juvenile victim about the fact that he did not report the alleged assault until three months after event—when he was brought in for questioning about his own alleged sexual molestation of another boy; prohibited cross-examination was sufficiently probative of a possible ulterior motive for alleged victim’s accusations against defendant; “Had defense counsel been allowed to explore this issue with TB during cross-examination, the jury reasonably might have inferred TB was fearful about what would happen to him as a result of his own acts and concocted the allegations against [defendant] to shift the focus of the police inquiry away from him.”).
- 40 *Carpenter*, 979 S.W.2d at 634 (“In order to impeach a witness with evidence of pending criminal actions, the proponent of the evidence must establish that the evidence is relevant.”); see also *Arroyo v. State*, 259 S.W.3d 831, 835–36 (Tex.App.-Tyler 2008, no pet.) (following *Carpenter* and holding that defendant was properly precluded from cross-examining eyewitness about her immigration or citizenship status as a “vulnerable relationship” to show bias and motive to testify for the State because no showing of a logical connection between that status and her testimony).
- 41 *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931); see also *Carroll v. State*, 916 S.W.2d 494, 500–01 (Tex.Crim.App.1996) (defendant was entitled to cross-examine witness about his current incarceration, his pending charge, and possible punishment as habitual criminal to show his potential motive, bias, or interest to testify for the State, even absent any proof that the State had made promises to him in return for his testimony because witness may have believed his testimony would be of benefit).

42 See, e.g., *Carroll*, 916 S.W.2d at 505 (Keller, J., dissenting) (“I agree that, ordinarily, the mere existence of a pending charge gives rise to an inference that the witness may have been influenced. But in some cases, additional facts in the record may show that such an inference is not warranted. If the latter is the case, and the defendant fails to otherwise make some showing that the pending charge may have influenced the witness, then the trial court does not abuse its discretion in disallowing cross-examination on that subject.”). As then—Judge Keller explained,

In this case, Russell [the witness] was charged with aggravated robbery *after* he gave the police his statement regarding the offense with which appellant was charged. Russell’s earlier statement was entirely consistent with his testimony at appellant’s trial. One cannot infer from the mere existence of the pending charge that it may have influenced Russell’s testimony because any motive for helping the State arose after Russell reported his version of the events. Appellant has not otherwise shown that the pending charge may have influenced Russell’s testimony at trial.

Id. (emphasis in original). Judge Keller’s dissent in *Carroll* laid the groundwork for the Court’s reasoning in *Carpenter*.

43 See, e.g., *Woods v. State*, 152 S.W.3d 105, 111–12 (Tex.Crim.App.2004) (trial court properly refused to allow defense to ask witness about possibility of receiving parole or good time; witness was not eligible for good time and there was no indication that he expected to be rewarded for testimony favorable to prosecution); *Willingham v. State*, 897 S.W.2d 351, 358 (Tex.Crim.App.1995) (defendant failed to show any “specific connection” between witness’s alleged hope for early release from prison and his motive to testify); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex.Crim.App.1993) (when witness did not know he was a suspect in two crimes, evidence of his “suspect” status had “no legitimate tendency to show that [he] was biased in favor of the State.”); *Janecka v. State*, 739 S.W.2d 813, 830–31 (Tex.Crim.App.1987) (limitation of impeachment proper where defendant attempted to show witness’s spouse had entered into plea bargain with State but failed to show why this would influence witness’s testimony); *London v. State*, 739 S.W.2d 842, 846–47 (Tex.Crim.App.1987) (State failed to show a causal connection between the fact that a defense witness’s relative had “troubles with the law” and any actual bias or motive to testify on behalf of defendant); *Callins v. State*, 780 S.W.2d 176, 196 (Tex.Crim.App.1989) (op. on reh’g) (trial court did not err in prohibiting cross-examination of witness concerning his status on deferred adjudication when defendant failed to show that the witness was biased against him because of that status); *Adams v. State*, 577 S.W.2d 717, 720–21 (Tex.Crim.App.1979) (“evidence of pending charges against a witness is admissible under certain circumstances for the limited purpose of showing bias, prejudice, interest, and motive of the witness in testifying as he did”; trial court did not err in excluding cross-examination of State’s witness concerning his extraneous offenses when defense made no attempt to show that witness’s testimony had been prompted by the promise or hope of favorable treatment), *rev’d in part on other grounds*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Garza v. State*, 532 S.W.2d 624, 626 (Tex.Crim.App.1976) (distinguishing *Davis v. Alaska* and stating that witness’s arrest record and pending case was not admissible to establish his bias or motive because “there was no attempt made to show that the pending indictment was being used to force the witness’ testimony or that he expected more favorable treatment in his pending case because of his testimony in this case.”); *Smith v. State*, 236 S.W.3d 282, 292–94 (Tex.App.-Houston [1st Dist.] 2007, *pet. ref’d*) (trial court did not err in refusing to allow defendant to question complaining witness about her deferred-adjudication probation; witness had given description of defendant to police before she was arrested, was not trying to shift suspicion away from herself, did not identify defendant at trial, and did not provide crucial testimony for prosecution); *Crenshaw v. State*, 125 S.W.3d 651, 654–55 (Tex.App.-Houston [1st Dist.] 2003, *pet. ref’d*) (trial court properly disallowed defendant from asking witnesses on cross-examination about whether they had committed an aggravated robbery because there was no showing that police suspected witnesses of committing such crime); *Juneau v. State*, 49 S.W.3d 387, 389–90 (Tex.App.-Fort Worth 2000, *no pet.*) (defendant failed to show logical connection between witness’s deferred adjudication status and any potential bias or motive); *Moreno v. State*, 944 S.W.2d 685, 690–92 (Tex.App.-Houston [14th Dist.] 1997) (State failed to show any logical connection between defendant’s deferred-adjudication status and his bias or motive to testify on his own behalf; “There was nothing in the record indicating any pressure on appellant by the state to revoke his deferred adjudication if he was convicted of the DWI. There was nothing in the record that would indicate that appellant’s testimony was ‘slanted’ because of any bias, motive or ill will directed at the state emanating from his status on deferred adjudication. There is no evidence that appellant’s deferred adjudication status in and of itself created bias or interest on his part sufficient to falsify his testimony.”), *aff’d*, 22 S.W.3d 482 (Tex.Crim.App.1999); *Duncan v. State*, 899 S.W.2d 279, 281 (Tex.App.-Houston [14th Dist.] 1995, *pet. ref’d*) (“To invoke his right to question a witness about deferred adjudication a defendant must show the witness testified against him as a result of bias, motive or ill will emanating from the witness’ status of deferred adjudication”; fact that witness was on deferred adjudication for unrelated crime did not show bias); *Saenz v. State*, 840 S.W.2d 96, 100 (Tex.App.-El Paso 1992, *pet. ref’d*) (trial court did not err in prohibiting defense from cross-examining 14-year-old witness about prior run-ins with juvenile authorities; witness had never been arrested, was unaware of any charges pending against him, and record was devoid of showing of motive to testify favorably to State).

44 48 S.W.3d 196 (Tex.Crim.App.2001).

- 45 *Maxwell* explicitly relied on *Moreno v. State*, 22 S.W.3d 482, 486 (Tex.Crim.App.1999), which stated that “evidence that involves unadjudicated crimes *could* be admissible to show a witness’s bias or interest[.]” (emphasis added). Indeed, all of these base facts—probationary status, pending charges, unadjudicated crimes or other bad acts—may be admissible to show motive or bias if the proponent makes a logical connection between the base fact and the witness’s testimony. Otherwise, it is irrelevant. See cases collected in note 43.
- 46 See *Maxwell*, 48 S.W.3d at 198–99 (citing *Moreno*, 22 S.W.3d at 485–86, and relying on *Evans v. State*, 519 S.W.2d 868, 871–73 (Tex.Crim.App.1975), and *Carroll v. State*, 916 S.W.2d 494, 500 (Tex.Crim.App.1996)). In *Moreno*, this Court held that the State could *not* cross-examine the defendant with his deferred adjudication probation status to show his potential bias and motive for testifying because it had “vanishingly” low probative value and was highly prejudicial. 22 S.W.3d at 489. It was prohibited under Rule 403. See TEX.R. EVID. 403. In *Evans*, this Court held that the trial court erred in preventing cross-examination of the State’s witness, who had a pending sodomy charge in the very same court in which the defendant’s case was being tried and that the trial setting on that sodomy charge kept being postponed until after the defendant’s trial. 519 S.W.2d at 871. Furthermore, the State’s witness was questioned by the police as an alternate suspect for the murder that the defendant was ultimately charged with. He clearly had a motive to shift suspicion away from himself and toward the defendant. *Id.* at 873. Finally, in *Carroll*, the witness against the defendant was in jail on pending aggravated robbery charges, and those charges could be enhanced by prior convictions to habitual offender status. 916 S.W.2d at 500. Thus, the State clearly had considerable power and control over that witness’s fate. *Id.* Even though there was no agreement between the State and the witness concerning the disposition of those charges, the witness himself might well have “believed his testimony in this case would be of later benefit.” *Id.* Yes, indeed. The logical, rational, and reasonable connection between the witness’s own notion (even without any suggestion by the prosecution) of the State’s ability to punish or reward him for his testimony is obvious—he can hope for dismissal of the pending charges and dread a life sentence if the charges are not dismissed, depending upon his value as a witness for the State.
- 47 *Maxwell*, 48 S.W.3d at 200.
- 48 *Moreno*, 22 S.W.3d at 486.
- 49 *Adams*, 577 S.W.2d at 721; *Evans*, 519 S.W.2d at 872–73.
- 50 *Davis v. Alaska*, 415 U.S. at 318, 94 S.Ct. 1105; see also *id.* at 321, 94 S.Ct. 1105 (Stewart, J., concurring) (“in the circumstances of this case”).
- 51 Commentators have expressed concern about the confusion generated by *Maxwell*. As noted in The Texas Rules of Evidence Manual,
The decision of the Court of Criminal Appeals in *Maxwell v. State*, creates uncertainty with reference to the relevancy requirement of prior cases in showing bias and interest. At one point in the majority opinion, the Court stated categorically that, “[A] defendant is permitted to cross-examine a State’s witness on the status of his deferred adjudication probation in order to show a *potential* motive, bias or interest to testify for the State....” Later, the majority observed that, prior to testifying, the witness had committed an offense that caused his deferred adjudication to be subject to adjudication at the time he testified, and stated, “*Therefore*, we conclude that the jury was entitled to hear evidence of [the witness’s] deferred adjudication to decide the amount of weight and credibility to give to his testimony.”
It is unclear whether the fact of the offense that subjected the witness to potential adjudication entitled the defendant to show the witness’s vulnerable relationship to the State, or whether the witness’s mere status of being on deferred adjudication entitled the defendant to cross-examine him about that status.
DAVID A. SCHLUTER & ROBERT R. BARTON, TEXAS RULES OF EVIDENCE MANUAL § 613.02[3][f] at 613–14 (8th ed. 2009). As the authors aptly noted, there is a distinct difference between the mere status of deferred adjudication probation and the prospect of having that probation adjudicated because of an intervening crime—the factual situation in *Maxwell*. *Id.* at 614. Thus, the facts in *Maxwell* show that the witness did, in fact, testify under the implicit coercion of having his probation revoked. By the time of trial, he had been convicted of a misdemeanor that could be used to immediately revoke his felony probation should the State so choose. Even without evidence of any special “deal,” promises, or coercion, the witness may have felt that he would ultimately benefit by testifying favorably for the State. *Maxwell*, 48 S.W.3d at 200.
- 52 *Davis*, 415 U.S. at 319, 94 S.Ct. 1105.

53 TEX.R. EVID. 609(d); TEX. FAM.CODE § 51.13(b).

54 Counsel also explained,

I believe that the day that [W.P.] made the allegation he knew that he was going to be in trouble for other offenses; that there was discussion of the fact that they were going to steal from a Wal-Mart; that they were going to rob Mr. Irby; and that his status of either being on bond or on probation for these offenses gives him motive, the type of motive that I'm entitled to inquire into under *Davis v. Alaska*.

When the trial judge asked what motive that evidence might show, counsel responded,

The motive to lie, the motive to come up with a reason to make this allegation given the fact that, based on the other evidence that would be presented, it would appear that Mr. Irby would be the complaining witness and he [W.P.] would be the defendant. There was talk about robbing Mr. Irby, stealing from Mr. Irby.

The trial judge ultimately held that evidence concerning W.P.'s status on deferred adjudication was not relevant. He also held that several extraneous offenses offered by the State were not relevant. This trial judge applied the same standard of relevance to both the defense and prosecution evidence and kept the parties focused on the main issues.

55 Furthermore, it seems an extraordinary leap of logic to suppose that W.P. would make up a story of his own consensual, economically based, sexual encounters to protect his friend William from either committing a robbery or from getting into trouble with W.P.'s parents for intending to commit a robbery.

56 Indeed, one could make the argument that W.P.'s willingness to go to the police and tell them about these sexual encounters, despite the fact that he was on probation and therefore "vulnerable" to having his conduct examined, buttresses the reliability of his story. Some people, perhaps including his probation officer, might take a dim view of W.P.'s conduct of exchanging sex for money. W.P.'s friend James had already expressed his disapproval to W.P. By going to police, W.P. was putting himself in harm's way, assuredly not "currying favor" with them. Furthermore, as the prosecutor suggested in her final argument, if W.P. had made up this story to "curry favor" with anyone, he would surely have made up a better story, one in which he was a true "victim" of sexual aggression instead of a willing participant in an economic transaction.

57 At least two Texas cases have suggested that the *Davis* rationale does not apply when the witness is the victim of the charged crime because it is illogical to think that the victim reported a crime to shift suspicion away from himself. See *Smith v. State*, 236 S.W.3d 282, 293 (Tex.App.-Houston [1st Dist.] 2007, pet. ref'd) (the victim-witness "could not have been trying to shift any suspicion away from herself because she was the victim."); *Gilmore v. State*, 871 S.W.2d 848, 851 (Tex.App.-Houston [14th Dist.] 1994, no pet.) (same).

1 See, e.g., 415 U.S. at 320, 94 S.Ct. 1105 ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

2 See, e.g., *id.* at 318, 94 S.Ct. 1105:

While counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination.

(Emphasis in original.)

3 For example, the Court stated, "*Not only* might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, *but* Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id.* at 311, 94 S.Ct. 1105 (emphasis added).

4 It should be noted that the Fifth Circuit interprets *Davis* even more broadly than I do in the present case. See, e.g., *Greene v. Wainwright*, 634 F.2d 272 (5th Cir.1981). In *Greene*, the defendant Greene had not even articulated a basis for wanting to impeach the witness Kennerly. The Court felt free to postulate for him, stating:

We can conceive of at least two theories of impeachment that defendant might have proposed had he been granted his constitutional rights. [For example], he might have argued that Kennerly was testifying to avoid prosecution for other illegal activities. “It is especially important in a case where a witness or an accomplice may have substantial reason to cooperate with the government that a defendant be permitted to search for an agreement between the government and the witness.” *United States v. Crumley*, 565 F.2d 945, 949 (5th Cir.1978). Whether or not such a deal existed is not crucial. *United States v. Mayer*, 556 F.2d 245, 249 (5th Cir.1977). What counts is whether the witness may be shading his testimony in an effort to please the prosecution. “A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception.” *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir.1980). See *United States v. Onori*, 535 F.2d 938, 945 (5th Cir.1976).
Id. at 276.

5 The Fifth Circuit interprets the above passage from *Davis* the same way as I do. See, e.g. *Greene*, 634 F.2d at 276: We do not know whether, on cross-examination, petitioner would have elicited testimony supporting either of these theories [that the Court had assumed the defense might have pursued]. Nor do we know whether, even had such testimony been elicited, the jury would have been persuaded to disbelieve [the witness]. The point is that it was for the jury to make this determination. (Quoting and citing *Davis*, 415 U.S. at 317–18, 94 S.Ct. 1105). Prior decisions from this Court have reached the same conclusion under similar circumstances. See, e.g., *Hurd v. State*, 725 S.W.2d 249, 253 (Tex.Crim.App.1987) (“It was not necessary for counsel to show the trial court that his cross-examination of the witness would affirmatively establish the facts he sought to prove.”).

6 The jury sent three notes to the Court, one of which clearly stated: “We are at an impasse that cannot be resolved. Our vote is 11 to 1.” The Court tried to resolve this “impasse” by giving the jury an *Allen* (*Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)) charge, only to receive yet another note from the jury requesting the trial court to provide it with “[W.P.’s] testimony describing the actual sequence of events of the sexual acts between the defendant and [W.P.],” and stating that the members of the jury had “questions” about this testimony and that there was a “dispute” among them “regarding the details of these events.”

7 The Court had in effect presumed that the possibility of the federal government’s treating the witness more leniently in light of his testimony for the State was remote because the State and the federal government were two separate prosecutorial authorities, and it was the State, not the federal government, that actually benefitted from the witness’s testimony. Nevertheless, the Court indicated that it might have still allowed Carpenter to impeach the witness with the impending federal charges if she had produced at least some evidence to overcome the Court’s presumption. Thus, the Court noted, even though Carpenter asserted that “ ‘it is possible the witness believed his testimony in this case would be of some benefit,’ ” she failed to “provide evidence to support her assertion.” 979 S.W.2d at 635. But, in the absence of such evidence, as the concurrence noted, “[t]he mere possibility the witness may derive a benefit [from the federal government] by testifying in a State prosecution on the State’s behalf does not implicate the Confrontation Clause, based on any reasonable interpretation of the Supreme Court’s holding in *Davis v. Alaska*.” *Id.* at 636 (Mansfield, J., concurring).

KeyCite Yellow Flag - Negative Treatment
Distinguished by [Foster v. State](#), Tex.App.-Waco, July 26, 2000

642 S.W.2d 471
Court of Criminal Appeals of Texas,
En Banc.

Curtis Paul HARRIS, Appellant,
v.
The STATE of Texas, Appellee.

No. 66879.
|
Sept. 15, 1982.
|
Rehearing Denied Dec. 15 and
Dec. 22, 1982.

Synopsis

Defendant was convicted in the 85th Judicial District Court, Brazos County, W.T. McDonald, Jr., J., of capital murder and received sentence of death. Pursuant to automatic review the Court of Criminal Appeals, Clinton, J., held that: (1) trial court's refusal to allow effective cross-examination of State's witness, in order to establish her bias or motive in testifying, denied defendant his constitutional right to confrontation, and (2) testimony of witness' attorney could not be substituted for accused's right to confront and cross-examine only witness against him.

Reversed and remanded.

McCormick, J., dissented and filed opinion.

West Headnotes (7)

[1] **Criminal Law**
Key-Cross-Examination and Impeachment

110Criminal Law
110XXTrial
110XX(C)Reception of Evidence
110k662Right of Accused to Confront Witnesses
110k662.7Cross-Examination and Impeachment
(Formerly 110k662(1))

Essential policy underlying Sixth Amendment

right to confrontation is to give accused opportunity to cross-examine witness against him. [U.S.C.A. Const. Amends. 6, 14.](#)

4 Cases that cite this headnote

[2] **Criminal Law**
Key-Witnesses

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1170.5Witnesses
110k1170.5(1)In General
(Formerly 110k11701/2(1))

Extreme prejudice ensues from denial of opportunity to place material witness in his proper setting as regards his testimony. [U.S.C.A. Const. Amends. 6, 14.](#)

3 Cases that cite this headnote

[3] **Witnesses**
Key-Cross-Examination to Discredit Witness or Disparage Testimony in General
Witnesses
Key-Conclusiveness of Answers on Cross-Examination

410Witnesses
410IVCredibility and Impeachment
410IV(A)In General
410k330Cross-Examination to Discredit Witness or Disparage Testimony in General
410k330(1)In General
410Witnesses
410IVCredibility and Impeachment
410IV(C)Interest and Bias of Witness
410k372Cross-Examination to Show Interest or Bias
410k372(3)Conclusiveness of Answers on Cross-Examination

Right to cross-examination for purpose of affecting witness' credibility is at least dual; witness may be asked any question, answer to which may have tendency to affect his credibility, and if he denies anything that would

show motive for or animus to, testify against party, it may be shown by other witnesses and by independent facts.

Ann. C.C.P. art. 37.071(e, f); U.S.C.A. Const. Amend. 6; Vernon's Ann. Const. Art. 1, § 10; V.T.C.A., Penal Code § 19.03.

14 Cases that cite this headnote

24 Cases that cite this headnote

[4] **Criminal Law**
 🔑 Cross-Examination and Impeachment

110Criminal Law
 110XXTrial
 110XX(C)Reception of Evidence
 110k662Right of Accused to Confront Witnesses
 110k662.7Cross-Examination and Impeachment
 (Formerly 110k662(1))

When cross-examiner is improperly denied opportunity to ask question and receive witness' answer for consideration by fact finder, he may concomitantly be denied right to establish facts which would illustrate true circumstances bearing on issue of extrinsic proof, and in such case, accused's right to effective confrontation is thoroughly frustrated.

6 Cases that cite this headnote

[5] **Criminal Law**
 🔑 Cross-Examination and Impeachment

110Criminal Law
 110XXTrial
 110XX(C)Reception of Evidence
 110k662Right of Accused to Confront Witnesses
 110k662.7Cross-Examination and Impeachment
 (Formerly 110k662(1))

Defendant charged with capital murder had unqualified right to ask, as he did, only witness linking him with offense, whether she too had been "accused" of offense on trial, and to receive her answer, and jury was entitled to understand "whole picture" of witness' vulnerable status in juvenile court and to observe her testimony thereon; thus, trial court's refusal to allow effective cross-examination of juvenile witness, in order to establish her bias or her motive in testifying denied defendant his constitutional rights to confrontation. [Vernon's](#)

[6] **Criminal Law**
 🔑 Cross-Examination and Impeachment

110Criminal Law
 110XXTrial
 110XX(C)Reception of Evidence
 110k662Right of Accused to Confront Witnesses
 110k662.7Cross-Examination and Impeachment
 (Formerly 110k662(1))

Defendant charged with capital murder had unqualified right to ask only witness linking him with offense whether she too had been accused of offense on trial and to receive her answers; thus, testimony of witness' attorney that some type of agreement had been made in exchange for witness' testimony could not be substituted for accused's right to confront and cross-examine only witness against him. [U.S.C.A. Const. Amends. 6, 14](#); [Vernon's Ann. Const. Art. 1, § 10](#).

2 Cases that cite this headnote

[7] **Criminal Law**
 🔑 Showing as to Examination and Impeachment of Witnesses

110Criminal Law
 110XXIVReview
 110XXIV(G)Record and Proceedings Not in Record
 110XXIV(G)3Bill of Exceptions
 110k1091Form and Contents
 110k1091(3)Showing as to Examination and Impeachment of Witnesses

Where record was fully developed as to facts defense sought to establish and reasons such facts were probative of witness' credibility, defense's failure to elicit witness' responses to questions disallowed, on bill of exceptions, did not waive error. [Vernon's Ann. C.C.P. art.](#)

40.09, subs. 6, 6(c), (d)(1, 2).

7 Cases that cite this headnote

Attorneys and Law Firms

*472 W. Tyler Moore, Jr., on appeal only, Bryan, for appellant.

Travis B. Bryan, III, Bryan, Robert Huttash, State's Atty., Austin, for the State.

Before the Court en banc.

Opinion

OPINION

CLINTON, Judge.

Before us for automatic review¹ are a conviction for the offense of capital murder² and sentence of death assessed pursuant to [Article 37.071\(e\), V.A.C.C.P.](#)

Appellant contends the trial court's refusal to allow effective crossexamination of the State's witness, Valerie Rencher, in order to establish her bias or motive in testifying, denied him his constitutional right to confrontation. See [U.S. Const. Amend. VI](#); and [Tex. Const., Article I, § 10](#). Facts germane to the disposition of this ground of error will be set out below.

The only evidence adduced at trial which connected appellant with the murder of the deceased was the testimony of Valerie Denise Rencher, appellant's sixteen year old girlfriend. According to Rencher, on December 12, 1978, she was with appellant at his home outside Bryan in Brazos County, watching television. At about 7:30 p.m., appellant's brother, Danny, and James Manuel arrived in a car³ and the couple joined them for a ride.

Sometime after Danny Harris had turned onto Sandy Point Road, driven several miles and stopped, he announced that the car would not start. He observed aloud that "twelve miles is too long to walk," so they began walking away from Bryan. A man came out on his porch and Danny asked whether he had any "cables," to which the man replied he did, but his car was not there.

After walking a short distance more, they saw headlights approaching and Danny Harris said, "We're going to stop this car." Standing in the middle of the oncoming vehicle's lane, Danny stopped a pickup truck, driven by Timothy Merka. Merka advised the group he did have some booster cables. After retrieving the cables from his truck, Merka and Danny Harris hooked the cables to each vehicle. Danny attempted unsuccessfully to start the car several times and after working for approximately thirty minutes, Merka suggested that a man down the road might be able to help them; he began preparing to leave, removing the cables from the vehicles.

According to Rencher, Danny Harris and James Manuel went to the trunk of their car and she could hear them talking, but not what they said. Though her testimony was conflicting, Rencher ultimately settled on a version in which she saw Danny at that location, holding a jack. Danny then approached the witness and appellant, who were standing beside the front of the car, and, positioned on the other side of Rencher, whispered across her to appellant: "We're going to drive this man."⁴

*473 Rencher could not remember "how" he got it, but she thought appellant got the jack from Danny, then began "drifting" to the driver's side of Merka's truck, then around its rear. Appellant walked behind Merka, and Danny, facing Merka, "pushed [him] with both hands and his chest," knocking him on his back. Danny sat on Merka's stomach, pinning his wrists and appellant "hit [Merka] with the jack." Rencher testified Merka asked, "What do you want?," and she said, "Don't hit him no more," but appellant hit him again. According to Rencher, she at this point got into Merka's truck and seated herself in the middle of the cab.

Rencher testified appellant hit Merka approximately six additional times on the top of his head, then entered the truck; Danny and James Manuel went to Merka's body, apparently located and took the deceased's wallet. Danny Harris observed, "If it was the man's time to die, it was the man's time to die." After more riding around and a side trip to Waller, Rencher went home with appellant and slept with him that night.

On crossexamination, Rencher conceded that as she sat in the truck she could not see what was transpiring outside because the dome light was on and admitted she actually saw appellant hit the deceased twice.⁵ She also testified that she did not warn the deceased of the impending attack. She denied remembering her prior statement that Danny Harris struck the first blow and appellant "joined in." She insisted that she could not remember anything

about “how” appellant obtained the jack, though she denied he had left his position next to her to get it from the trunk. She acknowledged she had spent two or two and one half hours “rehearsing” her testimony with the District Attorney on the preceding night. She was vigorously crossexamined about never having before mentioned in a statement that she told appellant, “don’t hit him no more.”

Returning to Rencher’s position between appellant and Danny when appellant “all of a sudden had [the jack],” defense counsel inquired:

“Q: For Curtis to get the jack from Danny, he would have either have to handed [sic] it in front of you or behind you, wouldn’t he?

A: I guess.

Q: And you don’t remember if he did or not?

A: No.

Q: Did anybody promise you anything in exchange for making a statement?

A: No.

Q: No?

A: Not that I can remember.

Q: Did anybody say anything to you like, ‘you help us, we’ll help you.’

A: I can’t remember.

Q: You don’t recall saying in a tape recorded statement in response to that question from the District Attorney....

‘Nobody has put any pressure on you or promised you anything is that right?’

And you responded,

‘I wouldn’t say promised me, but there has been somebody that said, “If you help us, we’ll help you”?’

Did you say that to the District Attorney on the 8th?

A: Not at this time.

Q: Ma’am?

A: Not at this time.

Q: Was that a true statement that you told the District Attorney ... that somebody had said to you, ‘If you help us, we’ll help you?’

A: I can’t remember.

Q: You can’t remember if that’s true or not?

A: What I’m saying is that I can’t remember who told me that.

Q: But someone did say that to you?

A: I can’t remember.

*474 Q: *You know, don’t you, that you’ve been accused of the offense of murder, don’t you?*⁶

A: Pardon me?

Q: You know you’ve been accused of the offense of murder?

MR. MAYHAN [RENCHE’S ATTORNEY]: Judge, I think I’m going to have to object at this point in time. As far as I know, there is no indictment or complaint or information that’s filed against her pending in the District Court that has jurisdiction.”

The trial court sustained the witness’ attorney’s objection.

Defense counsel continued,

“Q: Do you remember when you went before Judge Hensarling ... and she said, ‘*You’ve been accused of murder?*’ *Do you remember that?*”

[RENCHE’S ATTORNEY]: Judge, again I object. *We’re getting into a juvenile matter which is privileged, I believe, at least at this point in time.*

COURT: I have no way of knowing exactly what he’s referring to *but if it’s a juvenile matter, the objection is sustained.*

Q: Valerie, this gentleman that just stood up in the gray suit, ... *represents you arising on facts coming out of this killing, doesn’t he?*

[RENCHEER'S ATTORNEY]: Judge, I object again, if we're still getting into the juvenile matter.

COURT: Sustained, Mr. Moore.

MR. MOORE: Your Honor, note our exception—

COURT: *Sustained to any juvenile proceedings.*

[RENCHEER'S ATTORNEY]: Thank you, Judge.

MR. MOORE: Judge, the jury is entitled to know—

Whereupon the court intervened and had the jury removed from the courtroom.

Defense counsel stated his intent was to establish the "bias and prejudice of [the witness in this case by showing] the fact certification proceedings have started ... [with the filing of a] petition which charged her with the capital murder for which our client is on trial." Counsel argued that the jury should be fully informed of the witness' status and concluded,

"To deny us the right to effectively cross examine this witness denies us the right to attempt to impeach her as to her credibility by showing what she has to gain or lose as a result of her testimony, denies us the opportunity to show the jury that in exchange for her testimony about what happened in this killing, that if she is convicted she is going to get a favor from the District Attorney's Office."

At this point—and, for the first, as well as last time during this exchange—the District Attorney was heard on the issue: "Judge, I believe that goes to the Burkhalter case,⁷ and we've already brought out the ten year situation, and *we object to it, any further questioning about the juvenile proceeding and charges and accusations and so forth.* "

Again, Valerie Rencher's attorney spoke up:

"Well, the only fault I find with the whole thing, Judge, is the fact that we're presuming something that hasn't come to pass. *True enough, there is an application [to certify her as an adult] filed, but the juvenile judge hasn't heard that application, nor has he ruled, so at this point in time to say she is*

*accused, that is that she stands in the shoes of a person accused of a criminal offense under the *475 adult laws of the State of Texas is certainly not a true statement of the facts.* "

Rencher's attorney added that to his knowledge, the Brazos County District Attorney, Travis Bryan, did not represent the State in juvenile matters, but another individual did, "so it's not under their control at this point in time. It's not under this court's control ... because she has not been ... indicated or charged or in any other manner ... come before the jurisdiction of this court on this matter, [but is only] a witness as she sits here now."

Defense counsel requested an opportunity to develop the fact that the juvenile prosecutor had indeed agreed to abate the juvenile proceedings against Rencher at the request of Mr. Bryan, the District Attorney. The court replied, "That will be denied, and both objections of Mr. Bryan and Mr. Mayhan sustained."

At a recess, the defense called Travis Bryan, III. The District Attorney testified that he had communicated with Sarah Ryan, the juvenile prosecutor, and asked that the hearing on the petition pending against Rencher be delayed until the trials against appellant, Danny Harris and James Manuel could be conducted and that Rencher remain in custody until that time. Mr. Bryan stated that his "main concern was the safety of the witness" and denied that he had considered any tactical advantage to be gained by the witness' preindictment status, in the prosecution against appellant.

On appeal, the State argues that "the facts that could have impeached the witness were before the jury and no harm is shown." In support of this contention the State points to the testimony of Rencher's attorney, Richard Mayhan, adduced during the State's case in chief before Valerie Rencher had been called to the stand.

Mayhan testified that he represented Rencher and that such representation "gr [e]w out of the events which occurred on December 11th, 1978 ... which involved the alleged murder of Tim Merka," but the jury was then informed that Rencher was "a juvenile, and she had not been indicted in any felony case." Mayhan stated that Rencher had testified at "a writ of habeas corpus hearing," and had given two prior written statements "regarding this transaction." The prosecutor asked Mayhan if he were "aware of an agreement or a conversation with [the State] regarding [his] client's testimony in this case?" Mayhan's reply:

“The nature of that agreement is that if my client testified she would receive not more than ten years. This is in no way to say that I think my client is guilty, but this was our agreement. * * * This was, also as I recall, not an agreement on my ... client’s behalf to plead guilty or anything of this nature, but it was an agreement that if in the event my client was indicted and if in the event she was convicted or if in the event she pled guilty that she would receive not more than ten years.”

Mayhan affirmed he had communicated this agreement to his client.

On crossexamination, defense counsel attempted to fill in what surely must have been blanks in the minds of the jurors by having Mayhan affirm that in Texas, a juvenile must be certified as an adult before he can be indicted and that “a petition to certify [Rencher] as an adult in connection with capital murder of Tim Merka ha[d] been filed.” Mayhan reiterated, however, that his client was not then “under any criminal indictment, complaint, or information.”⁸ The witness admitted that he had refused to allow defense counsel for appellant, Danny Harris and James Manuel to interview his client, citing her extensive crossexamination in the mentioned habeas corpus hearing.

We cannot agree with the State that the facts developed by Richard Mayhan’s testimony adequately reflected the facts extant which were probative of the extent of the witness’ bias; neither did such testimony *476 justify or render harmless the denial of appellant’s fundamental right to effective confrontation and crossexamination of the witness against him. We are constrained to reverse.

[1] The essential policy underlying the Sixth Amendment right to confrontation is to give the accused an *opportunity* to crossexamine the witnesses against him. *Pointer v. Texas*, 380 U.S. 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This opportunity to expose falsehood and elicit the truth has been oft characterized as one of the safeguards “essential to a fair trial.” 380 U.S. at 404, 85 S.Ct. at 1068.⁹

“Cross-examination is the principal means by which the believability of the witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, *the cross-examiner is not only permitted to delve into the witness’ story to*

test the witness’ perceptions and memory, *but* the cross-examiner has traditionally been *allowed to impeach, i.e., discredit, the witness.*”

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

[2] Thus, extreme prejudice ensues from a denial of the opportunity to place a material witness in his proper setting as regards his testimony. Accordingly, eliciting an admission that the witness has been accused of or incarcerated for a crime may be pertinent to show that his “testimony was biased because given under promise *or* expectation of immunity,¹⁰ *or* under the coercive effect of his detention by officers of [government who are] conducting the present prosecution.¹¹ * * * Even if the witness were charged with some other offense..., [a defendant would be] entitled to show by cross examination that his testimony was affected by fear *or* favor growing out of his detention.”¹² *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931).

In *Jackson v. State*, 482 S.W.2d 864, 868 (Tex.Cr.App.1972), it was reiterated,

“Evidence to show bias or interest of a witness in a cause covers a wide range and *the field of external circumstances from which probable bias or interest may be inferred is infinite.* The rule encompasses *all facts and circumstances which*, when tested by human experience, *tend to show that a witness may shade his testimony* for the purpose of helping to establish one side of the cause only....”¹³

[3] [4] It is clear that the right to crossexamination for the purpose of affecting a witness’ credibility¹⁴ is at least dual: “A *477 witness *may be asked* any question, the answer to which may have a tendency to affect his credibility. *And* if he denies anything that would show a motive for, [sic] or animus to, testify against a party, *it may be shown* by other witnesses and by independent facts.” 482 S.W.2d at 857. Apparent then, is the fact that when the crossexaminer is improperly denied the *opportunity to ask a question and receive* the witnesses’ answer for consideration by the factfinder, he may concomitantly be denied the right to establish facts which would illustrate the true circumstances bearing on the issue by extrinsic proof. See *Spain v. State*, 585 S.W.2d 705 (Tex.Cr.App.1979); *Castro v. State*, 562 S.W.2d 252 (Tex.Cr.App.1978); *Randle v. State*, 565 S.W.2d 927 (Tex.Cr.App.1978); *Jackson* (1972), *supra*; *Curry v. State*, 72 Tex.Cr.App. 463, 162 S.W. 851 (1913). In such a case the accused’s right to *effective* confrontation is thoroughly frustrated, and we now hold a frustration of that right is presented in the instant case.

While Valerie Rencher’s attorney’s testimony indicated to the jury that some type of agreement had been made in exchange for her testimony against appellant, this was not by any means adequate to place the witness, *Rencher*, in her “proper setting” and put the weight of *her* testimony and *her* credibility to the test without which the jury could not fairly appraise *her*. See *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Alford*, *supra*; and *Spain*, *supra*. Richard Mayhan’s credibility was not in issue;¹⁵ the jury had a right to observe *Valerie Rencher* under questioning in this regard. If Valerie Rencher had denied—as Mayhan repeatedly did—that she was “charged with” or “accused of” the offense with which appellant was on trial, there is no doubt the defense would have been entitled to establish certain allegations made in the pending Petition for Discretionary Waiver of Juvenile Jurisdiction, which at least clarified, and at most, rebutted that testimony.¹⁶ But, the record reflects the trial court refused the admission of that petition before the jury when offered upon *Mayhan’s* denial,¹⁷ and, it is clear, improperly so. While the State and the trial court apparently believed Mayhan’s carefully qualified denial—that his *478 client was “accused, that is that she stands in the shoes of a person accused of a criminal offense under adult laws of the State of Texas”—would somehow prevent a full explanation of just exactly how his client *did* stand accused, it in fact exacted full disclosure. *Bell v. State*, 620 S.W.2d 116 (Tex.Cr.App.1981) (Opinion on State’s Motion for Rehearing); see also [Article 38.24, V.A.C.C.P.](#)

Once this petition was before the jury, appellant would have been entitled to develop through cross-examination of *Rencher*, the fact that she had been confined in State custody pursuant to it since several days after the commission of the offense and thereby establish a basis for an inference that her testimony was “affected by fear or favor growing out of her detention.” 282 U.S. at 693, 51 S.Ct. at 220; see also *Castro*, *supra*. The jury was also entitled to know that the district attorney had intervened in the juvenile cause so as to delay its adjudication until after *Rencher’s* testimony could be had against appellant.¹⁸

The State does not address the merits of the issue on appeal, but at trial the district attorney argued the petition had no relevance, and constituted a “record of a juvenile proceeding and is not an open record, not admissible in this court.” Defense counsel responded that whatever goals were advanced by the confidentiality of juvenile records were subordinate to his right to impeach the witness and establish as a matter of law that she was an accomplice within the meaning of [Article 38.14, V.A.C.C.P.](#)¹⁹

In *Davis v. Alaska*, *supra*, the Supreme Court confronted a virtually identical set of material circumstances. Conceding the State’s interest in confidentiality of juvenile matters, the Court observed the purpose of the evidence offered by the defense was to suggest the witness was biased and, therefore, his testimony was either not to be believed or, at the very least, to be considered in light of that bias; that serious damage to the State’s case was a “real possibility” had the defendant been allowed to pursue the line of inquiry terminated.

The Supreme Court there concluded,

“In this setting we conclude that the right of confrontation is paramount to the State’s policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by [an accused’s] right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In *Alford v. United States*..., the Court stated:

“[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.” [*Id.*, 282 U.S. at 694, 51 S.Ct. at 220.]

*479 The State could have protected [the witness] from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; *the State cannot, consistent with the right of confrontation, require [an accused] to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records.*”

415 U.S. at 319–320, 94 S.Ct. at 1111. See also *Texas Board of Pardons and Paroles v. Miller*, 590 S.W.2d 142

(Tex.Cr.App.1979); and *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

^[5] In the instant case, appellant had an unqualified right to ask, as he did, the only witness linking him with the offense, whether she too had been “accused” of the offense on trial, and to receive her answer; the jury was entitled to understand the “whole picture” of the witness’ vulnerable status in the juvenile court and observe *her* testimony thereon. That she had not yet been adjudicated a delinquent child or ordered transferred to the district court under the pending cause was itself a relevant circumstance, probative not only of her credibility as a witness, but also of the only substantive issue in the case: whether she was an accomplice witness whose testimony would require corroboration.²⁰

^[6] Finally, we find the suggestion that the testimony of a material State’s witness’ attorney—a highly interested person whose sole duty is to employ studied and professional skills in tactics, semantics and logic to the end of shielding his client from attacks, real, imagined or potential—may be substituted for an accused’s right to confront and crossexamine the only witness against him, nothing short of macabre. The reasons for rejecting such a notion are self evident.

^[7] Neither are we impressed with the State’s contention that the defense’s failure to elicit Valerie Rencher’s responses to the questions disallowed, on a bill of exception, waived the error under Article 40.09, subd. 6, V.A.C.C.P.²¹ As was observed in *Mutscher v. State*, 514 S.W.2d 905 (Tex.Cr.App.1974), an appellant is not restricted to any one method in showing any fact which would tend to establish ill feeling, bias, motive and animus on the part of a witness against him.²² Here, the record is fully developed as to the facts the defense sought to establish and the reasons such facts were probative of Rencher’s credibility. Compare *McManus v. State*, 591 S.W.2d 505 (Tex.Cr.App.1979); *Cloud v. State*, 567 S.W.2d 801 (Tex.Cr.App.1979); *Moreno v. State*, 587 S.W.2d 405 (Tex.Cr.App.1979); *Mutscher*, supra; and *Luna v. Beto*, 395 F.2d 35 (CA5 1968).

And finally, lest it be forgotten that the error committed in the first instance was the denial of an *opportunity to propound questions* in the presence of the jury, we quote from *Spain*, supra, at 710:

“Just as *Alford* held that a defendant is not required to show what facts the cross-examination would have revealed in order to establish prejudice, the appellant *480 in the present case is not required to show that his cross-examination would have affirmatively established the facts sought.

An effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. *The cross-examiner should be allowed to expose the limits of the witness’ knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the witness.* The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness’ credibility. *An unbelievable denial of the existence of a fact can be even more probative as to lack of credibility than an affirmative admission of the fact.*”

Though the law is clear that a showing of want of prejudice cannot cure a denial of the right of effective crossexamination,²³ we hasten to add in conclusion that, like that of the witness in *Davis v. Alaska*, supra, the testimony of Valerie Rencher adduced on crossexamination indicates she was, in effect, asserting a right to give questionably truthful answers in anticipation of the trial court’s protection.²⁴ See also *Spain*, supra. Indeed, the objections interposed by her attorney which were sustained by the court could not have been made at a more critical time in terms of the cogency of her story and the credibility of her testimony. “It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination.” 415 U.S. at 314, 94 S.Ct. at 1109.

For the refusal of the trial court to allow appellant “to place the parties and the witness in their proper prospective [sic] and to develop further the interests involved,”²⁵ the judgment of conviction is reversed, and this cause is remanded to the trial court.

McCORMICK, Judge, dissenting.

The Court, in reversing this conviction, is not only misconstruing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 247 (1974), but is also misinterpreting the record in this case.

The majority reverses the conviction because the appellant was not effectively allowed to cross-examine the State’s witness, Valerie Rencher, in order to establish her bias or motive in testifying. However, in examining the record, I found that the evidence of her possible bias or motive in testifying *did* come before the jury. It is a logical tactic to try and diminish to the greatest extent possible any harmful effect that a witness can have on the presentation of one’s case. That is the reason that often when a defendant testifies in his own behalf his attorney

will open the direct examination by going into the defendant's past record. This informs the jury that there may be a reason to question the credibility of a witness' testimony and takes away the "shock effect" that would occur if this evidence was allowed to be first brought out on cross-examination by opposing counsel.

This is exactly what the State did in the instant case. Wanting to be open and above-board with the jury, before even calling Valerie Rencher to the stand, the State called her attorney, Richard Mayhan. Mayhan's testimony informed the jury that he had negotiated an agreement for his client whereby if she testified in this case she would not receive more than ten years. On cross-examination he testified that a petition to certify Rencher as an adult in connection with the instant offense had been *481 filed. Surely the jury, after hearing this testimony, realized the potential for bias in Rencher's forthcoming testimony. To say otherwise would be to render a disservice to the jury's intelligence.

Certainly, Rencher's attorney, who had negotiated with the prosecution and who was trained in the law, could, better than Rencher, testify as to any agreement and the effect her testimony would have on such agreement.

Furthermore, appellant has failed to demonstrate any harm suffered as a result of being denied the opportunity to cross-examine Rencher in regard to this matter. My search of the record reveals that appellant did not preserve a bill of exception as to the evidence he would have brought out on cross-examination. As this Court has held in a multitude of cases, failure to preserve a bill of exceptions is failure to preserve error. *Passmore v. State*, 617 S.W.2d 682 (Tex.Cr.App.1982); *Marini v. State*, 593 S.W.2d 709 (Tex.Cr.App.1980).

The majority relies on *Davis v. Alaska*, *supra*. However, *Davis* may be distinguished from the case at bar. In *Davis*, the evidence of the witness' possible bias and prejudice never got to the jury. In the instant case, before the defense could attempt to bring out the possibility of bias, the State introduced the possibility of bias through their own witness.

I agree with the Supreme Court in *Davis* and in *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed.2d 624 (1931), that defense counsel has a right to impeach a witness by showing a possibility of bias. But when that evidence is already before the jury, no harm is suffered by limiting the defense's cross-examination of that witness.

I would refer the majority to Justice Stewart's concurring opinion in *Davis* where he says:

"In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." 415 U.S. at 321, 94 S.Ct. at 1112.

I would suggest that this is one of those cases.

Finally, I would refer the majority to the dissenting opinion in *Davis*. There is no constitutional principle at stake here as the majority argues. As Justice White writes:

"This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination..." 415 U.S. at 321, 94 S.Ct. at 1113.

The record shows that defense counsel was afforded opportunity to conduct *extensive* cross-examination of Rencher. This Court has long recognized that the manner and extent of cross-examination rests in the discretion of the trial judge and rarely will the trial judge's discretion be disturbed on appeal. Ray, *The Law of Evidence* (1980). The majority in *Davis v. Alaska*, *supra*, recognized this when they wrote:

"Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. *Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation*, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (Emphasis added) 415 U.S. at 316, 94 S.Ct. at 1110.

Where, as in the instant case, the impeaching material has already been laid before the jury, the trial judge's discretion should be upheld.

For the above reasons, I vigorously dissent to the reversal of this conviction.

All Citations

642 S.W.2d 471

Footnotes

- 1 [Article 37.071\(f\)](#) provides that “[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals....”
- 2 Appellant’s conviction is under [V.T.C.A. Penal Code, § 19.03](#), which provides in pertinent part:
 “(a) A person commits an offense if he [intentionally or knowingly causes the death of an individual] under Section 19.02(a)(1) of this code and:

 (2) the person intentionally commits the murder in the course of committing or attempting to commit ... robbery....”
- 3 It was later established that the vehicle was a stolen car.
- 4 Rencher testified that “drive” meant “jump on,” but denied she knew the meaning of the statement at the time it was made. On crossexamination it was established that in a prior statement, she had admitted understanding the communication when made.
- 5 “Yes, I testified Curtis hit him eight times, but I didn’t say I seen him hit him eight times.”
- 6 All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.
- 7 The reference is to [Burkhalter v. State](#), 493 S.W.2d 214 (Tex.Cr.App.1973), in which the trial court’s refusal to permit disclosure of the State’s plan not to prosecute a coincitcee if he would testify against Burkhalter without claiming immunity, was held to be reversible error notwithstanding the fact that the record did not clearly establish the witness actually knew of the specific terms of the agreement between his attorney and the State.
- 8 Outside the jury’s presence appellant sought to introduce the Petition for Discretionary Waiver of Juvenile Jurisdiction pending against Rencher, but the trial court refused its admission before the jury.
- 9 “Certain principles have remained relatively immutable in our jurisprudence. One of these is that ... the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it was untrue. While this is important in the case of documentary evidence, *it is even more important where the evidence consists of testimony of individuals whose memory might be faulty or who, in fact might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.*”
[Greene v. McElroy](#), 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).
- 10 See, e.g., [Simmons v. State](#), 548 S.W.2d 386 (Tex.Cr.App.1977).
- 11 See, e.g., [Castro v. State](#), 562 S.W.2d 252 (Tex.Cr.App.1978).
- 12 See, e.g., [Randle v. State](#), 565 S.W.2d 927 (Tex.Cr.App.1978); and [Evans v. State](#), 519 S.W.2d 868 (Tex.Cr.App.1975).
- 13 Other examples of circumstances which tend to show bias are proof that the witness fears he may be a suspect in the case, e.g., [Davis v. Alaska](#), *supra*; [Castro](#), *supra*; [Evans](#), *supra*; and, any prejudice or condition which might cause the witness selectively to perceive or report events. E.g., [Jackson](#) (1972), *supra*.
 Circumstances which are *not* probative of a witness’ credibility were found in, e.g., [Bilbrey v. State](#), 594 S.W.2d 754 (Tex.Cr.App.1980); [Cloud v. State](#), 567 S.W.2d 801 (Tex.Cr.App.1979); [Murphy v. State](#), 587 S.W.2d 718 (Tex.Cr.App.1979); and [Warren v. State](#), 514 S.W.2d 458 (Tex.Cr.App.1974).
- 14 Crossexamination for the purpose of establishing facts which are probative of a defensive issue in a criminal case is touched upon *post*.
- 15 In fact Mr. Mayhan’s role in this entire matter is puzzling. It is clear that neither he nor his client was a party to this

lawsuit, with standing to make objections. *Draper v. State*, 596 S.W.2d 855, 857, n. 2 (Tex.Cr.App.1980). But it was he who made and argued all objections to the defendant's questions regarding his client's status in the juvenile court. In this capacity, Mayhan could only be acting on behalf of the State.

While the suggestion that a defendant may be denied cross-examination of a material State's witness so long as he may cross-examine an assistant district attorney in the case may sound ludicrous, that is essentially what was done here. We are at a loss to understand the trial court's receptivity to such a state of affairs. One particularly awkward moment when Mayhan was under voir dire examination was eased thus:

"THE WITNESS: Judge, excuse me, if I might speak from the posture of a witness, but I also represent Ms. Rencher and I need to—

THE COURT: You can wear two hats, counsel. Take the witness hat off and put the lawyer's hat on."

See and cf. State Bar of Texas, Rules and Code of Professional Responsibility, EC 5–9 (1972).

16 Among other things, that petition alleged that the State of Texas "would respectfully show the Court that she has information and reason to believe, and does believe that:

III.

On or about the 11th day of December, 1978, [Valerie Denise Rencher] violated a penal law of this State punishable by imprisonment...to wit: Article 19.02 of the penal code of Texas, in that *she did then and there* in Brazos County, Texas:

... intentionally and knowingly cause the death of an individual, Timothy Michael Merka, by striking him on the head with a hard metal object; and the said Valerie Denise Rencher did then and there intentionally cause the death ... in the course of committing the offense of robbery of the said Timothy Michael Merka.

V.

The offense alleged is against the person and was done in a premeditated and aggressive manner. *There is evidence upon which the Grand Jury may be expected to return an indictment. * * **

17 The petition was introduced as defense Exhibit No. 23 for the record.

18 It is irrelevant that the district attorney's asserted reason for his intervention was to insure the witness' safety. Regardless of his internal mental processes, one real effect of his intervention was assurance that the matter loomed large before the witness when she testified against appellant. A *possible* effect of it was the avoidance of a change in Rencher's status from "juvenile accused" to "coindictee" which would have decisively made her an accomplice witness as a matter of law in appellant's prosecution.

Rencher's status as an accomplice was the only substantive issue—save her credibility—in the case, and the court charged the jury as to her being an accomplice witness as a matter of fact.

19 Article 38.14, V.A.C.C.P. provides:

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

20 We need not further explicate our rejection of the State's purported distinction between *Davis v. Alaska, supra*, where the witness had been adjudicated a delinquent and placed on juvenile probation, and the instant case.

21 Article 40.09, subd. 6, V.A.C.C.P. provides in relevant part:

"(a) A party desiring to have the record disclose some *action*, testimony, evidence, proceeding, objection, *exception* or other event or occurrence *not otherwise shown by the record* may utilize a bill of exception for this purpose. * * *

(b) A bill of exception shall be a necessary predicate for appellate review *only if the matter complained of is not otherwise shown by the record* as herein provided. * * * *If the transcription of the court reporter's notes ... shows the occurrence or existence of any particular action by the court or refusal of the court to act or any objection or exception or any other event, no further proof of the occurrence or existence of same shall be necessary.*"

See also (c) and (d)(1)–(2).

22 However, in *Mutscher, supra*, the failure to develop what the witness' testimony would have been on crossexamination was fatal to the ground on appeal because the record did not indicate in what manner a pending Federal indictment

might possibly affect the witness' testimony in Mutscher's State prosecution.

- 23 Such a denial is "constitutional error of the first magnitude and no amount of showing of want of prejudice [will] cure it." *Davis v. Alaska*, *supra*, at 318, 94 S.Ct. at 1111; see also *Spain*, *supra*; *Evans*, *supra*.
- 24 While it is apparent that the State's tactic was to have Mayhan testify to the specific terms of the agreement between the parties first and later have Rencher disclaim remembering those terms, thereby satisfying *Burkhalter*, *supra*, Mayhan had already told the jury he had communicated the agreement to his client. Therefore, Rencher's memory lapse alone justified an exploration on cross-examination of *her* understanding of *her* status vis-a-vis the offense on trial.
- 25 *Smith v. State*, 541 S.W.2d 831, 835 (Tex. Cr. App. 1976).

444 S.W.3d 760
Court of Appeals of Texas,
Fort Worth.

In re E.C., F.C., T.C., and [Cleburne Metal Works, LLC](#) d/b/a [Cleburne Sheet Metal](#), Relators.

No. 02-14-00235-CV.
|
Sept. 16, 2014.

Panel: [DAUPHINOT](#), [McCOY](#), and [MEIER](#), JJ.

Opinion

OPINION

[BILL MEIER](#), Justice.

Synopsis

Background: Relators petitioned for writ of mandamus to challenge discovery order entered in civil action by the 96th District Court, Tarrant County, R.H. [Wallace](#), J., requiring them to disclose juvenile’s counseling records stemming from a fatal car accident in which he was involved and the ensuing proceedings in which he was adjudicated delinquent for committing intoxication manslaughter.

Holdings: The Court of Appeals, [Bill Meier](#), J., held that:

- ^[1] statute that otherwise would have prohibited “use” of evidence previously used in juvenile delinquency proceedings did not prohibit discovery of juvenile’s counseling records in the subsequent civil suit against relators;
- ^[2] therapist’s files relating to juvenile’s counseling were not “records and files” of the sort that were recognized as confidential under statute limiting discovery of records relating to juvenile proceedings; and
- ^[3] juvenile’s therapist waived privileges by disclosing the communication as a witness in the earlier juvenile proceedings.

Petition denied.

Attorneys and Law Firms

***762** [Todd Clement](#), The Clement Law Firm, Dallas, [Greg Coontz](#), [Coontz Cochran](#), [Burluson](#), [Robert L. Ward](#), [Cleburne](#), for Real Parties in Interest.

[Michael A. Yanof](#), [Randy A. Nelson](#), Thompson, Coe, Cousins & Irons, L.L.P., Dallas, for Relators.

I. INTRODUCTION

Relators E.C., F.C., T.C., and Cleburne Metal Works, LLC d/b/a Cleburne Sheet Metal filed a petition for writ of mandamus complaining that the trial court had abused its discretion by overruling their assertions of confidentiality and privilege and ordering them to produce documents from the file of Dr. Dick Miller, a clinical psychologist who was hired as a consultant by E.C.’s defense attorneys in his juvenile proceeding. We hold that Dr. Miller’s file and opinions are not confidential and that any privileged information has been waived through voluntary disclosure. Accordingly, we will deny the petition.

II. RELEVANT BACKGROUND ¹

Sixteen-year-old E.C. was involved in an automobile accident late one night in June 2013 after he lost control of the truck that he was driving while intoxicated. Four people died and a number of others sustained injuries. E.C. hired defense attorneys “[w]ithin hours of the accident,” and the defense attorneys then retained Dr. Miller as a consultant. According to a document filed by Real Parties in Interest K.M. and A.M., individually and as next friends for L.M., a minor (collectively, RPIs), Dr. Miller spent approximately fifty hours treating E.C. and his parents after the accident.

In September 2013, the State filed a petition alleging that E.C. had engaged in delinquent conduct by committing four violations of [penal code section 49.08](#) and two violations of [penal code section 49.07](#). See [Tex. Penal Code Ann. §§ 49.07](#) (intoxication assault), [49.08](#) (intoxication manslaughter) (West 2011). According to RPIs, E.C. ultimately “pled guilty” to four counts of intoxication manslaughter. Although initially hired as a

consultant, Dr. Miller testified at the subsequent disposition hearing and “freely discussed the case, his treatment of [E.C.], and his role in the defense.” The juvenile court sentenced E.C. to ten years’ probation.

A civil lawsuit was filed against Relators in September 2013 to recover damages for injuries sustained as a result of Relators’ alleged negligence and gross negligence in connection with the accident. Other parties intervened in the coming months, including RPIs. Relators have settled all of the claims alleged by all of the plaintiffs and intervenors, except for those of RPIs.

*763 In March 2014, RPIs issued to Dr. Miller (1) a subpoena for production of documents and (2) a notice of deposition by written questions, both seeking Dr. Miller’s records pertaining to E.C.’s juvenile proceeding. Relators responded by filing motions for a protective order. RPIs later noticed Dr. Miller’s deposition, which Relators moved to quash. Relators argued in briefing that Dr. Miller’s file and his thoughts and opinions generated as part of E.C.’s defense in the juvenile proceeding are confidential under family code sections 51.13(b) and 58.005; privileged under the work-product, attorney-client, and mental-health privileges; and irrelevant.

The trial court conducted a hearing on Relators’ motions and signed an order on May 29, 2014,

- (1) finding that family code sections 51.13(b) and 58.005(a) were inapplicable to the records and testimony of Dr. Miller;
- (2) finding that Relators’ claims of work-product privilege, attorney-client privilege, and mental-health privilege had been waived;
- (3) granting Relators’ motions as to certain records; and
- (4) ordering Relators to submit the rest of Dr. Miller’s records for an in-camera inspection.

Relators filed a motion for rehearing, asking the trial court to perform an in-camera review of Dr. Miller’s file in order to assess their assertions of confidentiality and privilege, and E.C.’s defense counsel submitted Dr. Miller’s file to the trial court for an in-camera inspection. On July 22, 2014, the trial court signed an order requiring Relators to produce certain documents from Dr. Miller’s file (identified by Bates numbers) within fourteen days of the order. Relators filed this mandamus petition, and we granted their emergency motion to stay the May 29 and July 22, 2014 orders pending our consideration of the petition.

III. STANDARD OF REVIEW

[1] [2] Mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex.2009) (orig. proceeding). A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex.2010) (orig. proceeding).

IV. CONFIDENTIALITY ARGUMENTS

Relying primarily on family code sections 51.13(b) and 58.005(a), Relators argue that Dr. Miller’s file and opinions regarding E.C.’s juvenile case are confidential and not discoverable in a subsequent civil proceeding such as this one. See Tex. Fam.Code Ann. §§ 51.13(b), 58.005(a) (West 2014). They contend that juvenile proceedings are treated differently than adult criminal proceedings and civil proceedings, that all records and files of the juvenile in conjunction with a juvenile proceeding are confidential, and that “[t]here is only one conceivable exception that could allow disclosure (or at least discovery) of Dr. Miller’s opinions here: if [Relators] were to designate Dr. Miller as their own retained testifying expert *in this civil proceeding*,” which has not happened. Relators’ confidentiality arguments therefore require us to construe family code sections 51.13(b) and 58.005(a).

[3] [4] [5] [6] [7] [8] [9] [10] Our primary objective when construing a statute is to ascertain and give effect to the legislature’s intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex.2006). We seek that intent “first and *764 foremost” in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex.2006). Particularly important here is that we must consider the words in context, not in isolation. See *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562–63 (Tex.2014); *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.2002); see also Tex. Gov’t Code Ann. § 311.011(a) (West 2013) (providing that words and phrases shall be read in context). Thus, in determining the meaning of a statute, a court must consider the entire act, its nature and object, and the consequences that would follow from each construction.

Sharp v. House of Lloyd, Inc., 815 S.W.2d 245, 249 (Tex.1991). A court should not assign a meaning to a statutory provision that would be inconsistent with other provisions of the same act, even though it might be susceptible to such a construction standing alone. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex.2002). Indeed, “[i]nterpretations of statutes which would produce absurd results are to be avoided.” *Sharp*, 815 S.W.2d at 249. Accordingly, we begin our analysis with the statute’s words and then consider the apparent meaning of those words within their context. Statutory construction presents a question of law that we review de novo. *Shumake*, 199 S.W.3d at 284.

A. Family Code Section 51.13(b)

The Juvenile Justice Code is found in Title 3 of the family code. Chapter 51 includes a wide range of general provisions, including such topics as jurisdiction, waiver of rights, and polygraph examinations. *Tex. Fam.Code Ann. §§ 51.04, .09, .151* (West 2014). *Section 51.13* address the “[e]ffect” of an adjudication or disposition. *Id.* § 51.13. In particular, subsection (a) provides that an order of adjudication or disposition is not a conviction of a crime and does not disqualify a child in any civil service application or appointment, subsection (c) prohibits a child from being committed or transferred to a penal institution or other facility that is used primarily to execute the sentences of persons convicted of a crime, and subsection (d) explains when a particular adjudication is a final felony conviction for purposes of the habitual offender statute. *Id.* § 51.13(a), (c), (d). *Section 51.13(b)* provides as follows:

(b) The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent:

- (1) proceedings under this title in which the child is a party;
- (2) sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965; or
- (3) civil commitment proceedings under Chapter 841, Health and Safety Code.

Id. § 51.13(b). Subsection (b) is appropriately found in *section 51.13* because it identifies one “[e]ffect” of an adjudication or disposition; specifically, when (1) the adjudication or disposition of a child or (2) evidence adduced in a hearing under this title (3) may be *used*: in a subsequent (i) *proceeding* under this title in which the

child is a party, (ii) sentencing *proceeding* in criminal court against the child as permitted, or (iii) civil commitment *proceeding*. *Id.*

^[11] There are several reasons why *section 51.13(b)* has no application here. First, RPIs are not seeking to use E.C.’s adjudication, his disposition, or any evidence adduced at a hearing under this title. They are seeking to discover Dr. Miller’s *file and opinions*. Dr. Miller’s file and opinions are not an adjudication, a disposition, or evidence adduced at a hearing under this title. *Section 51.13(b)* is therefore inapposite.

*765 ^[12] To the extent that Relators conflate Dr. Miller’s file and opinions with evidence adduced at a hearing—because his testimony reflected his opinions and various matters contained in his file—*section 51.13(b)* nonetheless does not render Dr. Miller’s file confidential. A proper construction of *section 51.13(b)* cannot ignore that the legislature chose the verb “used” and followed it by setting out three different subsequent “proceedings.” *Id.* Statutory construction rules “require that the words employed by the legislature shall be taken in their ordinary and popular acceptance, unless technical terms are used, or unless it clearly appears from the context that the words used were not intended to be understood in their ordinary and popular signification.” *Engelking v. Von Wamel*, 26 Tex. 469, 469 (1863). The legislature did not define the word “used,” but because three subsequent “proceedings” are immediately identified thereafter, we can gather that the legislature intended for the word “used” to be construed in its technical sense: specifically, prior adjudications, dispositions, and evidence adduced in a hearing under the Juvenile Justice Code are “used” when they are *admitted* for some purpose. *See, e.g.,* George E. Dix and John M. Schmolesky, *43A Texas Practice, Criminal Practice and Procedure § 46:31* (citing *section 51.13(b)* and discussing the *admissibility* of juvenile adjudications in subsequent criminal prosecutions). Thus, it clearly appears from the context of *section 51.13(b)* that the intent of the legislature was to limit the formal instances, or “proceedings,” in which an adjudication, a disposition, or evidence adduced at a hearing under the Juvenile Justice Code could be admitted, or “used,” for whatever purpose it may be.

^[13] RPIs here are not attempting to “use[]” Dr. Miller’s file because they are not attempting to admit it in some proceeding for some purpose; rather, RPIs are merely trying to *discover* it pretrial. It is well understood in the civil context that there is a fundamental difference between the discoverability of evidence and the *admissibility* of evidence at trial or some proceeding.² *See, e.g., In re Pilgrim’s Pride Corp.*, 204 S.W.3d 831,

835 n. 8 (Tex.App.-Texarkana 2006, orig. proceeding [mand. dismiss]) (“Relevance should not be confused with admissibility. Admissibility is not required for information to be discoverable.”). Relators argue that this construction “is inefficient because it allows discovery of information and materials which cannot be used in the civil proceeding.” However, an inefficient result is not analogous to an absurd result, which is what we seek to avoid when construing a statute. Moreover, the rules of civil procedure contemplate some level of inefficiency. See *Tex.R. Civ. P. 192.3(a)* (stating that information that might not be admissible is nevertheless discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence). Accordingly, even if we assume that Dr. Miller’s file and opinions somehow constitute evidence adduced at a hearing, *section 51.13(b)* is inapposite because RPIs are not seeking to “use[]” Dr. Miller’s file.

B. Family Code Section 58.005(a)

^[14] Relators’ arguments implicating *section 58.005(a)* founder for a related, context-deficient reason. *Section 58.005(a)*, entitled “Confidentiality of Records,” provides as follows:

(a) *Records and files* concerning a child, including personally identifiable information, *766 and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court *may be disclosed only to:*

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the

purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Tex. Fam.Code Ann. § 58.005(a) (emphasis added). Relators broadly construe the terms “[r]ecords and files,” as that term is used in the statute, to refer to all records and files *in existence*, including the files of a person hired as a consultant by defense counsel, like Dr. Miller. But Relators perform no statutory-construction analysis to support their proposed interpretation; they merely cite *section 58.005(a)*, construe it in isolation from the remainder of the chapter, and argue that the statute means what they say it does. A proper construction demonstrates that the legislature had something else in mind when it used the words “[r]ecords and files.”

Chapter 58 of the Juvenile Justice Code contains many statutes addressing numerous aspects of juvenile records, including who must keep records, what type of information must be kept, and who can access records. *Id.* §§ 58.001–405 (West 2014). Subchapter A of chapter 58 is actually titled “Records.” Of the fourteen statutes contained in that subchapter, only two define the term “records.” See *id.* §§ 58.0051 (“ ‘Educational records’ means records in the possession of a primary or secondary educational institution that contain information relating to a student ...”), 58.0071(a)(2) (“ ‘Physical records and files’ include entries in a computer file or information on microfilm, microfiche, or any other electronic storage media.”). The other statutes in subchapter A simply refer to “records,” “files,” or both, including *section 58.005(a)*. Nonetheless, we can gain insight into what the legislature meant when it used the words “[r]ecords and files” in *section 58.005(a)* by examining the context in which the same terms are used throughout the subchapter. For example:

- *section 58.003(g)(1)* provides that on entry of a sealing order, “all *law enforcement, prosecuting attorney, clerk of court, and juvenile court* records ordered sealed shall be sent” timely to the court that issued the order. *Id.* § 58.003(g)(1) (emphasis added).
- *section 58.003(m)* provides in part that “[o]n request of the Department of Public Safety, a juvenile court shall reopen and allow the department to inspect *767 the files and records of the *juvenile court.*” *Id.* § 58.003(m) (emphasis added).
- *section 58.007(b)* provides that “the records and files of a *juvenile court, a clerk of court, a juvenile*

probation department, or a *prosecuting attorney* relating to a child who is a party to a proceeding under this title may be inspected or copied only by” various individuals or entities. *Id.* § 58.007(b) (emphasis added).

- section 58.007(c) addresses “*law enforcement records* and files concerning a child.” *Id.* § 58.007(c) (emphasis added).
- section 58.007(g) permits a *juvenile court* that is in possession of the record of a defendant’s adjudication to provide the record to a prosecuting attorney. *Id.* § 58.007(g).
- section 58.007(i) addresses when a *juvenile probation department* may release information contained in its records without leave of the juvenile court. *Id.* § 58.007(i).
- section 58.0071(c) identifies who may authorize the destruction of physical records and files relating to a closed juvenile case: “a juvenile board in relation to the records and files in the possession of the *juvenile probation department*,” “the head of a law enforcement agency in relation to the records and files in the possession of *the agency*,” and “a prosecuting attorney in relation to the records and files in the possession of the *prosecuting attorney’s office*.” *Id.* § 58.0071(c) (emphasis added).

The pattern here is apparent: when using the undefined terms “records” and “files,” the legislature is referring to records and files in the possession of or belonging to individuals or entities closely associated with the juvenile court system—a juvenile court, a prosecuting attorney, a court clerk, or a law enforcement agency. When [section 58.005\(a\)](#) is read in context, the “[r]ecords and files concerning a child” are those records and files in the possession of or belonging to the same individuals or entities identified throughout the subchapter. There is absolutely nothing in chapter 58 to indicate that unlike the other statutes contained therein, the legislature intended the terms “[r]ecords and files” to refer to all records and files in existence everywhere, including the records and files of a person hired as a consultant by defense counsel in a juvenile proceeding. While the terms might be susceptible to that construction when standing alone, there can be no doubt that such a construction is inconsistent with other provisions of the chapter and the intent of the legislature. See *Needham*, 82 S.W.3d at 318. Accordingly, Dr. Miller’s files are not “[r]ecords and files” as that term is used in [section 58.005\(a\)](#), and like [section 51.13\(b\)](#), the statute is inapposite to the discovery dispute in this case.

We hold that the trial court did not abuse its discretion by finding that [family code sections 51.13\(b\)](#) and [58.005\(a\)](#) were inapplicable to the records and testimony of Dr. Miller. We overrule all of Relators’ confidentiality arguments that are premised upon the family code.

V. PRIVILEGE ARGUMENTS

^[15] Relators argue that Dr. Miller’s file and opinions are protected by the work-product, attorney-client, and mental-health privileges. At the hearing on Relators’ motions for protection, RPIs argued that to the extent Dr. Miller’s file and opinions were privileged, the privileges had been waived because Dr. Miller testified about his opinions in open court at E.C.’s disposition hearing and gave several televised interviews during which he discussed his opinions. RPIs argued similarly *768 in their response. The trial court agreed, specifically finding in its May 29, 2014 order that Relators had waived their claims of work-product privilege, attorney-client privilege, and mental-health privilege as to Dr. Miller’s file and opinions. In light of the trial court’s order finding waiver, we presume (without deciding) that Dr. Miller’s file and opinions are privileged and proceed to consider whether the privileges have been waived.

^[16] Privileges may be waived by voluntarily disclosing or consenting to the disclosure of any significant part of the privileged matter, unless such disclosure itself is privileged. [Tex.R. Evid. 511\(1\)](#). [Rule of evidence 511](#) begins by stating, “A person upon whom *these rules confer a privilege* against disclosure *waives the privilege...*” *Id.* (emphasis added). Thus, [rule 511](#) applies to each of Relators’ claimed privileges, including the mental-health privilege, which is found in the immediately preceding rule. See [Tex.R. Evid. 510](#). The burden of proof to establish the existence of a privilege rests on the one asserting it. *Jordan v. Court of Appeals for the Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 648–49 (Tex.1985).

We do not have the record from E.C.’s disposition hearing, nor have we requested to review the documents that the trial court ordered Relators to produce, but we may consider whether waiver has occurred here because there is no dispute between the parties that Dr. Miller (1) testified at the disposition hearing and (2) disclosed a significant amount of information that would have otherwise been protected by the attorney-client, work-product, or mental-health privileges.³ See [Tex.R.App. P. 38.1\(g\)](#) “(In a civil case, the court will accept as true the facts stated unless another party

contradicts them”). Considering that we are presuming that Dr. Miller’s file is privileged, the question then is whether Dr. Miller’s testifying at E.C.’s disposition hearing about matters that would have otherwise been privileged constituted a waiver of Relators’ claimed privileges.

This court has held that a party waived privileged information by previously disclosing it in open court. *See Stroud Oil Props., Inc. v. Henderson*, No. 02–03–00003–CV, 2003 WL 21404820, at *3 (Tex.App.-Fort Worth June 19, 2003, pet. denied) (mem. op.). We set out the following facts in *Stroud Oil Properties*:

Appellants are plaintiffs and counter-defendants in a lawsuit against Appellees in Brazos County arising out of a dispute over an oil and gas development agreement. At the same time as the Brazos County suit was pending, Appellees apparently had an internal disagreement about how to operate their business. The dispute was focused primarily at how Appellees could best respond to Appellants’ suit in Brazos County.

Appellees filed suit in Tarrant County to resolve their dispute. Throughout the suit, Appellees allegedly disclosed privileged information in open court. Appellees settled the suit and filed a rule 76a motion to seal the record in an effort to prevent the privileged information from becoming public. After a hearing, the trial court sealed the record.

Appellants learned of the suit in Tarrant County and attempted to gain access *769 to the records claiming that the suit was held in open court and had to have some relationship with the suit in Brazos County. When Appellants discovered that the court sealed the records, Appellants intervened in the case in an attempt to unseal the record.... After [a] hearing, the trial court ruled to keep the record sealed, and Appellants appealed.

Id. 2003 WL 21404820 at *1. We held that “Appellees waived any alleged privileged information when they voluntarily disclosed it in open court.” *Id.* 2003 WL 21404820 at *3.

Stroud Oil Properties is on point. The trial court could have reasonably concluded that E.C. waived any privilege as to Dr. Miller’s file or opinions by eliciting his testimony on those matters in open court at the prior disposition hearing. *See Tex.R. Evid. 511*; *see also In re Oruno*, No. 14–08–00457–CV, 2008 WL 2855028, at *2 (Tex.App.-Houston [14th Dist.] July 24, 2008, orig. proceeding [mand. denied]) (“A party waives a privilege

if it voluntarily discloses the privileged information to an open court.”); *see also Nat’l Polymer Prods., Inc. v. Borg–Warner Corp.*, 641 F.2d 418, 421 (6th Cir.1981) (beginning analysis “with the well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use”); *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 532–35 (N.D.Ill.2003) (holding that party had waived attorney-client and work-product privileges by revealing protected information in earlier mandamus petition to circuit court).

Relators argue that Dr. Miller’s testifying at the disposition hearing did not waive any privileges because a privilege is not waived by disclosure if the disclosure itself is privileged, and under family code section 51.13(b), “testimony at a juvenile proceeding is and remains confidential,” and there is no exception for subsequent civil proceedings. *See Tex.R. Evid. 511*; *Tex. Fam.Code Ann. § 51.13(b)*. We already discussed section 51.13(b) above, and that analysis is equally applicable here. Section 51.13(b) does not state that “testimony at a juvenile proceeding is and remains confidential”; it identifies subsequent “proceedings” in which evidence adduced at a juvenile trial may be “used.” We reject Relators’ broad interpretation of section 51.13(b) as some kind of a catchall, blanket provision that renders juvenile proceedings confidential in every potential context imaginable, aside from the three set out in the statute.

Relators argue that *Dr. Miller* could not have waived the privileges by testifying at E.C.’s disposition hearing because only a party could have waived the privileges. *See Tex.R. Evid. 511*; *In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 814 (Tex.App.-Houston [14th Dist.] 2007, orig. proceeding) (“A client unquestionably has the right to waive the attorney-client privilege.”). Relators included in the mandamus record an affidavit signed by F.C. stating that he did not authorize Dr. Miller to speak publicly about his work with E.C. However, while F.C. may not have consented to Dr. Miller’s disclosure of otherwise privileged information, E.C. certainly did when he called Dr. Miller to testify at the disposition hearing.

Relators have not met their burden to show that the claimed privileges have not been waived. Accordingly, we hold that the trial court did not abuse its discretion by finding that Relators’ claims of work-product privilege, attorney-client privilege, and mental-health privilege had been *770 waived.⁴ We overrule Relators’ privilege arguments.

VI. CONCLUSION

We deny relators' petition for writ of mandamus and lift the stay previously ordered by this court on August 4, 2014.

Footnotes

- 1 All facts contained herein are taken from documents within the mandamus record. We do not attempt to correct any terminology that may be inconsistent with the Juvenile Justice Code.
- 2 Relators implicitly acknowledge this distinction when they state disjunctively that Dr. Miller's file is not "discoverable, pursuable or usable." [Emphasis added.]
- 3 According to RPIs, Dr. Miller testified that E.C.'s killing of four and injuring others was a product of "influenza," a mental condition that prevented him from linking his behavior with consequences. RPIs set out additional testimony of Dr. Miller, but we do not repeat it here.
- 4 Relators argue that the relevance exception contained in [rule of evidence 510\(d\)\(5\)](#) does not apply to except Dr. Miller's file and opinions from the mental-health privilege. See [Tex.R. Evid. 510\(d\)\(5\)](#). We need not reach this argument because we presumed that Dr. Miller's file is protected by the mental-health privilege (and that the exception therefore did not apply) but concluded that the privilege had been waived. See [Tex.R.App. P. 47.1](#).

All Citations

444 S.W.3d 760

282 S.W.3d 555
Court of Appeals of Texas,
Houston (14th Dist.).

Gloria Celeste LOVING, Appellant,
v.
CITY OF HOUSTON, Appellee.

No. 14-07-00621-CV.

Jan. 8, 2009.

Rehearing Overruled April 9, 2009.

Synopsis

Background: Applicant sought writ of mandamus, compelling city to disclose information pursuant to Texas Public Information Act. City filed special exception. The 151st District Court, Harris County, [Caroline Elizabeth Baker](#), J., granted special exception, and subsequently granted city's motion for summary judgment. Applicant appealed.

Holdings: The Court of Appeals, [John S. Anderson](#), J., held that:

^[1] exception to disclosure under Act for information involving a juvenile law enforcement record applied to record at issue, and

^[2] statutory requirement that adult and juvenile law enforcement files be separately maintained did not entitle applicant to disclosure.

Affirmed.

[Frost](#), J., dissented with opinion.

Attorneys and Law Firms

*557 [Steven Lieberman](#), Houston, for appellant.

Judith Benton, Houston, for appellee.
Panel consists of Justices [ANDERSON](#), [FROST](#), and Senior Justice [HUDSON](#).*

Opinion

MAJORITY OPINION

[JOHN S. ANDERSON](#), Justice.

Appellant Gloria Celeste Loving filed a suit for writ of mandamus against appellee City of Houston to compel disclosure of requested information under the Texas Public Information Act. Appellee filed a special exception, stating that a mandamus action was not proper under the Texas Government Code when the attorney general had issued a letter ruling excepting the information from disclosure. The trial court granted the special exception, but appellant did not amend her pleading on this issue. Appellee moved for summary judgment on two grounds: (1) the pleading is deficient; and (2) the information is confidential. Finding appellee met its summary-judgment burden on the second ground, we affirm the judgment of the trial court.

I. Factual and Procedural Background

On January 26, 2005, appellant, through her attorney Steven Lieberman, submitted a request to the City of Houston for a copy of all incident/offense reports and witness statements in Incident No. 037634500, a case involving a person named Quient Wolford. The City legal department responded on February 16, denying the request. The City cited two prior informal letter rulings from the attorney general's office as support of its decision to withhold the information. According to the letter rulings, the information is confidential because it involves a juvenile at the time of the incident, and juvenile law-enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential.

Lieberman then submitted a letter to the attorney general's office, requesting review of the City's decision to withhold the information. Lieberman explained that Quient Wolford was not a juvenile at *558 the time of the incident for which Lieberman was requesting information, and that Michael Torres was certified to stand trial as an adult. The letter argued that, if there was a concern, the City could easily redact references to Torres in the information requested. The attorney general's office responded that it could not resolve disputes of fact in the

open-records process, and, therefore, must rely on the representations of the City when it requested a ruling. The letter concluded that the City could withhold the information in reliance on the two prior rulings by the attorney general's office.

On August 10, 2006, appellant filed an original petition for writ of mandamus, requesting the trial court order the City to produce the requested information. Appellee responded with special exceptions, stating that (1) Harold Hurtt, Chief of Police, was not a proper party, and (2) [Texas Government Code section 552.321\(a\)](#) did not authorize a suit for writ of mandamus for public-information requests in which the attorney general's office had issued a letter ruling excepting the information from public disclosure. The trial court granted the special exceptions. Appellant filed an amended petition and notice of non-suit without prejudice as to her claim against Harold Hurtt, but did not amend the petition in response to the second special exception. Appellee filed a traditional motion for summary judgment, stating (1) appellant failed to amend her petition after the court granted appellee's special exception and (2) [Texas Government Code section 552.101](#) prevented the requested information from being disclosed. The trial court granted appellee's motion for summary judgment without specifying the grounds.

II. Discussion

In three issues on appeal, appellant challenges the trial court's granting of a special exception and the final summary judgment. Specifically, she contends the trial court erred by granting (1) a special exception on the ground that the Texas Government Code does not authorize a mandamus action in this case; (2) summary judgment when appellant did not amend her petition; and (3) summary judgment when appellee failed to meet its summary-judgment burden. We will address the third issue first because it is dispositive in this case.

Did appellee satisfy its summary-judgment burden?

Appellant contends the trial court erred in granting summary judgment because appellee failed to meet its summary-judgment burden. Specifically, appellant asserts that appellee has not shown, through its correspondence with appellant's attorney and the attorney general's office, that the information in question is confidential.

We review the district court's summary judgment *de*

novo. [Valence Operating Co. v. Dorsett](#), 164 S.W.3d 656, 661 (Tex.2005). The movant for a traditional summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. [Nixon v. Mr. Prop. Mgmt. Co.](#), 690 S.W.2d 546, 548 (Tex.1985). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the nonmovant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the nonmovant's favor. *Id.* at 548-49. When the trial court's order granting summary judgment does not specify the grounds relied upon, we must affirm if any of the theories advanced are meritorious. *See Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex.2004).

*559 Texas Public Information Act

^[1] ^[2] ^[3] "[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." [TEX. GOV'T CODE ANN. § 552.001\(a\)](#) (Vernon 2004). The Texas Public Information Act excepts from disclosure certain categories of information. *See* [Tex. Gov't Code Ann. § 552.101-552.148](#) (Vernon 2004 & Supp.2008). [Section 552.101](#) of the Act excepts from disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision. *Id.* § [552.101](#). The Act is to be liberally construed in favor of disclosing requested information, while exceptions to disclosure are interpreted narrowly. *Id.* § [552.001\(b\)](#); [Jackson v. Texas Dep't of Pub. Safety](#), 243 S.W.3d 754, 757 (Tex.App.-Corpus Christi 2007, *pet. denied*). A governmental body seeking to withhold information under the Act must establish that the requested information is not subject to the Act or falls within one of the Act's enumerated exceptions to disclosure. [Abbott v. North East Indep. Sch. Dist.](#), 212 S.W.3d 364, 367 (Tex.App.-Austin 2006, *no pet.*). Whether information is subject to the Act and whether an exception to disclosure applies are questions of law. [A & T Consultants v. Sharp](#), 904 S.W.2d 668, 674 (Tex.1995).

^[4] Here, appellee contends the requested information is excepted from disclosure because the information involves a juvenile law-enforcement record, which is confidential under [Family Code section 58.007\(c\)](#). That provision of the Family Code provides:

Except as provided by Subsection (d), law enforcement

records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

[Tex. Fam.Code Ann. § 58.007\(c\)](#) (Vernon 2002 & Pamph.2008). Appellee presented as summary-judgment evidence the correspondence between the parties and the attorney general’s office.

Appellant contends [Family Code section 58.007\(c\)](#) only applies to law-enforcement records and files “concerning a child” and she is seeking the law-enforcement records and files for an adult, Quiet Wolford. *See id.* However, appellant states in her First Amended Petition for Writ of Mandamus that she is seeking one incident report that concerns an investigation resulting in the arrest and prosecution of Wolford and Torres, a juvenile, among others. A “child” is defined in the Family Code as “a person who is: (A) ten years of age or older and under 17 years of age; or (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.” [TEX. FAM.CODE ANN. § 51.02\(2\)](#) (Vernon 2002). Although we have not seen the incident report in question, the parties do not dispute the fact that Torres met this definition at the time of the incident. Because Torres was a “child,” the requested information involves *560 the law-enforcement records and files concerning a child and it may not be disclosed. *See id.* [§ 58.007\(c\)](#).

[5] [6] Appellant argues that Torres was certified and tried as an adult and, therefore, [Family Code section 58.007\(c\)](#) is inapplicable. The parties do not dispute the fact that Torres was certified and tried as an adult.¹ [Family Code section 51.14](#), the predecessor to [section 58.007](#), expressly provided an exception to confidentiality for such a situation:

Except as provided by [Article 15.27, Code of Criminal Procedure](#), and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public[.]

Act of 1993, 73rd Leg., R.S., ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852 *repealed by* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100(a), 1995 Tex. Gen. Laws 2517, 2590. [Family Code section 58.007](#), added by the 74th Legislature in 1995, the same year [Family Code section 51.14](#) was repealed, does not include any such language. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 53, 1995 Tex. Gen. Laws 2517, 2552. When the legislature amends a statute and excludes certain language of the former statute in its new version, we are to presume the language was excluded for a reason and the excluded language is no longer the law. *See Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985) (“Every word excluded from a statute must be presumed to have been excluded for a reason.”); *State v. Eversole*, 889 S.W.2d 418, 425 (Tex.App.-Houston [14th Dist.] 1994, pet. ref’d) (holding perjury language in repealed section of Texas Election Code was not in new version and, therefore, legislature did not intend such a penalty). Therefore, because 58.007 does not contain language allowing the disclosure of law-enforcement records where a juvenile has been certified and tried as an adult, the requested information is excepted from disclosure.

[7] Appellant suggests that [Family Code section 58.007\(d\)](#) applies in this case. Subsection (d) is an exception to the confidentiality and maintenance requirements in [section 58.007\(c\)](#). *See Tex. Fam.Code Ann. § 58.007(c)* (Vernon 2002 & Pamph.2008). [Section 58.007\(d\)](#) states:

The law enforcement files and records of a person who is transferred from the Texas Youth Commission to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice may be transferred to a central state or federal depository for adult records on or after the date of transfer.

[Tex. Fam.Code Ann. § 58.007\(d\)](#) (Vernon 2002). Appellant has put forth no evidence that Torres was transferred from the Texas Youth Commission to the specified divisions of the Texas Department of Criminal Justice, nor has she shown his law-enforcement files and records were transferred to a central state or federal

depository for adult records. Without such a showing, [Family Code section 58.007\(d\)](#) does not apply.

[8] Finally, appellant contends that separate files should have been maintained for Wolford and for Torres, citing [*561 Family Code section 58.007\(c\)](#). According to [section 58.007\(c\)](#), law-enforcement records and files concerning a child must be kept separate from adult files and records. *Id.* § 58.007(c)(1)-(2). While it may be true that two separate files should have been maintained, one for Wolford and one for Torres, the fact is appellant seeks one document—Houston Police Department Incident Report Number 037634500—and, according to the parties, that report contains information concerning Torres, a “child” at the time of the incident. As such, the report is a law-enforcement record concerning a child and may not be disclosed to the public. *See id.* § 58.007(c). Appellant suggests the information about Torres could be redacted; however, she offers no authority for doing so.

We conclude summary judgment was proper on the ground that the information is confidential by law under [Family Code section 58.007\(c\)](#). We, therefore, overrule appellant’s third issue.

[9] [10] In her first two issues, appellant contends the trial court erred when it granted (1) a special exception on the ground that [Texas Government Code section 552.321\(a\)](#) did not authorize a suit for writ of mandamus and (2) summary judgment on the ground that appellant did not amend her pleadings after the special exception. The parties disagree over whether [Texas Government Code section 552.321](#) gives appellant the right to file a suit for mandamus against appellee when the attorney general has determined the requested information is not subject to disclosure. A suit for mandamus may be filed to compel a governmental body to make information available for public inspection under certain circumstances. *See Tex. Gov’t Code Ann. § 552.321 (Vernon 2004)*. We have held the information is confidential under [Family Code section 58.007](#). Therefore, appellee has no duty to provide the requested information, even if appellant had a right to file a suit for mandamus in this circumstance. *See Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353, 362 (Tex.App.-Waco 1998, pet. denied) (holding summary judgment proper when entity was not “governmental body” and, therefore, no error in denying writ of mandamus because custodian of records had no duty to provide requested information). Moreover, we need not address appellant’s second issue because summary judgment can be affirmed on the ground discussed above. *See Provident Life and Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 223 (Tex.2003); Tex.R.App. P. 47.1.

Conclusion

Having concluded that appellee met its burden for summary judgment, we affirm the judgment of the trial court.

KEM THOMPSON FROST, Justice, dissenting.

This court should reverse and remand this case because appellee, the City of Houston has not demonstrated that it met the burden of proof required to show that the requested information, an incident report, is excepted from disclosure under [section 552.101 of the Texas Government Code](#).

Under the Texas Public Information Act, confidential information may be excepted from disclosure by law or by judicial decision.¹ A governmental body, such as the City, seeking to withhold information under the Act must establish that the [*562](#) requested information is not subject to the Act or is excepted from disclosure.²

The City has asserted that the incident report in question “concern[s] a child,” and is excepted from disclosure under [section 58.007\(c\) of the Texas Family Code](#). However, the City did not furnish the incident report as summary judgment evidence to demonstrate that the report “concern[ed] a child,” under [section 58.007\(c\) of the Texas Family Code](#). Rather, in support of its motion for summary judgment, the City attached two opinion rulings from the Attorney General’s office and correspondence between the parties and the Attorney General’s office. In the two opinion rulings, the Attorney General advised the City that the requested information warranted confidentiality under [Family Code section 58.007\(c\)](#) based on assertions made by the City that such information involved a juvenile. The Attorney General advised the City to withhold the information sought, as required by [section 552.101 of the Texas Government Code](#). In one letter, in response to appellant Gloria Celeste Loving’s assertions that the requested information involved both a non-juvenile and a juvenile co-actor who was certified as an adult, the Attorney General replied, “[T]his office cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion, as we did in the two prior rulings.”

The appellate record does not contain the requested incident report at issue. This court, as a reviewing court, cannot determine if the requested information concerns a child, as contemplated by [section 58.007\(c\) of the Family Code](#), without the ability to review the requested incident report. Therefore, this court should not reach the merits of whether the information in dispute falls within the confidentiality exception to the Texas Public Information Act.

The majority acknowledges that it has not reviewed the incident report in question.³ The majority observes that the parties do not dispute that the requested incident report concerns an investigation pertaining to a juvenile, Torres, who, at the time of the investigation, met the definition of a “child” as defined by [section 51.02\(2\) of the Family Code](#).⁴ The parties also do not dispute that Torres was certified and tried as an adult. Therefore, as a matter of law, a question remains as to whether the records of a juvenile, who has been certified and tried as an adult, concern a child and are to be withheld and excepted from disclosure.⁵

The majority examines the legislative history of former [Family Code section 51.14\(d\)](#), the predecessor of current [Family Code section 58.007](#), which provided in relevant part, “[E]xcept for files and records relating to a charge for which a child *563 is transferred under section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public...”⁶ The majority concludes that because [section 51.14](#) was repealed by the legislature in [section 58.007](#), then the [section 51.14](#) language, which arguably would have excepted the incident report in this case, was excluded for a reason and is no longer applicable law.⁷ However, this court’s analysis is incomplete as applied to the facts of this case.

Under [Texas Government Code section 552.101](#), information may be excepted from disclosure by law or by judicial decision.⁸ Because [Family Code section 51.14](#) was repealed by [section 58.007](#), and is no longer applicable law, unless there is a statute excepting disclosure of the incident report at issue, this report may

be excepted from disclosure only by judicial decision.⁹ The trial court has authority to determine whether the requested information pertained to a juvenile, under [Family Code section 58.007](#), and, therefore, was subject to withholding or disclosure under [Government Code section 552.101](#).¹⁰ In this case, no judicial decision exists as to whether records of a juvenile who was certified and tried as an adult are subject to disclosure.

Because the City did not proffer the incident report, the City did not meet the burden of proving that the incident report is excepted from disclosure by application of [Family Code section 58.007\(c\)](#).¹¹ The City did not provide the requested incident report as summary judgment evidence, even for in-camera review. Therefore, the trial court was in no position to determine whether the information “concern[ed] a child” under the Family Code.¹² Because the summary judgment evidence did not prove as a matter of law that the incident report is excepted from disclosure under [section 58.007 of the Texas Family Code](#), the trial court erred in granting summary judgment. Likewise, on the record before us, this court’s review is improper without the opportunity to examine the incident report. Under the procedural regime proposed in the majority’s analysis, the Attorney General’s office may determine whether documents are excepted from disclosure under the Texas Public Information Act, without any judicial review and without reviewing the documents in question. This regime violates [section 552.101 of the Government Code](#), providing exceptions to disclosure only by law or judicial decision.

For the foregoing reasons, this court should not reach the merits of whether the incident report fits within the confidentiality exception. Given that the summary judgment evidence does not prove as a matter of law that the incident report is excepted from disclosure, this court should *564 reverse and remand. Because the court does not do so, I respectfully dissent.

All Citations

282 S.W.3d 555

Footnotes

* Senior Justice J. Harvey Hudson sitting by assignment.

¹ Loving notes that when her attorney raised the issue of Torres being certified and tried as an adult in his letter to the attorney general’s office, the office responded that it could not resolve disputes of fact in the open-records process and must rely on the City’s representations. However, no factual dispute exists as to whether Torres was certified and tried as an adult; the parties agree that he was.

- 1 See [TEX. GOV'T CODE ANN. § 552.101](#) (Vernon 2004 & Supp.2008).
- 2 [Abbott v. N.E. Indep. Sch. Dist.](#), 212 S.W.3d 364, 367 (Tex.App.-Austin 2006, no pet.) (noting that burden falls on governmental body seeking to withhold information to prove that the information is not subject to the Texas Public Information Act or is excepted from disclosure).
- 3 See *ante* at p. 559.
- 4 See [TEX. FAM.CODE ANN. § 51.02\(2\)](#) (Vernon Supp.2008) (defining a “child” as “a person who is (A) ten years of age or older and under 17 years of age; or (B) seventeen years of age or older and under 18 years of age who is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age”).
- 5 See [A & T Consultants v. Sharp](#), 904 S.W.2d 668, 674 (Tex.1995) (concluding that a determination of whether information is subject to the Texas Public Information Act and whether an exception to disclosure applies are questions of law).
- 6 See Act of June 9, 1993, 73rd Leg., R.S., ch. 461, § 2, sec. 3, 1993 Tex. Gen. Laws 1850, 1852, *repealed by* Act of June 1, 1995, 74th Leg., R.S., ch. 262, § 98, sec. 100(a), 1995 Tex. Gen. Laws 2517, 2590 (codified at [TEX. FAM.CODE ANN. § 58.007](#)).
- 7 See *ante* at p. 560.
- 8 See [TEX. GOV'T CODE ANN. § 552.101](#).
- 9 See *id.*
- 10 See [Tex. Dep't of Pub. Safety v. Gilbreath](#), 842 S.W.2d 408, 411 (Tex.App.-Austin 1992, no pet.) (providing that the trial court shall determine whether the information sought is public information subject to disclosure); see *also* [TEX. GOV'T CODE ANN. § 552.321\(a\)](#) (Vernon 2004).
- 11 See [Abbott](#), 212 S.W.3d at 367.
- 12 See *id.*

 KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in [In re Richards](#), Cal., December 3, 2012

79 S.Ct. 1173
Supreme Court of the United States

Henry NAPUE, Petitioner,
v.
PEOPLE OF THE STATE OF ILLINOIS.

No. 583.

Argued April 30, 1959.

Decided June 15, 1959.

Synopsis

Petitioner, who had been convicted of murder, filed a petition for a post-conviction hearing. The Criminal Court, Cook County, entered an order denying relief, and the petitioner brought error. The [Illinois Supreme Court](#), 13 Ill.2d 566, 150 N.E.2d 613, affirmed the order, and the petitioner brought certiorari. The United States Supreme Court, Mr. Chief Justice Warren, held that where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State’s Attorney had promised witness consideration, and Assistant State’s Attorney did nothing to correct false testimony of witness, petitioner was denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution, though jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner.

Judgment reversed.

West Headnotes (8)

[1] **Federal Courts**
 Criminal matters

170BFederal Courts
170BXVISupreme Court
170BXVI(B)Decisions Reviewable
170BK3161Review of State Courts

170BK3164Particular Cases, Contexts, and Questions
170BK3164(3)Criminal matters
(Formerly 170Bk506, 106k3971/2)

The United States Supreme Court granted certiorari to consider question whether petitioner was denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution because important witness for the State in murder prosecution of petitioner falsely testified that witness had received no promise of consideration in return for his testimony though in fact Assistant State’s Attorney had promised witness consideration. [U.S.C.A.Const. Amend. 14.](#)

101 Cases that cite this headnote

[2] **Constitutional Law**
 Use of Perjured or Falsified Evidence
Constitutional Law
 Failure to correct false testimony

92Constitutional Law
92XXVIIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)4Proceedings and Trial
92k4631Use of Perjured or Falsified Evidence
92k4632In general
(Formerly 92k257.5, 92k257)
92Constitutional Law
92XXVIIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)4Proceedings and Trial
92k4631Use of Perjured or Falsified Evidence
92k4633Failure to correct false testimony
(Formerly 92k257.5, 92k257)

Conviction obtained through use of false testimony, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. [U.S.C.A.Const. Amend. 14.](#)

1934 Cases that cite this headnote

[3] **Constitutional Law**
 🔑 Use of Perjured or Falsified Evidence

92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)4Proceedings and Trial
 92k4631Use of Perjured or Falsified Evidence
 92k4632In general
 (Formerly 92k257.5, 92k257)

Principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. U.S.C.A.Const. Amend. 14.

1933 Cases that cite this headnote

[4] **Constitutional Law**
 🔑 Use of Perjured or Falsified Evidence
Constitutional Law
 🔑 Failure to correct false testimony
Criminal Law
 🔑 Duty to correct false or perjured testimony

92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)4Proceedings and Trial
 92k4631Use of Perjured or Falsified Evidence
 92k4632In general
 (Formerly 92k257.5, 92k257)
 92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)4Proceedings and Trial
 92k4631Use of Perjured or Falsified Evidence
 92k4633Failure to correct false testimony
 (Formerly 92k257.5, 92k257)
 110Criminal Law
 110XXXICounsel
 110XXXI(D)Duties and Obligations of Prosecuting Attorneys
 110XXXI(D)5Presentation of Evidence
 110k2032Use of False or Perjured Testimony
 110k2036Duty to correct false or perjured testimony
 (Formerly 110k706(2), 92k257.5, 92k257)

Where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of

consideration in return for his testimony, though in fact Assistant State’s Attorney had promised witness consideration, and Assistant State’s Attorney did nothing to correct false testimony of witness, fact that jury was apprised of other grounds for believing that witness may have had an interest in testifying against petitioner did not turn what was otherwise a tainted trial into a fair one. U.S.C.A.Const. Amend. 14.

561 Cases that cite this headnote

[5] **Constitutional Law**
 🔑 Use of Perjured or Falsified Evidence
Criminal Law
 🔑 Duty to correct false or perjured testimony

92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)4Proceedings and Trial
 92k4631Use of Perjured or Falsified Evidence
 92k4632In general
 (Formerly 92k257.5)
 110Criminal Law
 110XXXICounsel
 110XXXI(D)Duties and Obligations of Prosecuting Attorneys
 110XXXI(D)5Presentation of Evidence
 110k2032Use of False or Perjured Testimony
 110k2036Duty to correct false or perjured testimony
 (Formerly 110k706(2), 92k257.5)

Where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State’s Attorney had promised witness consideration, and Assistant State’s Attorney did nothing to correct false testimony of witness, petitioner was denied due process of law, though jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner. U.S.C.A.Const. Amend. 14.

544 Cases that cite this headnote

[6] **Federal Courts**

Questions of fact, verdicts, and findings

- 170BFederal Courts
- 170BXVISupreme Court
- 170BXVI(E)Proceedings
- 170Bk3203Scope and Extent of Review
- 170Bk3209Review of State Courts
- 170Bk3209(2)Questions of fact, verdicts, and findings
- (Formerly 170Bk512, 106k399(2))

The United States Supreme Court has the duty to make its own independent examination of the record to determine facts when federal constitutional deprivations are alleged.

17 Cases that cite this headnote

The United States Supreme Court was free to reach a factual conclusion different from that reached by the Illinois Supreme Court, when the United States Supreme Court, on certiorari, passed on question whether petitioner was denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution because important witness for the State in murder prosecution of petitioner falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration. U.S.C.A.Const. Amend. 14.

61 Cases that cite this headnote

[7]

Federal Courts

Questions of fact, verdicts, and findings

- 170BFederal Courts
- 170BXVISupreme Court
- 170BXVI(E)Proceedings
- 170Bk3203Scope and Extent of Review
- 170Bk3209Review of State Courts
- 170Bk3209(2)Questions of fact, verdicts, and findings
- (Formerly 170Bk512, 106k399(2))

In cases in which there is a claim of denial of rights under the Federal Constitution, the United States Supreme Court is not bound by factual conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.

15 Cases that cite this headnote

Attorneys and Law Firms

****1174 *264** Mr. George N. Leighton, Chicago, Ill., for petitioner.

Mr. William C. Wines, Chicago, Ill., for respondent.

Opinion

****1175 *265** Mr. Chief Justice WARREN, delivered the opinion of the Court.

At the murder trial of petitioner the principal state witness, then serving a 199-year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised 'to do what he could' for the witness. The question presented is whether on these facts the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The record in this Court contains testimony from which the following facts could have been found. The murder in question occurred early in the morning of August 21, 1938, in a Chicago, Illinois, cocktail lounge. Petitioner

[8]

Federal Courts

Questions of fact, verdicts, and findings

- 170BFederal Courts
- 170BXVISupreme Court
- 170BXVI(E)Proceedings
- 170Bk3203Scope and Extent of Review
- 170Bk3209Review of State Courts
- 170Bk3209(2)Questions of fact, verdicts, and findings
- (Formerly 170Bk512, 106k399(2))

Henry Napue, the witness George Hamer, one Poe and one Townsend entered the dimly lighted lounge and announced their intention to rob those present. An off-duty policeman, present in the lounge, drew his service revolver and began firing at the four men. In the melee that followed Townsend was killed, the officer was fatally wounded, and the witness Hamer was seriously wounded. Napue and Poe carried Hamer to the car where a fifth man, one Webb, was waiting. In due course Hamer was apprehended, tried for the murder of the policeman, convicted on his plea of guilty and sentenced to 199 years. Subsequently, Poe was apprehended, tried, convicted, sentenced to death and executed. Hamer was not used as a witness.

Thereafter, petitioner Napue was apprehended. He was put on trial with Hamer being the principal witness *266 for the State. Hamer's testimony was extremely important because the passage of time and the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain, and because some pertinent witnesses had left the state. On the basis of the evidence presented, which consisted largely of Hamer's testimony, the jury returned a guilty verdict and petitioner was sentenced to 199 years.

Finally, the driver of the car, Webb, was apprehended. Hamer also testified against him. He was convicted of murder and sentenced to 199 years.

Following the conviction of Webb, the lawyer who, as former Assistant State's Attorney, had prosecuted the Hamer, Poe and Napue cases filed a petition in the nature of a writ of error coram nobis on behalf of Hamer. In the petition he alleged that as prosecuting attorney he had promised Hamer that if he would testify against Napue, 'a recommendation for a reduction of his (Hamer's) sentence would be made and, if possible effectuated.'¹ The *267 attorney **1176 prayed that the court would effect 'consummation of the compact entered into between the duly authorized representatives of the State of Illinois and George Hamer.'

This coram nobis proceeding came to the attention of Napue, who thereafter filed a post-conviction petition, in which he alleged that Hamer had falsely testified that he had been promised no consideration for his testimony,² and that the Assistant State's Attorney handling the case had known this to be false. A hearing was ultimately held at which the former Assistant State's Attorney testified that he had only promised to help Hamer if Hamer's story 'about being a reluctant participant' in the robbery was borne out, and not merely if Hamer would testify at petitioner's trial. He testified that in his coram nobis petition on Hamer's behalf he 'probably used some

language that (he) should not have used' in his 'zeal to do something for Hamer' to whom he 'felt a moral obligation.' The lower court denied petitioner relief on the basis of the attorney's testimony.

^[1] On appeal, the Illinois Supreme Court affirmed on different grounds over two dissents. 13 Ill.2d 566, 150 N.E.2d 613. It found, contrary to the trial court, that the attorney had promised Hamer consideration if he would testify at petitioner's trial, a finding which the State does not contest here. It further found that the Assistant State's Attorney knew that Hamer had lied in denying that *268 he had been promised consideration. It held, however, that petitioner was entitled to no relief since the jury had already been apprised that someone whom Hamer had tentatively identified as being a public defender 'was going to do what he could' in aid of Hamer, and 'was trying to get something did' for him.³ We **1177 granted certiorari *269 to consider the question posed in the first paragraph of this opinion. 358 U.S. 919, 79 S.Ct. 293, 3 L.Ed.2d 238.

^[2] First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Pyle v. State of Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Curran v. State of Delaware*, 3 Cir., 259 F.2d 707. See *State of New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 63 S.Ct. 840, 87 L.Ed. 1083, and *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348. Compare *Jones v. Commonwealth of Kentucky*, 6 Cir., 97 F.2d 335, 338, with *In re Sawyer's Petition*, 7 Cir., 229 F.2d 805, 809. Cf. *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. State of Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *United States ex rel. Thompson v. Dye*, 3 Cir., 221 F.2d 763; *United States ex rel. Almeida v. Baldi*, 3 Cir., 195 F.2d 815, 33 A.L.R.2d 1407; *United States ex rel. Montgomery v. Ragen, D.C.*, 86 F.Supp. 382. See generally annotation, 2 L.Ed.2d 1575.

^[3] The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this

one, [People v. Savvides](#), 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854—855:

‘It is of no consequence that the falsehood bore upon the witness’ credibility rather than directly upon defendant’s guilt. A lie is a lie, no matter *270 what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney’s silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.’

[4] [5] Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one. As Mr. Justice Schaefer, joined by Chief Justice Davis, rightly put it in his dissenting opinion below, [13 Ill.2d 566, 571, 150 N.E.2d 613, 616](#):

‘What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender’s office.’

Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration. That the Assistant State’s Attorney himself thought it important to establish before the jury that no official source had promised Hamer consideration is made clear by his redirect examination, which was the last testimony of Hamer’s heard by the jury:

**1178 ‘Q. Mr. Hamer, has Judge Prystalski (the trial judge) promised you any reduction of sentence?’

*271 A. No, sir.

‘Q. Have I promised you that I would recommend any

reduction of sentence to anybody? A. You did not. (That answer was false and known to be so by the prosecutor.)

‘Q. Has any Judge of the criminal court promised that they (sic) would reduce your sentence? A. No, sir.

‘Q. Has any representative of the Parole Board been to see you and promised you a reduction of sentence? A. No, sir.

‘Q. Has any representative of the Governor of the State of Illinois promised you a reduction of sentence? A. No, sir.’

We are therefore unable to agree with the Illinois Supreme Court that ‘there was no constitutional infirmity by virtue of the false statement.’

[6] [7] [8] Third, the State argues that we are not free to reach a factual conclusion different from that reached by the Illinois Supreme Court, and that we are bound by its determination that the false testimony could not in any reasonable likelihood have affected the judgment of the jury. The State relies on [Hysler v. State of Florida](#), 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 932. But in that case the Court held only that a state standard of specificity and substantiality in making allegations of federal constitutional deprivations would be respected, and this Court made its own ‘independent examination’ of the allegations there to determine if they had in fact met the Florida standard. The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. [Martin v. Hunter’s Lessee](#), 1 Wheat. 304, 4 L.Ed. 97; [Cooper v. Aaron](#), 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. *272 This principle was well stated in [Niemojko v. State of Maryland](#), 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267:

‘In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.’

It is now so well settled that the Court was able to speak in [Kern-Limerick, Inc. v. Scurlock](#), 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546, of the ‘long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.’⁷⁴ As previously **1179 indicated, our own

evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be reversed.

Reversed.

All Citations

360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217

Footnotes

- 1 In relevant part, his petition read as follows:
 ‘After Hamer was sentenced your petitioner (the Assistant State’s Attorney) well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would made confessions of their participation in the crime, represented to Hamer that if he would be willing to cooperate with law enforcing officials upon the trial of (sic) trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated.
 ‘Before testifying on behalf of the State and against Napue, Hamer expressed to your petitioner a reluctance to cooperate any further unless he were given definite assurance that a recommendation for reduction of his sentence would be made. Your petitioner, feeling that the interests of justice required Hamer’s testimony, again assured Hamer that every possible effort would be made to conform to the promise previously made to him.’
- 2 The alleged false testimony of Hamer first occurred on his cross-examination:
 ‘Q. Did anybody give you a reward or promise you a reward for testifying? A. There ain’t nobody promised me anything.’
 On redirect examination the Assistant State’s Attorney again elicited the same false answer.
 ‘Q. (by the Assistant State’s Attorney) Have I promised you that I would recommend any reduction of sentence to anybody? A. You did not.’
- 3 The following is Hamer’s testimony on the subject:
 ‘Q. (on cross-examination) And didn’t you tell him (one of Napue’s attorneys) that you wouldn’t testify in this case unless you got some consideration for it? A. * * * Yes, I did; I told him that.
 ‘Q. What are you sentenced for? A. One Hundred and Ninety-Nine Years.
 ‘Q. You hope to have that reduced, don’t you? A. Well, if anybody would help me or do anything for me, why certainly I would.
 ‘Q. Weren’t you expecting that when you came here today? A. There haven’t no one told me anything, no more than the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.
 ‘Q. Which lawyer was that? A. I don’t know; it was a Public Defender. I don’t see him in here.
 ‘Q. You mean he was from the Public Defender’s office? A. I imagine that is where he was from, I don’t know.
 ‘Q. And he was the one who told you that? A. Yes, he told me he was trying to get something did for me.
 ‘Q. * * * And he told you he was going to do something for you? A. He said he was going to try to.
 ‘Q. And you told them (police officers) you would (testify at the trial of Napue) but you expected some consideration for it? A. I asked them was there any chance of me getting any. The man told me he didn’t know, that he couldn’t promise me anything.
 ‘Q. Then you spoke to a lawyer today who said he would try to get your time cut? A. That was this Public Defender. I don’t even know his name. * * *
- 4 See, e.g., [Payne v. State of Arkansas](#), 356 U.S. 560, 562, 78 S.Ct. 844, 847, 2 L.Ed.2d 975; [Leyra v. Denno](#), 347 U.S. 556, 558, 74 S.Ct. 716, 717, 98 L.Ed. 948; [Avery v. State of Georgia](#), 345 U.S. 559, 561, 73 S.Ct. 891, 892, 97 L.Ed. 1244; [Feiner v. People of State of New York](#), 340 U.S. 315, 322, 323, note 4, 71 S.Ct. 303, 307, 95 L.Ed. 267 (dissenting opinion); [Cassell v. State of Texas](#), 339 U.S. 282, 283, 70 S.Ct. 629, 94 L.Ed. 839; [Haley v. State of Ohio](#), 332 U.S. 596, 599, 68 S.Ct. 302, 303, 92 L.Ed. 224; [Malinski v. People of State of New York](#), 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029; [Ashcraft v. State of Tennessee](#), 322 U.S. 143, 149, 64 S.Ct. 921, 923, 88 L.Ed. 1192; [Ward v. State of Texas](#), 316 U.S. 547, 550, 62 S.Ct. 1139, 1141, 86 L.Ed. 1663; [Smith v. State of Texas](#), 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84; [State of South Carolina v. Bailey](#), 289 U.S. 412, 420, 53 S.Ct. 667, 670, 77 L.Ed. 1292. See also, e.g., [Roth v. United States](#), 354 U.S. 476, 497, 77 S.Ct. 1304, 1315, 1 L.Ed.2d 1498 (dissenting opinion); [Stroble v. State of California](#), 343 U.S. 181, 190, 72 S.Ct. 599, 603, 96 L.Ed. 872; [Sterling v. Constantin](#), 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375; [Southern Pacific Co. v. Schuyler](#), 227 U.S. 601, 611, 33 S.Ct. 277, 280, 57 L.Ed. 662; [Creswill v. Grand Lodge Knights of Pythias](#), 225 U.S. 246, 261, 32 S.Ct. 822, 56 L.Ed. 1074.
 Mr. Justice Holmes, writing for the Court, recognized the principle over 35 years ago in [Davis v. Wechsler](#), 263 U.S. 22,

79 S.Ct. 1173, 3 L.Ed.2d 1217

[24, 44 S.Ct. 13, 14, 68 L.Ed. 143:](#)

'If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.'

Declined to Extend by [District Attorney's Office for Third Judicial Dist. v. Osborne](#), U.S., June 18, 2009

83 S.Ct. 1194
Supreme Court of the United States

John L. BRADY, Petitioner,
v.
STATE OF MARYLAND.

No. 490.

Argued March 18 and 19, 1963.

Decided May 13, 1963.

Synopsis

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the [Maryland Court of Appeals](#), 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

West Headnotes (6)

[1] **Federal Courts**
Review of state courts

170BFederal Courts
170BXVISupreme Court
170BXVI(C)Finality of Determination Below
170Bk3176Review of state courts
(Formerly 170Bk503, 106k393)

Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A.Const Amend. 14.

814 Cases that cite this headnote

[2] **Constitutional Law**

Witnesses

Criminal Law

Statements of witnesses or prospective witnesses

92Constitutional Law
92XXVIIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)4Proceedings and Trial
92k4592Disclosure and Discovery
92k4594Evidence
92k4594(2)Particular Items or Information, Disclosure of
92k4594(4)Witnesses
(Formerly 92k268(5), 92k257)
110Criminal Law
110XXTrial
110XX(A)Preliminary Proceedings
110k627.5Discovery Prior to and Incident to Trial
110k627.7Statements, Disclosure of
110k627.7(3)Statements of witnesses or prospective witnesses
(Formerly 92k268(5), 92k257)

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

10609 Cases that cite this headnote

[3]

Constitutional Law

🔑 Evidence

92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)4Proceedings and Trial
 92k4592Disclosure and Discovery
 92k4594Evidence
 92k4594(1)In general
 (Formerly 92k268(5), 92k257)

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. [U.S.C.A.Const. Amend. 14.](#)

[17117 Cases that cite this headnote](#)

[4]

Criminal Law

🔑 Questions of Law or of Fact

110Criminal Law
 110XXTrial
 110XX(F)Province of Court and Jury in General
 110k733Questions of Law or of Fact
 110k734In general

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. [Const.Md. art. 15, § 5.](#)

[314 Cases that cite this headnote](#)

[5]

Federal Courts

🔑 Sources of Authority

170BFederal Courts
 170BXVState or Federal Laws as Rules of Decision; Erie Doctrine
 170BXV(A)In General
 170Bk3006Sources of Authority
 170Bk3007In general

(Formerly 170Bk371, 106k359(1), 106k359)

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. [Const. Md. art 15, § 5.](#)

[21 Cases that cite this headnote](#)

[6]

Constitutional Law

🔑 Determination and disposition

Criminal Law

🔑 Sentence

92Constitutional Law
 92XXVIIDue Process
 92XXVII(H)Criminal Law
 92XXVII(H)8Appeal or Other Proceedings for Review
 92k4771Determination and disposition
 (Formerly 92k271)
 110Criminal Law
 110XXIVReview
 110XXIV(U)Determination and Disposition of Cause
 110k1181.5Remand in General; Vacation
 110k1181.5(3)Remand for Determination or Reconsideration of Particular Matters
 110k1181.5(8)Sentence
 (Formerly 92k271)

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; [Const.Md. art. 15, § 5;](#) [U.S.C.A.Const. Amend. 14.](#)

[8254 Cases that cite this headnote](#)

Attorneys and Law Firms

****1195 *84** E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

^[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland *85 Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812, 83 S.Ct. 56, 9 L.Ed.2d 54.¹

****1196** The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words 'without capital punishment.' 3 Md. Ann. Code, 1957, Art. 27, s 413. In Maryland, by reason of the state constitution, the jury in a criminal case are 'the Judges of Law, as well as of fact.' Art. XV, s 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new

trial to the question of punishment.

***86** ^[2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—*United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 33 A.L.R.2d 1407, and *United States ex rel. Thompson v. Dye*, 221 F.2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'

In *Pyle v. Kansas*, 317 U.S. 213, 215—216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

'Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.'

***87** The Third Circuit in the Baldi case construed that

statement in *Pyle v. Kansas* to mean that the ‘suppression of evidence favorable’ to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in *Mooney v. Holohan* when we said: ‘The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’ And see *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *Wilde v. Wyoming*, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. *Durley v. Mayo*, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates ****1197** due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’² A prosecution that withholds evidence on demand of an accused which, if made available, ***88** would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not ‘the result of guile,’ to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

‘There is considerable doubt as to how much good Boblit’s undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady’s hands or Boblit’s hands that twisted the shirt about the victim’s neck. * * * (I)t would be ‘too dogmatic’ for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

‘Not without some doubt, we conclude that the withholding of this particular confession of Boblit’s was prejudicial to the defendant Brady. * * *

‘The appellant’s sole claim of prejudice goes to the punishment imposed. If Boblit’s withheld confession had been before the jury, nothing in it could have reduced the appellant Brady’s offense below murder in the first degree. We, therefore, see no occasion to retry that issue.’ 226 Md., at 429—430, 174 A.2d, at 171. (Italics added.)

***89** If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner’s offense ‘below murder in the first degree’? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

[4] [5] [6] But Maryland’s constitutional provision making the jury in criminal ****1198** cases ‘the Judges of Law’ does not mean precisely what it seems to say.³ The present status of that provision was reviewed recently in *Giles v. State*, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that ‘Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.’ 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century. *Wheeler v. State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, ‘except in regard to questions as to what shall be considered as evidence.’ And the court ‘having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction.’ *Bell v. State*, 57 Md. 108, 120. And see *Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; *Dick v. State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel v. State*, 163 Md. 267, 162 A. 705.

***90** We usually walk on treacherous ground when we explore state law,⁴ for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the ‘admissibility of evidence’ pertinent to ‘the issue of the innocence or guilt of the accused.’ *Giles v. State*, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession ‘could have reduced the appellant

Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.⁵ But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprivation of this defendant of that sporting chance through the use of a *91 bifurcated trial (cf. [Williams v. New York](#), 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, 'The suppression or withholding by the State of material evidence exculpatory to an accused is a violation **1199 of due process' without citing the United States Constitution or the Maryland Constitution which also has a due process clause.* We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See [New York City v. Central Savings Bank](#), 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; [Minnesota v. National Tea Co.](#), 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. [Bell v. Hood](#), 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, *92 wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, 'The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.' After discussing at some length and disposing of the suppression matter in federal constitutional terms it says

the question still to be decided is the same as it was before: 'The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment.'

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?¹ In my opinion an affirmative answer would *93 be required if the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases 'the Judges of Law, as **1200 well as of fact,' as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under s 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,² rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the

Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive *94 of the crucial issue here. 226 Md., at 427—429, 174 A.2d, at 170.³

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility vel non of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not 'overrule' the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that 'in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility.' (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement would have been admissible at

the trial on the issue of guilt.⁴

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms *95 address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920.

All Citations

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215

Footnotes

- 1 Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. s 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'Final judgment in a criminal case means sentence. The sentence is the judgment' (*Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' (*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (*United States v. General Motors Corp.*, 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (*Radio Station WOW v. Johnson*, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent v. Texas*, 318 U.S. 418, 421—422, 63 S.Ct. 667, 668—669, 87 L.Ed. 873. Cf. *Local No. 438 Const. and General Laborers' Union v. Curry*, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.
- 2 Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:
'The Solicitor General is not a neutral; he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.'
- 3 See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md.St.Bar Assn.Rept. 246, 253—254.
- 4 For one unhappy incident of recent vintage see *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, 309 U.S. 703.
- 5 'In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?' Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also *Bell v. State*, supra, 57 Md. at 120; *Vogel v. State*, 163 Md., at 272, 162 A., at 706—707.

- * Md.Const., Art. 23; [Home Utilities Co., Inc., v. Revere Copper & Brass, Inc.](#), 209 Md. 610, 122 A.2d 109; [Raymond v. State ex rel. Szydlouski](#), 192 Md. 602, 65 A.2d 285; [County Com'rs of Anne Arundel County v. English](#), 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842; [Oursler v. Tawes](#), 178 Md. 471, 13 A.2d 763.
- 1 I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196—1197 of its opinion.
- 2 Section 645G provides in part: 'If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.' Rule 870 provides that the Court of Appeals 'will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended.'
- 3 It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of [Day v. State](#), 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.
- 4 In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: 'It would have been, yes.'



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Long v. Pfister](#), 7th Cir.(Ill.), October 20, 2017

92 S.Ct. 763

Supreme Court of the United States

John GIGLIO, Petitioner,

v.

UNITED STATES.

No. 70—29.

Argued Oct. 12, 1971.

Decided Feb. 24, 1972.

Synopsis

While appeal from a judgment of conviction was pending in the Court of Appeals, defense counsel filed a motion for new trial on basis of newly discovered evidence. The District Court denied the motion. On certiorari to the Court of Appeals, the Supreme Court, Mr. Chief Justice Burger, held that if assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.

Reversed and remanded.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of case.

West Headnotes (5)

[1]

Criminal Law

Use of False or Perjured Testimony

110Criminal Law

110XXXICounsel

110XXXI(D)Duties and Obligations of Prosecuting Attorneys

110XXXI(D)5Presentation of Evidence

110k2032Use of False or Perjured Testimony

110k2033In general

(Formerly 110k706(2), 110k700)

Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice.

1097 Cases that cite this headnote

[2]

Criminal Law

Misconduct of Counsel for Prosecution

110Criminal Law

110XXIMotions for New Trial

110k919Misconduct of Counsel for Prosecution

110k919(1)In general

When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.

1488 Cases that cite this headnote

[3]

Criminal Law

Misconduct of Counsel for Prosecution

Criminal Law

Hearing and rehearing in general

110Criminal Law

110XXIMotions for New Trial

110k919Misconduct of Counsel for Prosecution

110k919(1)In general

110Criminal Law

110XXIMotions for New Trial

110k948Application for New Trial

110k959Hearing and rehearing in general

A new trial is not automatically required whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materiality of the evidence is required; a new trial is required if the false testimony could in any reasonable

likelihood have affected the judgment of the jury.

[2052 Cases that cite this headnote](#)

[4]

Attorney General

➤ [Bringing and prosecution of actions](#)

Constitutional Law

➤ [Agreements](#)

Criminal Law

➤ [Impeaching evidence](#)

- 46Attorney General
- 46k5Powers and Duties
- 46k7Bringing and prosecution of actions
- 92Constitutional Law
- 92XXVIIDue Process
- 92XXVII(H)Criminal Law
- 92XXVII(H)4Proceedings and Trial
- 92k4592Disclosure and Discovery
- 92k4594Evidence
- 92k4594(2)Particular Items or Information, Disclosure of
- 92k4594(5)Agreements (Formerly 92k268(9), 92k268(8))
- 110Criminal Law
- 110XXXICounsel
- 110XXXI(D)Duties and Obligations of Prosecuting Attorneys
- 110XXXI(D)2Disclosure of Information
- 110k1993Particular Types of Information Subject to Disclosure
- 110k1999Impeaching evidence (Formerly 110k700(4), 92k268(9), 92k268(8))

If assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process.

[2059 Cases that cite this headnote](#)

[5]

Witnesses

➤ [Interest in Event of Witness Not Party to](#)

Record

- 410Witnesses
- 410IVCredibility and Impeachment
- 410IV(C)Interest and Bias of Witness
- 410k367Interest in Event of Witness Not Party to Record
- 410k367(1)In general

Where Government’s case depended almost entirely on testimony of a witness who was named as a conspirator but was not indicted, and without it there could have been no indictment and no evidence to carry case to jury, such witness’ credibility was important issue in case, and evidence of any understanding or agreement as to future prosecution would be relevant to such witness’ credibility and jury was entitled to know of it.

[943 Cases that cite this headnote](#)

****764 Syllabus***

*150 Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. Held: Neither the Assistant’s lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution’s duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 765—766.

Reversed and remanded.

Attorneys and Law Firms

James M. LaRossa, New York City, for petitioner.

Harry R. Sachse, New Orleans, La., for respondent.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the

Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government *151 had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a conspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the **765 scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

'(Counsel.) Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

'(Taliento.) Nobody told me I wouldn't be prosecuted.

'Q. They told you you might not be prosecuted?

'A. I believe I still could be prosecuted.

.....

*152 'Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

'A. Not at that particular time.

'Q. To this date, have you been charged with any crime?

'A. Not that I know of, unless they are still going to prosecute.'

In summation, the Government attorney stated, '(Taliento) received no promises that he would not be indicted.'

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola,¹ that if he testified before the grand jury and at trial he would not be prosecuted.² DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento.³ The United *153 States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted.⁴

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney—the first one who dealt with Taliento—now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

**766 ^[1] ^[2] ^[3] As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that

suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’ See American *154 Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule. [Napue, supra, at 269, 79 S.Ct., at 1177](#). We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .’ [United States v. Keogh, 391 F.2d 138, 148 \(CA2 1968\)](#). A finding of materiality of the evidence is required under [Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215](#). A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .’ [Napue, supra, at 271, 79 S.Ct., at 1178](#).

^[4] In the circumstances shown by this record, neither DiPaola’s authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency s 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial s 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be

established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

^[5] Here the Government’s case depended almost entirely on Taliento’s testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento’s credibility as a witness was therefore *155 an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in [Napue](#) and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

All Citations

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499](#).

¹ During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

² DiPaola’s affidavit reads, in part, as follows: ‘It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted.’

³ Golden’s affidavit reads, in part, as follows: ‘Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio.’

⁴ The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

KeyCite Yellow Flag - Negative Treatment
 Overruling Recognized by *U.S. v. Shaffer*, 9th Cir.(Cal.), May 5, 1986

96 S.Ct. 2392
 Supreme Court of the United States

UNITED STATES, Petitioner,
 v.
 Linda AGURS.

No. 75-491.
 |
 Argued April 28, 1976.
 |
 Decided June 24, 1976.

Synopsis

Defendant's conviction of second-degree murder was reversed by the United States Court of Appeals for the District of Columbia Circuit, [167 U.S.App.D.C. 28, 510 F.2d 1249](#), rehearing en banc was denied, [171 U.S.App.D.C. 350, 520 F.2d 82](#), and certiorari was granted. The Supreme Court, Mr. Justice Stevens, held that the prosecutor's failure to tender the murder victim's criminal record to the defense did not deprive defendant of a fair trial where it appeared that the record was not requested by defense counsel and gave no rise to an inference of perjury, the trial judge remained convinced of defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable.

Court of Appeals reversed.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan joined. Although attorney for the sovereign must prosecute accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done.

****2394 Syllabus***

***97** Respondent was convicted of second-degree murder for killing one Sewell with a knife during a fight. Evidence at the trial disclosed, *Inter alia*, that Sewell, just before the killing, had been carrying two knives, including the one with which respondent stabbed him, that he had been repeatedly stabbed, but that respondent herself was uninjured. Subsequently, respondent's

counsel moved for a new trial, asserting that he had discovered that Sewell had a prior criminal record (including guilty pleas to charges of assault and carrying a deadly weapon, apparently a knife) that would have tended to support the argument that respondent acted in self-defense, and that the prosecutor had failed to disclose this information to the defense. The District Court denied the motion on the ground that the evidence of Sewell's criminal record was not material, because it shed no light on his character that was not already apparent from the uncontradicted evidence, particularly the fact that he had been carrying two knives, the court stressing the inconsistency between the self-defense claim and the fact that Sewell had been stabbed repeatedly while respondent was unscathed. The Court of Appeals reversed, holding that the evidence of Sewell's criminal record was material and that its nondisclosure required a new trial because the jury might have returned a different verdict had the evidence been received. Held : The prosecutor's failure to tender Sewell's criminal record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment, where it appears that the record was not requested by defense counsel and gave rise to no inference of perjury, that the trial judge remained convinced of respondent's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and that the ****2395** judge's firsthand appraisal of the entire record was thorough and entirely reasonable. *Mooney v. Holohan*, [294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791](#); *Brady v. Maryland*, [373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215](#), distinguished. Pp. 2397-2402.

(a) A prosecutor does not violate the constitutional duty of ***98** disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 2399-2400.

(b) Whether or not procedural rules authorizing discovery of everything that might influence a jury might be desirable, the Constitution does not demand such broad discovery; and the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. P. 2400.

(c) Nor is the prosecutor's constitutional duty of disclosure measured by his moral culpability or willfulness; if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. Pp. 2400-2401.

right to fair trial. [U.S.C.A.Const. Amends. 5, 14.](#)

[408 Cases that cite this headnote](#)

[5] **Criminal Law**
 🔑 [Information or Things, Disclosure of](#)

- [110Criminal Law](#)
- [110XXTrial](#)
- [110XX\(A\)Preliminary Proceedings](#)
- [110k627.5Discovery Prior to and Incident to Trial](#)
- [110k627.6Information or Things, Disclosure of](#)
- [110k627.6\(1\)In general](#)

Whether or not procedural rules authorizing discovery of everything that might influence jury might be desirable, Constitution does not demand such broad discovery; and mere possibility that item of undisclosed information might have aided defense, or might have affected outcome of trial, does not establish “materiality” in constitutional sense. [U.S.C.A.Const. Amends. 5, 14.](#)

[897 Cases that cite this headnote](#)

[6] **Criminal Law**
 🔑 [Constitutional obligations regarding disclosure](#)

- [110Criminal Law](#)
- [110XXXICounsel](#)
- [110XXXI\(D\)Duties and Obligations of Prosecuting Attorneys](#)
- [110XXXI\(D\)2Disclosure of Information](#)
- [110k1991Constitutional obligations regarding disclosure](#)
- [\(Formerly 110k700\(2.1\), 110k700\(2\), 110k700\)](#)

Prosecutor’s constitutional duty of disclosure is not measured by his moral culpability or willfulness, but if suppression of evidence results in constitutional error, it is because of character of evidence, not character of prosecutor. [U.S.C.A.Const. Amends. 5, 14.](#)

[170 Cases that cite this headnote](#)

[7] **Criminal Law**
 🔑 [Constitutional obligations regarding disclosure](#)

- [110Criminal Law](#)
- [110XXXICounsel](#)
- [110XXXI\(D\)Duties and Obligations of Prosecuting Attorneys](#)
- [110XXXI\(D\)2Disclosure of Information](#)
- [110k1991Constitutional obligations regarding disclosure](#)
- [\(Formerly 110k700\(3\), 110k700\)](#)

There are situations in which evidence is obviously of such substantial value to defense that elementary fairness requires that prosecutor disclose it to defendant even without specific request. [U.S.C.A.Const. Amends. 5, 14.](#)

[1233 Cases that cite this headnote](#)

[8] **Criminal Law**
 🔑 [Duties and Obligations of Prosecuting Attorneys](#)

- [110Criminal Law](#)
- [110XXXICounsel](#)
- [110XXXI\(D\)Duties and Obligations of Prosecuting Attorneys](#)
- [110XXXI\(D\)1In General](#)
- [110k1980In general](#)
- [\(Formerly 110k700\(1\), 110k700\)](#)

Although attorney for the sovereign must prosecute accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that justice shall be done.

[44 Cases that cite this headnote](#)

[9] **Criminal Law**
 🔑 [Grounds for New Trial in General](#)
Criminal Law
 🔑 [Materiality and probable effect of information in general](#)

Andrew L. Frey, Washington, D. C., for petitioner.

Edwin J. Bradley, Washington, D. C., for respondent.

Opinion

Mr. Justice STEVENS delivered the opinion of the Court.

After a brief interlude in an inexpensive motel room, respondent repeatedly stabbed James Sewell, causing his death. She was convicted of second-degree murder. The question before us is whether the prosecutor's failure *99 to provide defense counsel with certain background information about Sewell, which would have tended to support the argument that respondent acted in self-defense, deprived her of a fair trial under the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

The answer to the question depends on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged.

I

At about 4:30 p. m. on September 24, 1971, respondent, who had been there before, and Sewell, registered in a motel as man and wife. They were assigned a room without a bath. Sewell was wearing a bowie knife in a sheath, and carried another knife in his pocket. Less than two hours earlier, according to the testimony of his estranged wife, he had had \$360 in cash on his person.

About 15 minutes later three motel employees heard respondent screaming for help. A forced entry into their room disclosed Sewell on top of respondent struggling for possession of the bowie knife. She was holding the knife; his bleeding hand grasped the blade; according to one witness he was trying to jam the blade into her chest. The employees separated the two and summoned the authorities. Respondent departed without comment before they arrived. Sewell was dead on arrival at the hospital.

Circumstantial evidence indicated that the parties had completed an act of intercourse, that Sewell had then gone to the bathroom down the hall, and that the struggle occurred upon his return. The contents of his pockets were in disarray on the dresser and no money was found; the jury may have inferred that respondent took Sewell's

money and that the fight started when Sewell re-entered the room and saw what she was doing.

*100 **2396 On the following morning respondent surrendered to the police. She was given a physical examination which revealed no cuts or bruises of any kind, except needle marks on her upper arm. An autopsy of Sewell disclosed that he had several deep stab wounds in his chest and abdomen, and a number of slashes on his arms and hands, characterized by the pathologist as "defensive wounds."¹

Respondent offered no evidence. Her sole defense was the argument made by her attorney that Sewell had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. The support for this self-defense theory was based on the fact that she had screamed for help. Sewell was on top of her when help arrived, and his possession of two knives indicated that he was a violence-prone person.² It took the jury about 25 minutes to elect a foreman and return a verdict.

Three months later defense counsel filed a motion for a new trial asserting that he had discovered (1) that Sewell had a prior criminal record that would have further evidenced his violent character; (2) that the prosecutor had failed to disclose this information to the defense; and (3) that a recent opinion of the United States Court of Appeals for the District of Columbia Circuit made it clear that such evidence was admissible even if not known to the defendant.³ Sewell's prior record included a plea of guilty to a charge of assault and carrying *101 a deadly weapon in 1963, and another guilty plea to a charge of carrying a deadly weapon in 1971. Apparently both weapons were knives.

The Government opposed the motion, arguing that there was no duty to tender Sewell's prior record to the defense in the absence of an appropriate request; that the evidence was readily discoverable in advance of trial and hence was not the kind of "newly discovered" evidence justifying a new trial; and that, in all events, it was not material.

The District Court denied the motion. It rejected the Government's argument that there was no duty to disclose material evidence unless requested to do so,⁴ *102 assumed that the evidence was admissible, but held that it was not sufficiently material. The District Court expressed the opinion that the prior conviction shed no light on Sewell's character that was not already apparent from the uncontradicted evidence, particularly the fact that he carried two knives; the court stressed the inconsistency **2397 between the claim of self-defense and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

^[3] In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for “all Brady material” or for “anything exculpatory.” Such a request really gives the prosecutor no better notice than if no request is made. *107 If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor’s duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all. The third situation in which the Brady rule arguably applies, typified by this case, therefore embraces the case in which only a general request for “Brady material” has been made.

We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.

III

We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant’s discovery rights. We are dealing with the defendant’s right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our construction of that Clause will apply equally to the comparable Clause in the Fourteenth Amendment applicable to trials in state courts.

The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel. *108 Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor’s constitutional duty to disclose.

^[4] Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions **2400 in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury’s verdict. That statement of a constitutional standard of materiality approaches the “sporting theory of justice” which the Court expressly rejected in *Brady*.¹⁵ For a jury’s *109 appraisal of a case “might” be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

^[5] Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not “suppress substantial material evidence,” former Chief Justice Traynor of the California Supreme Court has pointed out that “they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.” *In re Imbler*, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 14 (1963). And this Court recently noted that there is “no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.” *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706.¹⁶ The mere possibility that an item of undisclosed information *110 might have helped the

18 The hypothetical example given by the District Judge in this case was fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.

19 This is the standard generally applied by lower courts in evaluating motions for new trial under [Fed.Rule Crim.Proc. 33](#) based on newly discovered evidence. See, E. g., [Ashe v. United States](#), 288 F.2d 725, 733 (CA6 1961); [United States v. Thompson](#), 493 F.2d 305, 310 (CA9 1974), cert. denied, 419 U.S. 834, 95 S.Ct. 60, 42 L.Ed.2d 60; [United States v. Houle](#), 490 F.2d 167, 171 (CA2 1973), cert. denied, 417 U.S. 970, 94 S.Ct. 3174, 41 L.Ed.2d 1141; [United States v. Meyers](#), 484 F.2d 113, 116 (CA3 1973); [Heald v. United States](#), 175 F.2d 878, 883 (CA10 1949). See also 2 C. Wright, [Federal Practice and Procedure](#) s 557 (1969).

20 It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See [Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense](#), 74 [Yale L.J.](#) 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

21 "If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different." Comment, 40 [U.Chi.L.Rev.](#), supra, n. 10, at 125.

22 See, E. g., [Stout v. Cupp](#), 426 F.2d 881, 882-883 (CA9 1970); [Peterson v. United States](#), 411 F.2d 1074, 1079 (CA8 1969); [Lessard v. Dickson](#), 394 F.2d 88, 90-92 (CA9 1968), cert. denied, 373 U.S. 1004, 89 S.Ct. 494, 21 L.Ed.2d 469; [United States v. Tomaiolo](#), 378 F.2d 26, 28 (CA2 1967). One commentator has identified three different standards this way:

"As discussed previously, in earlier cases the following standards for determining materiality for disclosure purposes were enunciated: (1) evidence which may be merely helpful to the defense; (2) evidence which raised a reasonable doubt as to defendant's guilt; (3) evidence which is of such a character as to create a substantial likelihood of reversal." Comment, [Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure](#), 59 [Iowa L.Rev.](#) 433, 445 (1973). See also [Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence](#), 60 [Col.L.Rev.](#) 858 (1960).

1 The burden generally imposed upon such a motion has also been described as a burden of demonstrating that the newly discovered evidence would probably produce a different verdict in the event of a retrial. See, E. g., [United States v. Kahn](#), 472 F.2d 272, 287 (CA2 1973); [United States v. Rodriguez](#), 437 F.2d 940, 942 (CA5 1971); [United States v. Curran](#), 465 F.2d 260, 264 (CA7 1972).

2 See [United States v. Keogh](#), 391 F.2d 138, 148 (CA2 1968), in which Judge Friendly implies that the standard the Court adopts is more severe than the standard the Court rejects.

3 To emphasize the harshness of the Court's rule, the defendant's fate is determined finally by the judge only if the judge does not entertain a reasonable doubt as to guilt. If evidence withheld by the prosecution does create a reasonable doubt as to guilt in the judge's mind, that does not end the case rather, the defendant (one might more accurately say the prosecution) is "entitled" to have the case decided by a jury.

4 In [Stout v. Cupp](#), 426 F.2d 881 (CA9 1970), a habeas proceeding, the court simply quoted the District Court's finding that if the suppressed evidence had been introduced, "the jury would not have reached a different result." *Id.*, at 883. There is no indication that the quoted language was intended as anything more than a finding of fact, which would, quite obviously, dispose of the defendant's claim under any standard that might be suggested. In [Peterson v. United States](#), 411 F.2d 1074 (CA8 1969), the court appeared to require a showing that the withheld evidence "was 'material' and would have aided the defense." *Id.*, at 1079. The court in [Lessard v. Dickson](#), 394 F.2d 88 (CA9 1968), found it determinative that the withheld evidence "could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which (the defendant) was surrounded." *Id.*, at 91. The jury, the court noted, would not have been "likely to have had any (difficulty)" with the argument defense counsel would have made with the withheld evidence. *Id.*, at 92. Finally, [United States v. Tomaiolo](#), 378 F.2d 26 (CA2 1967), required the

defendant to show that the evidence was “material and of some substantial use to the defendant.” *Id.*, at 28.

⁵ See, E. g., *United States v. Morell*, 524 F.2d 550, 553 (CA2 1975); *Ogden v. Wolff*, 522 F.2d 816, 822 (CA8 1975); *Woodcock v. Amaral*, 511 F.2d 985, 991 (CA1 1974); *United States v. Miller*, 499 F.2d 736, 744 (CA10 1974); *Shuler v. Wainwright*, 491 F.2d 1213, 1223 (CA5 1974); *United States v. Kahn*, 472 F.2d, at 287; *Clark v. Burke*, 440 F.2d 853, 855 (CA7 1971); *Hamric v. Bailey*, 386 F.2d 390, 393 (CA4 1967).

⁶ That there is a significant difference between the Court’s standards and what has been described as the prevailing view is made clear by Judge Friendly, writing for the court in *United States v. Miller*, 411 F.2d 825 (CA2 1969). After stating the court’s conclusion that a new trial was required because of the Government’s failure to disclose to the defense the pretrial hypnosis of its principal witness, Judge Friendly observed:

“We have reached this conclusion with some reluctance, particularly in light of the considered belief of the able and conscientious district judge, who has lived with this case for years, that review of the record in light of all the defense new trial motions left him ‘convinced of the correctness of the jury’s verdict.’ We, who also have had no small exposure to the facts, are by no means convinced otherwise. The test, however, is not how the newly discovered evidence concerning the hypnosis would affect the trial judge or ourselves but whether, with the Government’s case against (the defendant) already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. We cannot conscientiously say there was not.” *Id.*, at 832 (footnote omitted).

⁷ It is the presence of deliberate prosecutorial misconduct and a desire to deter such misconduct, presumably, that leads the Court to recognize a rule more readily permitting new trials in cases involving a specific defense request for information. The significance of the defense request, the Court states, is simply that it gives the prosecutor notice of what is important to the defense; once such notice is received, the failure to disclose is “seldom, if ever, excusable.” *Ante*, at 2399. It would seem to follow that if an item of information is of such obvious importance to the defense that it could not have escaped the prosecutor’s attention, its suppression should be treated in the same manner as if there had been a specific request. This is precisely the approach taken by some courts. See E. g., *United States v. Morell*, 524 F.2d, at 553; *United States v. Miller*, 499 F.2d, at 744; *United States v. Kahn*, 472 F.2d, at 287; *United States v. Keogh*, 391 F.2d, at 146-147.

Superseded by Constitutional Amendment as Stated in [People v. Horton](#), Ill.App. 2 Dist., October 12, 2016

105 S.Ct. 3375
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Hughes Anderson BAGLEY.

No. 84-48.

Argued March 20, 1985.

Decided July 2, 1985.

Synopsis

Defendant appealed from an order of the United States District Court for the Western District of Washington, Donald S. Voorhees, J., denying his motion to vacate, set aside, or correct sentence received for his narcotics convictions. The United States Court of Appeals for the Ninth Circuit, 719 F.2d 1462, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Blackmun, held that evidence withheld by government is “material,” as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

Reversed and remanded.

Justice White filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Burger and Justice Rehnquist joined.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined.

Justice Stevens filed a dissenting opinion.

**3375 *667 Syllabus*

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a

discovery motion requesting, *inter alia*, “any deals, promises or inducements made to [Government] witnesses in exchange for their testimony.” The Government’s response did not disclose that any “deals, promises or inducements” had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to requests **3376 made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government’s failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, which held that the prosecution’s suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses’ testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, holding that the Government’s failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the Government’s principal *668 witnesses required automatic reversal. The Court of Appeals also stated that it “disagree[d]” with the District Court’s conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses’ testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it."³

Respondent waived his right to a jury trial and was tried before the court in December 1977. At the trial, O'Connor *671 and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, 5 U.S.C. §§ 552 and 552a. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" information **3378 to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form contained the following typewritten description of services:

"That he will provide information regarding T-I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut [*sic*] in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid.*

The figure "\$300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion,⁴ respondent moved under 28 U.S.C. § 2255 to vacate his sentence. He *672 alleged that the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady v. Maryland, supra*.

The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary

hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of \$300 to both O'Connor and Mitchell pursuant to the contracts.⁵ Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[n]either O'Connor nor Mitchell expected to receive the payment of \$300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id.*, at 7a. The District Court also expressly rejected, *ibid.*, the Magistrate's conclusion, *id.*, at 14a, that:

*673 "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963)."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Government **3379 had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id.*, at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is “even more egregious” than failure to disclose exculpatory evidence “because it threatens the defendant’s right to confront adverse witnesses.” 719 F.2d, at 1464. Relying on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Court of Appeals held that the Government’s failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes “ ‘constitutional error of the first magnitude’ ” requiring automatic reversal. 719 F.2d, at 1464 (quoting *Davis v. Alaska*, *supra*, 415 U.S., at 318, 94 S.Ct., at 1111).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio v. United States*, *supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government *3381 *677 witness that he would not be prosecuted if he testified for the Government. This Court said:

“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....’ A finding of materiality of the evidence is required under *Brady*.... A new trial is required if ‘the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....’ ” 405 U.S., at 154, 92 S.Ct., at 766 (citations omitted).

Thus, the Court of Appeals’ holding is inconsistent with our precedents.

Moreover, the court’s reliance on *Davis v. Alaska* for its “automatic reversal” rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile

adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant’s conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant “the right of effective cross-examination which ‘ ‘would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.’ ” *Brookhart v. Janis*, 384 U.S. 1, 3” [86 S.Ct. 1245, 1246, 16 L.Ed.2d 314].” 415 U.S., at 318, 94 S.Ct., at 1111 (quoting *678 *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968)). See also *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

[3] The present case, in contrast, does not involve any direct restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government. The constitutional error, if any, in this case was the Government’s failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with “our overriding concern with the justice of the finding of guilt,” *United States v. Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III

A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs*. The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the prosecutor’s knowing use of perjured testimony or, equivalently, the prosecutor’s knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be

set aside if there is any ****3382** reasonable likelihood that the false testimony could have affected the judgment of the jury.” ***679** 427 U.S., at 103, 96 S.Ct., at 2397 (footnote omitted).⁸ Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review,⁹ it may as ***680** easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves “a corruption of the truth-seeking function of the trial process.” *Id.*, at 104, 96 S.Ct., at 2397.

At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel.¹⁰ 427 U.S., at 111–112, 96 S.Ct., at 2401. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably ****3383** would have resulted in acquittal. *Id.*, at 111, 96 S.Ct., at 2401. The Court reasoned: “If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State’s possession as when it was found in a neutral source, there would be no special significance to the prosecutor’s obligation to serve the cause of justice.” *Ibid.* The ***681** standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence.¹¹ The Court did not define the standard of materiality applicable in this situation,¹² but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request. 427 U.S., at 106, 96 S.Ct., at 2398. The Court also noted: “When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” *Ibid.*

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In

neither case did the Court’s discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses “only if there is a reasonable likelihood that the testimony could have affected the judgment of the ***682** trier of fact.” And in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694, 104 S.Ct., at 2068.¹³ The *Strickland* Court defined a “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” *Ibid.*

^[4] We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the “no request,” “general request,” and “specific request” cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for United ****3384** States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid.*

We agree that the prosecutor’s failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the ***683** nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse

effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor’s incomplete response.

B

In the present case, we think that there is a significant likelihood that the prosecutor’s response to respondent’s discovery motion misleadingly induced defense counsel to believe that O’Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O’Connor and Mitchell if the information they supplied led to “the accomplishment of the objective sought to be obtained ... to the satisfaction of [the Government].” App. 22 and 23. This possibility of a reward gave O’Connor and Mitchell a direct, personal stake in respondent’s conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government’s satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O’Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in *684 criminal activity. In fact, O’Connor and Mitchell signed the last of these affidavits the very day after they signed the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a “promise of reward,” the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O’Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any “inducements.”

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of

materiality applicable to the prosecutor’s knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it “disagreed” with the District Court’s finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was based. The District Court reasoned **3385 that O’Connor’s and Mitchell’s testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O’Connor’s and Mitchell’s testimony was in fact inculpatory on those charges. 719 F.2d, at 1464, n. 1. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O’Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

Justice POWELL took no part in the decision of this case.

*685 Justice WHITE, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring in part and concurring in the judgment.

[4] I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was “material,” and I therefore join Parts I and II of the Court’s opinion. I also agree with Justice BLACKMUN that for purposes of this inquiry, “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Ante*, at 3384. As the Justice correctly observes, this standard is “sufficiently flexible” to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid*. Given the flexibility of the standard and the inherently factbound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense’s request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals’ failure to apply this standard necessitates reversal. I therefore concur in the judgment.

Upon discovering these ATF forms through a Freedom of Information Act request, Bagley sought relief from his conviction. The District Court Judge denied Bagley’s motion to vacate his sentence stating that because he was the same judge who had been the original trier of fact, he was able to determine the effect the contracts would have had on his decision, more than four years earlier, to convict Bagley. The judge stated that beyond a reasonable doubt the contracts, if disclosed, would have had no effect upon the convictions:

“The Court has read in their entirety the transcripts of the testimony of James P. O’Connor and Donald E. Mitchell at the trial.... Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against the defendant of distributing controlled substances and possessing ****3387** controlled substances with the intention of distributing them, the testimony of O’Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant’s counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant’s own use. As to that aspect of their testimony, the testimony of O’Connor and Mitchell tended to be favorable to the defendant.” *Id.*, at 8a.

***689** The foregoing statement, as to which the Court remands for further consideration, is seriously flawed on its face. First, the testimony that the court describes was in fact the *only inculpatory testimony in the case* as to the two counts for which Bagley received a sentence of imprisonment. If, as the judge claimed, the testimony of the two information “vendors” was “very brief” and in part favorable to the defendant, that fact shows the weakness of the prosecutor’s case, not the harmlessness of the error. If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution’s case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Second, the court’s statement that Bagley did not attempt to discredit the witnesses’ testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government’s failure to disclose the existence of any

inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy.

Moreover, counsel for Bagley in fact did attempt to discredit O’Connor, by asking him whether two ATF agents had pressured him or had threatened that his job might be in ***690** jeopardy, in order to get him to cooperate. 7 Tr. 89–90. But when O’Connor answered in the negative, *ibid.*, counsel stopped this line of questioning. In addition, counsel for Bagley attempted to argue to the District Court, in his closing argument, that O’Connor and Mitchell had “fabricated” their accounts, 14 Tr. 1117, but the court rejected the proposition:

“Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. *I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant.*” *Id.*, at 1117–1118. (Emphasis added.)

The District Court, in so saying, of course had seen no evidence to suggest that the two witnesses might have any motive for “mak[ing] a case” against Bagley. Yet, as Justice BLACKMUN points out, the possibility of a reward, the size of which is directly related to the Government’s success at trial, gave the two witnesses a “personal stake” in the conviction and an “incentive to testify falsely in order to secure a conviction.” *Ante*, at 3384.

Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew. The failure to disclose evidence ****3388** affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Agurs*, 427 U.S. 97, 121, 96 S.Ct. 2392, 2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting), but when “the ‘reliability of a given

witness may well be determinative of guilt or innocence,’ ” *Giglio, supra*, 405 U.S., at 154, 92 S.Ct., at 766 (quoting *Napue, supra*, 360 U.S., at 269, 79 S.Ct., at 1177), and when “the Government’s case depend[s] almost entirely on” the testimony of a certain witness, 405 U.S., at 154, 92 S.Ct., at 766, evidence of that witness’ possible *691 bias simply may not be said to be irrelevant, or its omission harmless. As THE CHIEF JUSTICE said in *Giglio v. United States*, in which the Court ordered a new trial in a case in which a promise to a key witness was not disclosed to the jury:

“[W]ithout [Taliento’s testimony] there could have been no indictment and no evidence to carry the case to the jury. Taliento’s credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

“For these reasons, the due process requirements enunciated in *Napue* and other cases cited earlier require a new trial.” *Id.*, at 154–155, 92 S.Ct., at 766.

Here, too, witnesses O’Connor and Mitchell were crucial to the Government’s case. Here, too, their personal credibility was potentially dispositive, particularly since the allegedly corroborating tape recordings were not audible. It simply cannot be denied that the existence of a contract signed by those witnesses, promising a reward whose size would depend “on the Government’s satisfaction with the end result,” *ante*, at 3384, might sway the trier of fact, or cast doubt on the truth of all that the witnesses allege. In such a case, the trier of fact is absolutely entitled to know of the contract, and the defense counsel is absolutely entitled to develop his case with an awareness of it. Whatever the applicable standard of materiality, see *infra*, in this instance it undoubtedly is well met.

Indeed, *Giglio* essentially compels this result. The similarities between this case and that one are evident. In both cases, the triers of fact were left unaware of Government inducements to key witnesses. In both cases, the individual trial prosecutors acted in good faith when they failed to disclose the exculpatory evidence. See *Giglio, supra*, 405 U.S., at 151–153, 92 S.Ct., at 764–765; App. to Pet. for Cert. 13a (Magistrate’s finding that *692 Bagley prosecutor would have disclosed information had he known of it). The sole difference between the two cases lies in the fact that in *Giglio*, the prosecutor affirmatively stated to the trier of fact that no promises had been made. Here, silence in response to a defense request took the place of an affirmative error at trial—although the prosecutor did make an affirmative

misrepresentation to the defense in the affidavits. Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. “[T]he truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution.” *Agurs, supra*, 427 U.S., at 120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting). In this case, as in *Giglio*, a new trial is in order, and the Court of Appeals correctly reversed the District Court’s denial of such relief.

II

Instead of affirming, the Court today chooses to reverse and remand the case for application of its newly stated standard to the facts of this case. While I believe that the evidence at issue here, which remained undisclosed despite a particular request, undoubtedly was material under the Court’s standard, I also have serious doubts whether the Court’s definition of **3389 the constitutional right at issue adequately takes account of the interests this Court sought to protect in its decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A

I begin from the fundamental premise, which hardly bears repeating, that “[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one.” *Application of Kapatos*, 208 F.Supp. 883, 888 (SDNY 1962); see *Giles v. Maryland*, 386 U.S. 66, 98, (1967) (Fortas, J., concurring in judgment) (“The State’s obligation is not to convict, but to see that, so far as possible, truth emerges”). When evidence favorable to the defendant is known to exist, *693 disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the state does not disclose information in its possession that might reasonably be considered favorable

defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.

Under the foregoing analysis, the prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure.

C

The Court, however, offers a complex alternative. It defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial. Thus, the Court holds that due process does not require the prosecutor to turn over evidence unless the evidence is "material," and the *700 Court states that evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ante*, at 3383. Although this looks like a post-trial standard of review, see, e.g., *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (adopting this standard of review), it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial. By adhering to the view articulated in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)—that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial—the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors **3393 the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition.

The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation. Numerous lower court cases provide examples of evidence that is undoubtedly favorable but not necessarily "material" under the Court's definition, and that consequently would not have to be disclosed to the defendant under the Court's view. See, e.g., *United States v. Sperling*, 726 F.2d 69, 71–72 (CA2 1984) (prior statement disclosing motive of key

Government witness to testify), cert. denied, 467 U.S. 1243, 104 S.Ct. 3516, 82 L.Ed.2d 824 (1984); *King v. Ponte*, 717 F.2d 635 (CA1 1983) (prior inconsistent statements of Government witness); see also *United States v. Oxman*, 740 F.2d 1298, 1311 (CA3 1984) (addressing "disturbing" prosecutorial tendency to withhold information because of later opportunity to argue, with the benefit of hindsight, that information was not "material"), cert. pending *sub nom. United States v. Pflaumer*, No. 84–1033. The result is to veer sharply away from the basic notion that the fairness of a trial increases *701 with the amount of existing favorable evidence to which the defendant has access, and to disavow the ideal of full disclosure.

The Court's definition poses other, serious problems. Besides legitimizing the nondisclosure of clearly favorable evidence, the standard set out by the Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant—of which he presumably knows very little—and perform the impossible task of deciding whether a certain piece of information will have a significant impact on the trial, bearing in mind that a defendant will later shoulder the heavy burden of proving how it would have affected the outcome. At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive. One Court of Appeals has recently vented its frustration at these unfortunate consequences:

"It seems clear that those tests [for materiality] have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure.... [T]he root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial, the prosecutor cannot know whether, after trial, particular evidence will prove to have been material.... Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can always argue, *702 with the benefit of hindsight, that it was not material." *United States v. Oxman*, *supra*, at 1310.

The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain

trial ought to be no different in the two cases, and the burden he faces on appeal should also be the same. *Giglio* remains the law for a class of cases, and I ****3396** reaffirm my belief that the same standard applies to this case as well. See *Agurs*, 427 U.S., at 119–120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting).

Second, only a strict appellate standard, which places on the prosecutor a burden to defend his decisions, will remove the incentive to gamble on a finding of harmlessness. Any lesser standard, and especially one in which the defendant bears the burden of proof, provides the prosecutor with ample room to withhold favorable evidence, and provides a reviewing court with a simple means to affirm whenever in its view the correct result was reached. This is especially true given the speculative nature of retrospective review:

“The appellate court’s review of ‘what might have been’ is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel.” Capra, *supra*, at 412.

As a consequence, the appellate court no less than the prosecutor must substitute its judgment for that of the trier of fact under an inherently slippery test. Given such factors as a reviewing court’s natural inclination to affirm a judgment ***707** that appears “correct” and that court’s obvious inability to know what a jury ever will do, only a strict and narrow test that places the burden of proof on the prosecutor will begin to prevent affirmances in cases in which the withheld evidence might have had an impact.

Even under the most protective standard of review, however, courts must be careful to focus on the nature of the evidence that was not made available to the defendant and not simply on the quantity of the evidence against the defendant separate from the withheld evidence. Otherwise, as the Court today acknowledges, the reviewing court risks overlooking the fact that a failure to disclose has a direct effect on the entire course of trial.

Without doubt, defense counsel develops his trial strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation. Under such circumstances, a reviewing court must be sure

not to focus on the amount of evidence supporting the verdict to determine whether the trier of fact reasonably would reach the same conclusion. Instead, the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have affected the outcome of trial.⁷

***708 **3397** In this case, it is readily apparent that the undisclosed information would have had an impact on the defense presented at trial, and perhaps on the judgment. Counsel for Bagley argued to the trial judge that the Government’s two key witnesses had fabricated their accounts of the drug distributions, but the trial judge rejected the argument for lack of any evidence of motive. See *supra*, at ——. These key witnesses, it turned out, were each to receive monetary rewards whose size was contingent on the usefulness of their assistance. These rewards “served only to strengthen any incentive to testify falsely in order to secure a conviction.” *Ante*, at 3384. To my mind, no more need be said; this nondisclosure ***709** could not have been harmless. I would affirm the judgment of the Court of Appeals.

Justice STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 3379–3381, but I respectfully dissent from the Court’s unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 3379, the holding in *Brady* was that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” 373 U.S., at 87, 83 S.Ct., at 1196. We noted in *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution’s knowing use of perjured testimony, exemplified by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and the prosecution’s suppression of favorable evidence

specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate nondisclosure constitutes constitutional error—the conviction must be set aside if the suppressed or perjured evidence was “material” and there was “any reasonable likelihood” that it “could have affected” the outcome of the trial. 427 U.S., at 103, 96 S.Ct., at 2397.¹ See **3398 *Brady*, *supra*, 373 U.S., at 88, 83 S.Ct., at 1197 (“would tend to exculpate”); *710 accord, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982) (“reasonable likelihood”); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (“reasonable likelihood”); *Napue v. Illinois*, 360 U.S. 264, 272, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959) (“may have had an effect on the outcome”). The combination of willful prosecutorial suppression of evidence and, “more importantly,” the potential “corruption of the truth-seeking function of the trial process” requires that result. 427 U.S., at 104, 106, 96 S.Ct., at 2397, 2398.²

In *Brady*, the suppressed confession was *inadmissible* as to guilt and “could not have affected the outcome” on that issue. 427 U.S., at 106, 96 S.Ct., at 2398. However, the evidence “could have affected Brady’s punishment,” and was, therefore, “material on the latter issue but not on the former.” *Ibid.* Materiality *711 was thus used to describe admissible evidence that “could have affected” a dispositive issue in the trial.

The question in *Agurs* was whether the *Brady* rule should be *extended*, to cover a case in which there had been neither perjury nor a specific request—that is, whether the prosecution has some constitutional duty to search its files and disclose automatically, or in response to a general request, all evidence that “might have helped the defense, or might have affected the outcome.” 427 U.S., at 110, 96 S.Ct., at 2400.³ Such evidence would, of course, be covered by the *Brady* formulation if it were specifically requested. We noted in *Agurs*, however, that because there had been no specific defense request for the later-discovered evidence, there was no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be of particular value. 427 U.S., at 106–107, 96 S.Ct., at 2398–2399. Consequently, we stated that in the absence of a request the prosecution has a constitutional duty to volunteer only “obviously exculpatory ... evidence.” *Id.*, at 107, 96 S.Ct., at 2399. Because this constitutional duty to disclose is *different* from the duty described in *Brady*, it is not surprising that we developed a different standard of materiality in the *Agurs* context. Necessarily describing the “inevitably imprecise” standard in terms appropriate to post-trial review, we held that no constitutional

violation occurs in the absence of a specific request unless “the omitted evidence creates a reasonable doubt that did not otherwise exist.” *Id.*, at 108, 112, 96 S.Ct., at 2399, 2401.⁴

*712 **3399 What the Court ignores with regard to *Agurs* is that its analysis was restricted entirely to the general or no-request context.⁵ The “standard of materiality” we fashioned for the purpose of determining whether a prosecutor’s failure to *volunteer* exculpatory evidence amounted to constitutional error was and is unnecessary with regard to the two categories of prosecutorial suppression already covered by the *Brady* rule. The specific situation in *Agurs*, as well as the circumstances of *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), simply falls “outside the *Brady* context.” *Ante*, at 3383.

But the *Brady* rule itself unquestionably applies to this case, because the Government failed to disclose favorable evidence that was clearly responsive to the defendant’s specific *713 request. Bagley’s conviction therefore must be set aside if the suppressed evidence was “material”—and it obviously was, see n. 1, *supra*—and if there is “any reasonable likelihood” that it could have affected the judgment of the trier of fact. Our choice, therefore, should be merely whether to affirm for the reasons stated in Part I of Justice MARSHALL’s dissent, or to remand to the Court of Appeals for further review under the standard stated in *Brady*. I would follow the latter course, not because I disagree with Justice MARSHALL’s analysis of the record, but because I do not believe this Court should perform the task of reviewing trial transcripts in the first instance. See *United States v. Hasting*, 461 U.S. 499, 516–517, 103 S.Ct. 1974, 1984–1985, 76 L.Ed.2d 96 (1983) (STEVENS, J., concurring in judgment). I am confident that the Court of Appeals would reach the appropriate result if it applied the proper standard.

The Court, however, today sets out a reformulation of the *Brady* rule in which I have no such confidence. Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a “reasonable probability” that the suppressed evidence “would” have altered “the result of the [trial].” *Ante*, at 3384, 3385. According to the Court this single rule is “sufficiently flexible” to cover specific as well as general or no-request instances of nondisclosure, *ante*, at 3384, because, at least in the view of Justice BLACKMUN and Justice O’CONNOR, a reviewing court can “consider directly”

under this standard the more threatening effect that nondisclosure in response to a specific defense request will generally have on the truth-seeking function of the adversary process. *Ante*, at 3384 (opinion of **BLACKMUN, J.**).⁶

***714** I cannot agree. The Court’s approach stretches the concept of “materiality” beyond any recognizable scope, transforming it from merely an evidentiary concept as used in *Brady* and *Agurs*, which required that material evidence be admissible and probative of guilt or innocence in the context of a specific request, into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not “material,” and hence suppressible by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal. Justice MARSHALL rightly criticizes the incentives such a standard creates for prosecutors “to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive.” *Ante*, at 3393.

Moreover, the Court’s analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that “may” be considered by a reviewing court. *Ante*, at 3384 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that “[w]hen the prosecutor receives a specific and relevant request, the

failure to make any response is seldom, if ever, excusable.” 427 U.S., at 106, 96 S.Ct., at 2398. Such suppression is far more serious than mere nondisclosure of evidence in which the defense has expressed no particular interest. A reviewing court should attach great significance to silence in the face of a specific request, when responsive evidence is later shown to have been in the Government’s possession. Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i.e.*, perjury)—indeed, the two situations are aptly described as “sides of a single coin.” Babcock, ***715 Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel**, 34 *Stan.L.Rev.* 1133, 1151 (1982).

Accordingly, although the judgment of the Court of Appeals should be vacated and the case should be remanded for further proceedings, I disagree with the Court’s statement of the correct standard to be applied. I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court’s new standard.

All Citations

473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, 53 USLW 5084

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- ¹ In addition, ¶ 10(b) of the motion requested “[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.,” and ¶ 11 requested “[a]ll information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant.” App. 18–19.
- ² The Jencks Act, 18 U.S.C. § 3500, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant’s motion, any statement of the witness in the Government’s possession that relates to the subject matter of the witness’ testimony.
- ³ Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV–3592–RJK(M) (CD Cal.) Exhibits 1–9.
- ⁴ The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.
- ⁵ The Magistrate found, too, that ATF paid O’Connor and Mitchell, respectively, \$90 and \$80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O’Connor and Mitchell for expenses, and

would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id.*, at 7a, 13a.

- 6 By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). See *Brady v. Maryland*, 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.
- 7 See *United States v. Agurs*, 427 U.S. 97, 106, 111, 96 S.Ct. 2392, 2398, 2401, 49 L.Ed.2d 342 (1976); *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). See also *California v. Trombetta*, 467 U.S. 479, 488, n. 8, 104 S.Ct. 2528, 2534, n. 8, 81 L.Ed.2d 413 (1984). An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland*, 386 U.S. 66, 117, 87 S.Ct. 793, 818, 17 L.Ed.2d 737 (1967) (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.
- 8 In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.*, at 112, 55 S.Ct., at 341. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.
- The Court again reaffirmed this principle in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction—even false testimony that goes only to the credibility of the witness—is "implicit in any concept of ordered liberty." *Id.*, at 269, 79 S.Ct., at 1177. Finally, the Court held that it was not bound by the state court's determination that the false testimony "could not in any reasonable likelihood have affected the judgment of the jury." *Id.*, at 271, 79 S.Ct., at 1178. The Court conducted its own independent examination of the record and concluded that the false testimony "may have had an effect on the outcome of the trial." *Id.*, at 272, 79 S.Ct., at 1178. Accordingly, the Court reversed the judgment of conviction.
- 9 The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue v. Illinois*, 360 U.S. at 271, 79 S.Ct., at 1178. See n. 8, *supra*. See also *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S., at 271, 79 S.Ct., at 1178). *Napue* antedated *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of " 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' " and a rule " 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " 386 U.S., at 24, 87 S.Ct., at 828 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87, 84 S.Ct. 229, 230–231, 11 L.Ed.2d 171 (1963)). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36–38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.
- 10 This is true only if the nondisclosure is treated as error subject to harmless-error review, and not if the nondisclosure is treated as error only if the evidence is material under a not "harmless beyond a reasonable doubt" standard.
- 11 The Court in *Agurs* identified *Brady* as a case in which specific information was requested by the defense. 427 U.S., at 106, 96 S.Ct., at 2398. The request in *Brady* was for the extrajudicial statements of *Brady's* accomplice. See 373 U.S., at 84, 83 S.Ct., at 1195.

It is clear that the term “material” has an evidentiary meaning quite distinct from that which the Court attributes to it. Judge Weinstein, for example, defines as synonymous the words “ultimate fact,” “operative fact,” “material fact,” and “consequential fact,” each of which, he states, means “a ‘fact that is of consequence to the determination of the action.’” 1 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 401[03], n. 1 (1982) (quoting *Fed. Rule Evid.* 401). Similarly, another treatise on evidence explains that there are two components to relevance—materiality and probative value. “Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.” E. Cleary, *McCormick on Evidence* § 185 (3d ed. 1984). “Probative value” addresses the tendency of the evidence to establish a “material” proposition. *Ibid.* See also 1 J. Wigmore, *Evidence* § 2 (P. Tillers rev. 1982). There is nothing in *Brady* to suggest that the Court intended anything other than a rule that favorable evidence need only relate to a proposition at issue in the case in order to merit disclosure.

Even if the Court did not use the term “material” simply to refer to favorable evidence that might be relevant, however, I still believe that due process requires that prosecutors have the duty to disclose all such evidence. The inherent difficulty in applying, prior to trial, a definition that relates to the outcome of the trial, and that is based on speculation and not knowledge, means that a considerable amount of potentially consequential material might slip through the Court’s standard. Given the experience of the past decade with *Agurs*, and the practical problem that inevitably exists because the evidence must be disclosed prior to trial to be of any use, I can only conclude that all potentially favorable evidence must be disclosed. Of course, I agree with courts that have allowed exceptions to this rule on a showing of exigent circumstances based on security and law enforcement needs.

6 In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the system of justice as to require reversal in all cases, such as discrimination in jury selection. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process.

7 For example, in *United States ex rel. Butler v. Maroney*, 319 F.2d 622 (CA3 1963), the defendant was convicted of first-degree murder. Trial counsel based his defense on temporary insanity at the time of the murder. During trial, testimony suggested that the shooting might have been the accidental result of a struggle, but defense counsel did not develop that defense. It later turned out that an eyewitness to the shooting had given police a statement that the victim and Butler had struggled prior to the murder. If defense counsel had known before trial what the eyewitness had seen, he might have relied on an additional defense, and he might have emphasized the struggle. See Note, *The Prosecutor’s Constitutional Duty to Reveal Evidence to the Defendant*, 74 *Yale L.J.* 136, 145 (1964). Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome. No matter how overwhelming the evidence that Butler committed the murder, he had a right to go before a trier of fact and present his best available defense.

Similarly, in *Ashley v. Texas*, 319 F.2d 80 (CA5), cert. denied, 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963), the defendant was sentenced to death for murder. The prosecutor disclosed to the defense a psychiatrist’s report indicating that the defendant was sane, but he failed to disclose the reports of a psychiatrist and a psychologist indicating that the defendant was insane. The nondisclosed information did not relate to the trial defense of self-defense. But the failure to disclose the evidence clearly prevented defense counsel from developing the possibly dispositive defense that he might have developed through further psychiatric examinations and presentation at trial. The nondisclosed evidence obviously threw off the entire course of trial preparation, and a new trial was in order. In such a case, there simply is no need to consider—in light of the evidence that actually was presented and the quantity of evidence to support the verdict returned—the possible effect of the information on the particular jury that heard the case. Indeed, to make such an evaluation would be to substitute the reviewing court’s judgment of the facts, including the previously undisclosed evidence, for that of the jury, and to do so without the benefit of competent counsel’s development of the information.

See also Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 *U.Pa.L.Rev.* 15 (1976) (discussing application of harmless-error test).

1 I do not agree with the Court’s reference to the “constitutional error, *if any*, in this case,” see *ante*, at 3381 (emphasis added), because I believe a violation of the *Brady* rule is by definition constitutional error. Cf. *United States v. Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401 (rejecting rule making “every nondisclosure ... automatic error” outside the *Brady* specific request or perjury contexts). As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over “upon request” and “the evidence is material either to guilt or punishment.” *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1196. As JUSTICE MARSHALL’s explication of the record in this case demonstrates, *ante*, at 3377–3379, the suppressed evidence here was not only favorable to Bagley, but also unquestionably material to the issue of his guilt or innocence. The two witnesses who had signed the undisclosed “Contract[s] for Purchase of Information” were the only trial witnesses as to the two distribution counts on which Bagley

was convicted. On cross-examination defense counsel attempted to undercut the witnesses' credibility, obviously a central issue, but had little factual basis for so doing. When defense counsel suggested a lack of credibility during final argument in the bench trial, the trial judge demurred, because "I really did not get the impression at all that either one or both of these men were trying at least in court here to make a case against the defendant." A finding that evidence showing that the witnesses in fact had a "direct, personal stake in respondent's conviction," *ante*, at 3384, was nevertheless not "material" would be egregiously erroneous under any standard.

- 2 "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice..." *Brady, supra*, 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.
- 3 "[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all...
"We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U.S., at 107, 96 S.Ct., at 2399.
- 4 "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112, 96 S.Ct., at 2401 (footnote omitted).
We also held in *Agurs* that when no request for particular information is made, post-trial determination of whether a failure voluntarily to disclose exculpatory evidence amounts to constitutional error depends on the "character of the evidence, not the character of the prosecutor." *Id.*, at 110, 96 S.Ct., at 2400. Nevertheless, implicitly acknowledging the broad discretion that trial and appellate courts must have to ensure fairness in this area, we noted that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*, at 108, 96 S.Ct., at 2399. Finally, we noted that the post-trial determination of reasonable doubt will vary even in the no-request context, depending on all the circumstances of each case. For example, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 113, 96 S.Ct., at 2402.
- 5 See *ante*, at 3382 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs* "); *ante*, at 3383 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante*, at 3393 (MARSHALL, J., dissenting) (describing *Agurs* as stating a general rule that "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial"). But see Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 *Stan.L.Rev.* 1133, 1148 (1982) (*Agurs* "distinguished" between no-request situations and the other two *Brady* contexts "where a pro-defense standard ... would continue").
- 6 I of course agree with Justice BLACKMUN, *ante*, at 3382, n. 9, and 3385, and Justice MARSHALL, *ante*, at 3396, that our long line of precedents establishing the "reasonable likelihood" standard for use of perjured testimony remains intact. I also note that the Court plainly envisions that reversal of Bagley's conviction would be possible on remand even under the new standard formulated today for specific-request cases. See *ante*, at 3385.

KeyCite Yellow Flag - Negative Treatment
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115 S.Ct. 1555
 Supreme Court of the United States

Curtis Lee KYLES, Petitioner,
 v.
 John P. WHITLEY, Warden.

No. 93-7927.

Argued Nov. 7, 1994.

Decided April 19, 1995.

Synopsis

Petitioner, whose capital murder conviction and death sentence had been affirmed on direct appeal, [513 So.2d 265](#), filed petition for habeas corpus. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., denied petition, and the Court of Appeals for the Fifth Circuit, [5 F.3d 806](#), affirmed. Certiorari was granted. The Supreme Court, Justice [Souter](#), held that: (1) in determining whether evidence not disclosed by state was “material,” in violation of *Brady*, cumulative effect of all suppressed evidence favorable to the defendant is considered, rather than considering each item of evidence individually, and (2) favorable evidence state failed to disclose to defendant would have made a different result “reasonably probable” in capital murder prosecution, and thus, nondisclosure of evidence was *Brady* violation.

Reversed and remanded.

Justice [Stevens](#) filed concurring opinion in which Justices [Ginsburg](#) and [Breyer](#) joined.

Justice [Scalia](#) filed dissenting opinion in which Chief Justice [Rehnquist](#) and Justices [Kennedy](#) and [Thomas](#) joined.

**1558 Syllabus*

*419 Petitioner Kyles was convicted of first-degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence

on direct appeal, it was revealed on state collateral review that the State had never disclosed certain evidence favorable to him. That evidence included, *inter alia*, (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as “Beanie,” who was never called to testify; and (3) a computer printout of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles’s car. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles’s application for discretionary review. He then sought relief on federal habeas, claiming, among other things, that his conviction was obtained in violation of *Brady v. Maryland*, [373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215](#), which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. The Federal District Court denied relief, and the Fifth Circuit affirmed.

Held:

1. Under *United States v. Bagley*, [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481](#), four aspects of materiality for *Brady* purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a “reasonable probability” that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal. [473 U.S., at 682, 685, 105 S.Ct., at 3383-3384, 3385. United States v. Agurs, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 2401-2402, 49 L.Ed.2d 342, distinguished.](#) Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Third, contrary to the Fifth Circuit’s assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality *420 under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson*, [507 U.S. 619, 623, 113 S.Ct. 1710, 1715, 123 L.Ed.2d 353](#). Fourth, the state’s disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. [473 U.S., at 675, and n. 7, 105 S.Ct., at](#)

3380, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached. **1559 Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit’s opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 1565–1569.

2. Because the net effect of the state-suppressed evidence favoring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 1569–1576.

(a) A review of the suppressed statements of eyewitnesses—whose testimony identifying Kyles as the killer was the essence of the State’s case—reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State’s two best witnesses. Pp. 1569–1571.

(b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie—who, by the State’s own admission, was essential to its investigation and, indeed, “made the case” against Kyles—reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence. Pp. 1571–1573.

(c) While the suppression of the prosecution’s list of the cars at the crime scene after the murder does not rank with the failure to disclose the other evidence herein discussed, the list would have had some value as exculpation of Kyles, whose license plate was not included thereon, and as impeachment of the prosecution’s arguments to the jury that the killer left his car at the scene during the investigation and that a grainy *421 photograph of the scene showed Kyles’s car in the

background. It would also have lent support to an argument that the police were irresponsible in relying on inconsistent statements made by Beanie. Pp. 1573–1574.

(d) Although not every item of the State’s case would have been directly undercut if the foregoing *Brady* evidence had been disclosed, it is significant that the physical evidence remaining unscathed would, by the State’s own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. While the inconclusiveness of that evidence does not prove Kyles’s innocence, and the jury might have found the unimpeached eyewitness testimony sufficient to convict, confidence that the verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. Pp. 1574–1576.

5 F.3d 806 (CA5 1993), reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O’CONNOR, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 1576. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 1576.

Attorneys and Law Firms

James S. Liebman, New York City, for petitioner.

Jack Peebles, New Orleans, LA, for respondent.

Opinion

Justice SOUTER delivered the opinion of the Court.

After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried **1560 again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state’s obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention. Because the net effect of the evidence withheld by the State in this case raises *422 a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State v. Kyles*, 513 So.2d 265 (La.1987), cert. denied, 486 U.S. 1027, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988). On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding, the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles v. Butler*, 566 So.2d 386 (La.1990).

Kyles then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. 5 F.3d 806 (CA5 1993). As we explain, *infra*, at 1569, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987),¹ we granted certiorari, 511 U.S. 1051, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994), and now reverse.

*423 II

A

The record indicates that, at about 2:20 p.m. on Thursday, September 20, 1984, 60-year-old Dolores Dye left the Schwegmann Brothers' store (Schwegmann's) on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

New Orleans police took statements from six eyewitnesses,² who offered various descriptions of the gunman. They agreed that he was a black man, and four

of them said that he had braided hair. The witnesses differed significantly, however, in their descriptions of height, age, weight, build, and hair length. Two reported seeing a man of 17 or 18, while another described the gunman as looking as old as 28. One witness described him as 5' 4" or 5'5", medium build, 140–150 pounds; another described the man as slim and close to six feet. One witness ****1561** said he had a mustache; none of the others spoke of any facial hair at all. One witness said the murderer had shoulder-length hair; another described the hair as "short."

Since the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD, they recorded the license numbers of the cars remaining in the parking lots around the store at 9:15 p.m. on the evening of the murder. Matching these numbers with registration records produced the names and addresses of the owners of the cars, with a notation of any owner's police ***424** record. Despite this list and the eyewitness descriptions, the police had no lead to the gunman until the Saturday evening after the shooting.

At 5:30 p.m., on September 22, a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as petitioner, Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's. He agreed to meet with the police.

A few hours later, the informant met New Orleans Detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded. See App. 221–257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace.³

His story, as well as his name, had changed since his earlier call. In place of his original account of buying a Thunderbird from Kyles on Thursday, Beanie told Miller that he had not seen Kyles at all on Thursday, *id.*, at 249–250, and had bought a red LTD the previous day, Friday, *id.*, at 221–222, 225. Beanie led Miller to the parking lot of a nearby bar, where he had left the red LTD, later identified as Dye's.

Beanie told Miller that he lived with Kyles's brother-in-law (later identified as Johnny Burns),⁴ whom Beanie repeatedly called his "partner." *Id.*, at 221. Beanie described Kyles as slim, about 6-feet tall, 24 or 25 years old, with a "bush" hairstyle. *Id.*, at 226, 252. When asked if Kyles ever wore ***425** his hair in plaits, Beanie said that

he did but that he “had a bush” when Beanie bought the car. *Id.*, at 249.

During the conversation, Beanie repeatedly expressed concern that he might himself be a suspect in the murder. He explained that he had been seen driving Dye’s car on Friday evening in the French Quarter, admitted that he had changed its license plates, and worried that he “could have been charged” with the murder on the basis of his possession of the LTD. *Id.*, at 231, 246, 250. He asked if he would be put in jail. *Id.*, at 235, 246. Miller acknowledged that Beanie’s possession of the car would have looked suspicious, *id.*, at 247, but reassured him that he “didn’t do anything wrong,” *id.*, at 235.

Beanie seemed eager to cast suspicion on Kyles, who allegedly made his living by “robbing people,” and had tried to kill Beanie at some prior time. *Id.*, at 228, 245, 251. Beanie said that Kyles regularly carried two pistols, a .38 and a .32, and that if the police could “set him up good,” they could “get that same gun” used to kill Dye. *Id.*, at 228–229. Beanie rode with Miller and Miller’s supervisor, Sgt. James Eaton, in an unmarked squad car to Desire Street, where he pointed out the building containing Kyles’s apartment. *Id.*, at 244–246.

Beanie told the officers that after he bought the car, he and his “partner” (Burns) drove Kyles to Schwegmann’s about 9 p.m. on Friday evening to pick up Kyles’s car, described as an orange four-door Ford.⁵ **1562 *Id.*, at 221, 223, 231–232, 242. When asked where Kyles’s car had been parked, Beanie replied that it had been “[o]n the same side [of the lot] where the woman was killed at.” *Id.*, at 231. The officers later drove Beanie to Schwegmann’s, where he indicated the space where he claimed Kyles’s car had been parked. Beanie went on to say that when he and Burns had brought Kyles to pick *426 up the car, Kyles had gone to some nearby bushes to retrieve a brown purse, *id.*, at 253–255, which Kyles subsequently hid in a wardrobe at his apartment. Beanie said that Kyles had “a lot of groceries” in Schwegmann’s bags and a new baby’s potty “in the car.” *Id.*, at 254–255. Beanie told Eaton that Kyles’s garbage would go out the next day and that if Kyles was “smart” he would “put [the purse] in [the] garbage.” *Id.*, at 257. Beanie made it clear that he expected some reward for his help, saying at one point that he was not “doing all of this for nothing.” *Id.*, at 246. The police repeatedly assured Beanie that he would not lose the \$400 he paid for the car. *Id.*, at 243, 246.

After the visit to Schwegmann’s, Eaton and Miller took Beanie to a police station where Miller interviewed him again on the record, which was transcribed and signed by Beanie, using his alias “Joseph Banks.” See *id.*, at

214–220. This statement, Beanie’s third (the telephone call being the first, then the recorded conversation), repeats some of the essentials of the second one: that Beanie had purchased a red Ford LTD from Kyles for \$400 on Friday evening; that Kyles had his hair “combed out” at the time of the sale; and that Kyles carried a .32 and a .38 with him “all the time.”

Portions of the third statement, however, embellished or contradicted Beanie’s preceding story and were even internally inconsistent. Beanie reported that after the sale, he and Kyles unloaded Schwegmann’s grocery bags from the trunk and back seat of the LTD and placed them in Kyles’s own car. Beanie said that Kyles took a brown purse from the front seat of the LTD and that they then drove in separate cars to Kyles’s apartment, where they unloaded the groceries. *Id.*, at 216–217. Beanie also claimed that, a few hours later, he and his “partner” Burns went with Kyles to Schwegmann’s, where they recovered Kyles’s car and a “big brown pocket book” from “next to a building.” *Id.*, at 218. Beanie did not explain how Kyles could have picked up his car and recovered the purse at Schwegmann’s, after Beanie *427 had seen Kyles with both just a few hours earlier. The police neither noted the inconsistencies nor questioned Beanie about them.

Although the police did not thereafter put Kyles under surveillance, Tr. 94 (Dec. 6, 1984), they learned about events at his apartment from Beanie, who went there twice on Sunday. According to a fourth statement by Beanie, this one given to the chief prosecutor in November (between the first and second trials), he first went to the apartment about 2 p.m., after a telephone conversation with a police officer who asked whether Kyles had the gun that was used to kill Dye. Beanie stayed in Kyles’s apartment until about 5 p.m., when he left to call Detective John Miller. Then he returned about 7 p.m. and stayed until about 9:30 p.m., when he left to meet Miller, who also asked about the gun. According to this fourth statement, Beanie “rode around” with Miller until 3 a.m. on Monday, September 24. Sometime during those same early morning hours, detectives were sent at Sgt. Eaton’s behest to pick up the rubbish outside Kyles’s building. As Sgt. Eaton wrote in an interoffice memorandum, he had “reason to believe the victims [*sic*] personal papers and the Schwegmann’s bags will be in the trash.” Record, Defendant’s Exh. 17.

At 10:40 a.m., Kyles was arrested as he left the apartment, which was then searched under a warrant. Behind the kitchen stove, the police found a .32-caliber revolver containing five live rounds and one spent cartridge. Ballistics tests later showed that this pistol was used to murder Dye. In a wardrobe in a hallway leading to the

kitchen, the officers found a homemade shoulder holster that fit the murder weapon. In a bedroom dresser drawer, they discovered two boxes of ammunition, one containing several .32-caliber rounds of the same brand as those found in the pistol. Back in the kitchen, various cans of cat and dog food, some of them of the brands Dye typically purchased, were found in Schwegmann's sacks. No other groceries **1563 were identified as *428 possibly being Dye's, and no potty was found. Later that afternoon at the police station, police opened the rubbish bags and found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's sack.

The gun, the LTD, the purse, and the cans of pet food were dusted for fingerprints. The gun had been wiped clean. Several prints were found on the purse and on the LTD, but none was identified as Kyles's. Dye's prints were not found on any of the cans of pet food. Kyles's prints were found, however, on a small piece of paper taken from the front passenger-side floorboard of the LTD. The crime laboratory recorded the paper as a Schwegmann's sales slip, but without noting what had been printed on it, which was obliterated in the chemical process of lifting the fingerprints. A second Schwegmann's receipt was found in the trunk of the LTD, but Kyles's prints were not found on it. Beanie's fingerprints were not compared to any of the fingerprints found. Tr. 97 (Dec. 6, 1984).

The lead detective on the case, John Dillman, put together a photo lineup that included a photograph of Kyles (but not of Beanie) and showed the array to five of the six eyewitnesses who had given statements. Three of them picked the photograph of Kyles; the other two could not confidently identify Kyles as Dye's assailant.

B

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the typed and signed statement *429 given by Beanie on Sunday morning; (5) the computer print-out of license numbers of cars parked at Schwegmann's on the

night of the murder, which did not list the number of Kyles's car; (6) the internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258–262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *430 *Id.*, at 249–250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's **1564 car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again,

the heart of the State’s case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles’s. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann’s on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles’s counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim’s about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried to sell him the car on Thursday evening, shortly after the murder. *Id.*, at 234–235. Another witness testified that Beanie, with his hair in a “Jheri curl,” had attempted to sell him the car on Friday. *Id.*, at 249–251. One witness, Beanie’s “partner,” Burns, testified that he had seen Beanie on Sunday at Kyles’s apartment, stooping down near *431 the stove where the gun was eventually found, and the defense presented testimony that Beanie was romantically interested in Pinky Burns. To explain the pet food found in Kyles’s apartment, there was testimony that Kyles’s family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt found in Dye’s car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann’s, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of \$1,600 in reward money. See Tr. of Hearing on Post–Conviction Relief 19–20 (Feb. 24, 1989); *id.*, at 114 (Feb. 20, 1989).

Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state

remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the Fifth Circuit affirmed,⁶ Judge *432 King dissented, **1565 writing that “[f]or the first time in my fourteen years on this court ... I have serious reservations about whether the State has sentenced to death the right man.” 5 F.3d, at 820.

III

[1] [2] [3] The prosecution’s affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court’s decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *id.*, at 86, 83 S.Ct., at 1196 (relying on *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341–342, 79 L.Ed. 791 (1935), and *Pyle v. Kansas*, 317 U.S. 213, 215–216, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (1942)). *Brady* held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S., at 87, 83 S.Ct., at 1196–1197; see *433 *Moore v. Illinois*, 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 (1972). In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), however, it became clear that a defendant’s failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S., at 103–104, 96 S.Ct., at 2397–2398;⁷ second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id.*, at 104–107, 96 S.Ct., at 2398–2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be “of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Id.*, at 108, 96 S.Ct., at 2400.

In the third prominent case on the way to current *Brady* law, *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court disavowed any

difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e.*, the “specific-request” and “general- or no-request” situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *434 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment).

[4] [5] Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, **1566 a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant). *Id.*, at 682, 105 S.Ct., at 3383–3384 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)); *Bagley*, *supra*, 473 U.S., at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment) (same); see 473 U.S., at 680, 105 S.Ct., at 3382–3383 (opinion of Blackmun, J.) (*Agurs* “rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal”); cf. *Strickland*, *supra*, 466 U.S., at 693, 104 S.Ct., at 2068 (“[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case”); *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986) (“[A] defendant need not establish that the attorney’s deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*”). *Bagley*’s touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.” *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.

[6] [7] The second aspect of *Bagley* materiality bearing

emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory *435 evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.⁸

[8] Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F.3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had “ ‘substantial and injurious effect or influence in determining the jury’s verdict,’ ” *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993), quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). This is amply confirmed by the development of the respective governing standards. Although *436 *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), held that a conviction tainted by constitutional error must be set aside unless **1567 the error complained of “was harmless beyond a reasonable doubt,” we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht*, *supra*, 507 U.S., at 622–623, 113 S.Ct., at 1713–1714. Under *Kotteakos* a conviction may be set aside only if the error “had substantial and injurious effect or influence in determining the jury’s verdict.” *Kotteakos*, *supra*, 328 U.S., at 776, 66 S.Ct., at 1253. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that “the constitutional standard of materiality must impose a higher burden on the defendant.” *Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater

than the harm sufficient for reversal under *Kotteakos*. In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*.⁹

^[9] ^[10] The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.¹⁰ As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the *437 government fails or chooses not to disclose evidence that might prove helpful to the defense. 473 U.S., at 675, 105 S.Ct., at 3380 and n. 7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused”); ABA Model Rule of Professional Conduct 3.8(d) (1984) (“The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”).

^[11] ^[12] While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached. This in turn means that the 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. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith *438 or bad faith, see *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196–1197), the prosecution’s responsibility for failing to disclose known, favorable **1568 evidence rising to a material level of importance is inescapable.

^[13] The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.¹¹ To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State’s favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that “procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.” *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government’s *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government’s obligation to ensure fair trials.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard “makes it difficult ... to know” from the “perspective [of the prosecutor at] trial ... exactly what might become important later on.” Tr. of Oral Arg. 33. The State asks for “a certain amount of leeway in making a judgment call” as to the disclosure of any given piece of evidence. *Ibid*.

*439 Uncertainty about the degree of further “leeway” that might satisfy the State’s request for a “certain amount” of it is the least of the reasons to deny the request. At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government’s only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State’s complaint over the responsibility for

judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs*, 427 U.S., at 108, 96 S.Ct., at 2399–2400 (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure”). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). *440 And it will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. **1569 See *Rose v. Clark*, 478 U.S. 570, 577–578, 106 S.Ct. 3101, 3105–3106, 92 L.Ed.2d 460 (1986); *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965); *United States v. Leon*, 468 U.S. 897, 900–901, 104 S.Ct. 3405, 3409, 82 L.Ed.2d 677 (1984) (recognizing general goal of establishing “procedures under which criminal defendants are ‘acquitted or convicted on the basis of all the evidence which exposes the truth’”) (quoting *Alderman v. United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

[14] There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority’s *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been “exposed to any or all of the undisclosed materials,” 5 F.3d, at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. See, e.g., *id.*, at 812 (“We do not agree that this statement made the transcript material and so mandated disclosure.... Beanie’s statement ... is itself not decisive”), 814 (“The nondisclosure of this much of the transcript was insignificant”), 815 (“Kyles has not shown on this basis

that the three statements were material”), 815 (“In light of the entire record ... we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted”), 816 (“We are not persuaded that these notes [relating to discovery of the gun] were material”), 816 (“[W]e are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have induced reasonable doubt where the jury did not find it... the rebuttal of the photograph would have made no difference” *441 The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

[15] In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, “the essence of the State’s case” was the testimony of eyewitnesses, who identified Kyles as Dye’s killer. 5 F.3d, at 853 (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

The State rated Henry Williams as its best witness, who testified that he had seen the struggle and the actual shooting by Kyles. The jury would have found it helpful to probe this conclusion in the light of Williams’s contemporaneous statement, in which he told the police that the assailant was “a black male, about 19 or 20 years old, about 5’4” or 5’5”, 140 to 150 pounds, medium build” and that “his hair looked like it was platted.” App. 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6-foot tall and thin, as a man more than half a foot shorter with a medium build.¹² Indeed, since Beanie was 22 years old, 5’ 5” tall, and 159 pounds, *442 the defense would have had a compelling argument that Williams’s description pointed to Beanie but not to Kyles.¹³

****1570** The trial testimony of a second eyewitness, Isaac Smallwood, was equally damning to Kyles. He testified that Kyles was the assailant, and that he saw him struggle with Dye. He said he saw Kyles take a “.32, a small black gun” out of his right pocket, shoot Dye in the head, and drive off in her LTD. When the prosecutor asked him whether he actually saw Kyles shoot Dye, Smallwood answered “Yeah.” Tr. 41–48 (Dec. 6, 1984).

Smallwood’s statement taken at the parking lot, however, was vastly different. Immediately after the crime, Smallwood ***443** claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. “I heard a loud [sic] pop,” he said. “When I looked around I saw a lady laying on the ground, and there was a red car coming toward me.” App. 189. Smallwood said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim’s red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman “was already in the car and coming toward me.” *Id.*, at 188–190.

A jury would reasonably have been troubled by the adjustments to Smallwood’s original story by the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course, was the type of weapon used. His description of the victim’s car had gone from a “Thunderbird” to an “LTD”; and he saw fit to say nothing about the assailant’s shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood’s story and raising a substantial implication that the prosecutor had coached him to give it.¹⁴

****1571 *444** Since the evolution over time of a given eyewitness’s description can be fatal to its reliability, cf. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (reliability depends in part on the accuracy of prior description); *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (reliability of identification following impermissibly suggestive line-up depends in part on accuracy of witness’s prior description), the Smallwood and Williams identifications would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and

Williams were the State’s two best witnesses. See Tr. of Closing Arg. 49 (Dec. 7, 1984) (After discussing Territo’s and Kersh’s testimony: “Isaac Smallwood, have you ever seen a better witness[?] ... What’s better than that is Henry Williams.... Henry Williams was the closest of them all ***445** right here”). Nor, of course, would the harm to the State’s case on identity have been confined to their testimony alone. The fact that neither Williams nor Smallwood could have provided a consistent eyewitness description pointing to Kyles would have undercut the prosecution all the more because the remaining eyewitnesses called to testify (Territo and Kersh) had their best views of the gunman only as he fled the scene with his body partly concealed in Dye’s car. And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See *Agurs*, 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401–2402, n. 21.

B

Damage to the prosecution’s case would not have been confined to evidence of the eyewitnesses, for Beanie’s various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State’s own admission, Beanie was essential to its investigation and, indeed, “made the case” against Kyles. Tr. of Closing Art. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie’s statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye’s murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie’s initial meeting with the police, and in his signed statement, he said he bought Dye’s LTD and helped Kyles retrieve his car from the Schwegmann’s lot on Friday. In his first call to the police, ***446** he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles’s car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of

groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

^[16] Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense ****1572** could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, e.g., *Bowen v. Maynard*, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case").¹⁵

***447** By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T.V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103–105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id.*, at 95.

The admitted failure of the police to pursue these pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags ***448** would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post-Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had planted the incriminating evidence in the garbage, Tr. of Hearing on Post-Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a juror would have, too.¹⁶

****1573** To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun."¹⁷ App. 228–229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, they would probably find the murder weapon, the jury could also have taken Beanie to have been making the more sinister ***449** suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny Burns lurking near the stove, where the gun was later found.¹⁸ Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment on Sunday. Tr. 93, 101 (Dec. 6, 1984).¹⁹

***450 C**

^[17] Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would ****1574** obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does ***451** not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989)

(testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he ***452** was right in describing the way it was priced at Schwegmann's market, where he commonly shopped.²⁰

Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to ****1575** buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2-inch-long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase. *Id.*, at 181-182.²¹

***453** The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams.²² But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

(a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;

(b) that the lead police detective who testified was either less than wholly candid or less than fully informed;

(c) that the informant’s behavior raised suspicions that he had planted both the murder weapon and the victim’s purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State’s case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he *454 claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;

(f) that there was no consistency to eyewitness descriptions of the killer’s height, build, age, facial hair, or hair length.

Since all of these possible findings were precluded by the prosecution’s failure to disclose the evidence that would have supported them, “fairness” cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the “massive” case envisioned by the dissent, *post*, at 1585; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

**1576 The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, concurring.

As the Court has explained, this case presents an important legal issue. See *ante*, at 1569. Because Justice *455 SCALIA so emphatically disagrees, I add this brief response to his criticism of the Court’s decision to grant certiorari.

Proper management of our certiorari docket, as Justice SCALIA notes, see *post*, at 1576–1578, precludes us from hearing argument on the merits of even a “substantial percentage” of the capital cases that confront us. Compare *Coleman v. Balkcom*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (STEVENS, J., concurring in denial of certiorari), with *id.*, at 956, 101 S.Ct., at 2035 (REHNQUIST, C.J., dissenting). Even aside from its legal importance, however, this case merits “favored treatment,” cf. *post*, at 1577, for at least three reasons. First, the fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial. Second, cases in which the record reveals so many instances of the state’s failure to disclose exculpatory evidence are extremely rare. Even if I shared Justice SCALIA’s appraisal of the evidence in this case—which I do not—I would still believe we should independently review the record to ensure that the prosecution’s blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial. Third, despite my high regard for the diligence and craftsmanship of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner’s guilt expressed by the dissenting judge in that court.

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this “generalizable principle,” *post*, at 1578, especially important. Cf. *Harris v. Alabama*, 513 U.S. 504, 519–520, 115 S.Ct. 1031, 1039, 130 L.Ed.2d 1004 and n. 5 (1995) (STEVENS, J., dissenting). I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant *456 duty conveys a message more significant than even the most penetrating legal analysis.

Justice [SCALIA](#), with whom the Chief Justice, Justice [KENNEDY](#), and Justice [THOMAS](#) join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system was described, with characteristic candor, by Justice Jackson:

“Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done.” [Brown v. Allen](#), 344 U.S. 443, 540, 73 S.Ct. 397, 427, 97 L.Ed. 469 (1953) (opinion concurring in result).

Since this Court has long shared Justice Jackson’s view, today’s opinion—which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it—is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.*, except in cases of the plainest error) be denied. **1577 [United States v. Johnston](#), 268 U.S. 220, 227, 45 S.Ct. 496, 496, 69 L.Ed. 925 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, [Sumner v. Mata](#), 449 U.S. 539, 543, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981); and under what we have called the “two-court rule,” the policy has been applied with particular rigor when district *457 court and court of appeals are in agreement as to what conclusion the record requires. See, *e.g.*, [Graver Tank & Mfg. Co. v. Linde Air Products Co.](#), 336 U.S. 271, 275, 69 S.Ct. 535, 537, 93 L.Ed. 672 (1949). How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. 28 U.S.C. § 2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); [Sumner](#), *supra*, at 550, n. 3, 101 S.Ct., at 770, n. 3. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new

findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e.g.*, *ante*, at 1561 (“Beanie seemed eager to cast suspicion on Kyles”); *ante*, at 1569, n. 12 (“Record photographs of Beanie ... depict a man possessing a medium build”); *ante*, at 1573, n. 18 (“the record photograph of the homemade holster indicates ...”).

The Court says that we granted certiorari “[b]ecause ‘[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,’ [Burger v. Kemp](#), 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).” *Ante*, at 1560. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: “Nevertheless, when the lower courts have found that [no constitutional error occurred], ... deference to the shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions.” [Burger v. Kemp](#), 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

The greatest puzzle of today’s decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, *458 to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts that “[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence,” *ante*, at 1569. In support of this it quotes isolated sentences of the opinion below that supposedly “dismiss[ed] particular items of evidence as immaterial,” *ibid*. This claim of legal error does not withstand minimal scrutiny. The Court of

Appeals employed *precisely* the same legal standard that the Court does. Compare 5 F.3d 806, 811 (CA5 1993) (“We apply the [*United States v. Bagley*], 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different”), with *ante*, at 1569 (“In this case, **1578 disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable”). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that *Bagley* *459 requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F.3d, at 817 (“[w]e are not persuaded that it is reasonably probable that the jury would have found in Kyles’ favor if exposed to any *or all* of the undisclosed materials”) (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See 5 F.3d, at 807 (basing its rejection of petitioner’s claim on “a complete reading of the record”); *id.*, at 811 (“Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit”); *id.*, at 813 (“We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information”). It is, in other words, the Court itself which errs in the manner that it accuses the Court of Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court’s own opinion acknowledges must be done: to “evaluate the tendency and force of the undisclosed evidence item by item; there is no other way.” *Ante*, at 1567, n. 10. Finally, the Court falls back on this: “The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*,” *ante*, at 1569. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an *incorrect* legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of federal law that because of its novelty *460 or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we

have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated—which is to say little fear that today’s grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case, the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. *Fed. Rule Civ. Proc. 52(a)*, and the Court’s verdict would be reversed if there were somewhere further to appeal.

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court’s methodology are appropriate. It is fundamental to the discovery rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the materiality of a failure to disclose favorable evidence “must be evaluated in the context of the entire record.” *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to “destro[y],” *ante*, at 1569, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner’s burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner’s guilt. See **1579 *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *Agurs*, *461 *supra*, at 112–113, 96 S.Ct., at 2401–2402. The Court’s opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 1569–1574, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 1574–1575. This partiality is confirmed in the Court’s attempt to “recap ... *the suppressed evidence* and its significance for the prosecution,” *ante*, at 1575 (emphasis added), which omits the required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the

analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory—designed to neutralize the physical evidence (Mrs. Dye’s purse in his garbage, the murder weapon behind his stove)—was that petitioner was the victim of a “frame-up” by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner’s theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner’s brief amply demonstrates), but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante*, at 1561), injected both Kyles and himself into the investigation in order to get the innocent Kyles convicted.¹ If this were not stupid enough, the *462 wicked Beanie is supposed to have suggested that the police search his victim’s premises *a full day before he got around to planting the incriminating evidence on the premises*.

The second half of petitioner’s theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer—three picking him out of a photo array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame*—the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is “reasonably probable” the undisclosed witness interviews would have persuaded the jury of petitioner’s implausible theory of mistaken eyewitness testimony, and then argues that it is “reasonably probable” the undisclosed information regarding Beanie would have persuaded the jury of petitioner’s implausible theory regarding the incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn, and thus

victory on the whole, *463 without considering the infinitesimal probability of the jury’s swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the **1580 Court’s obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once avowed. The Court’s opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 1571, that he was an accessory after the fact, *cf. ibid.*, or even that he planted evidence against petitioner, *ante*, at 1572–1573. Even if the undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken.²

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose “testimony almost certainly would have inculpated [petitioner]” and whom “any reasonable attorney would perceive ... as a ‘loose cannon.’ ” 5 F.3d, at 818. Perhaps because that premise seems so implausible, the Court retreats to the possibility that petitioner’s counsel, *464 even if not calling Beanie to the stand, could have used the evidence relating to Beanie to attack “the reliability of the investigation.” *Ante*, at 1572. But that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

II

The undisclosed evidence does not create a “ ‘reasonable probability’ of a different result.” *Ante*, at 1566 (quoting

United States v. Bagley, 473 U.S., at 682, 105 S.Ct., at 3383). To begin with the eyewitness testimony: Petitioner’s basic theory at trial was that the State’s four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side by side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann’s parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road, and pull up just behind Territo’s truck. When the light turned green petitioner pulled *465 beside Territo and stopped while waiting to make a turn. Petitioner looked Territo full in the face. Territo testified, “I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him.” Tr. 13–14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture “could have been the guy that did it. I told him no.” *Id.*, at 24. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she **1581 got “a good look” at him as he drove away, she answered “yes.” *Id.*, at 32. She also answered “yes” to the question whether she “got to see the side of his face,” *id.*, at 31, and said that while petitioner was stopped she had driven to within reaching distance of the driver’s-side door of Mrs. Dye’s car and stopped there. *Id.*, at 34. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id.*, at 42. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id.*, at 43–45, and Smallwood saw his face from the side. *Id.*, at 43. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that “the gentleman came up the side of the car,” struggled with Mrs. Dye, shot her, walked around to the driver’s side of the car, and drove away. *Id.*, at 52. Williams not only “saw him before he shot her,” *id.*, at 54, but watched petitioner drive slowly by “within less than ten feet.” *Ibid.* When asked “[d]id you get an opportunity to look at him good?”, Williams said, “I did.” *Id.*, at 55.

The Court attempts to dispose of this direct, unqualified, and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was

apparently not suggested by petitioner’s counsel until the oral-argument-*cum*-evidentiary-hearing held before us, perhaps because it is a theory that only the most removed appellate court could *466 love. This theory is that there is a reasonable probability that the jury would have changed its mind about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in Mrs. Dye’s car, and thus could identify him, not by his height and build, but *only by his face*. Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four eyewitnesses, Smallwood, did not see the killer outside the car.³ And never mind, also, the dubious premise that the build of a man 6-foot tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than 5 ½-foot tall (like Beanie). To assert that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only on facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute “mug” shots of wanted felons, rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an *467 identifying witness by asking “You admit that you saw only the killer’s face?” will be laughed out of the courtroom.

It would be different, of course, if there were evidence that Kyles’s and Beanie’s faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question “You admit that you saw only the killer’s face?” draws no blood; it does not explain *any* witness’s identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court’s repeated references **1582 to the partial concealment of the killer’s body from view, see, *e.g.*, *ante*, at 1570, 1570–1571, n. 14, 1571, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact,

quite the opposite: every federal and state court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each other in any respect. See 5 F.3d, at 813 (“Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face”); App. 181 (District Court opinion) (“The court examined all of the pictures used in the photographic line-up and compared Kyles’ and Beanie’s pictures; it finds that they did not resemble one another”); *id.*, at 36 (state trial court findings on postconviction review) (“[Beanie] clearly and distinctly did not resemble the defendant in this case”) (emphasis in original). The District Court’s finding controls because it is not clearly erroneous, Fed.Rule Civ.Proc. 52(a), and the state court’s finding, because fairly supported by the record, must be presumed correct on habeas review. See 28 U.S.C. § 2254(d).

*468 The Court’s second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same “build-is-everything” theory to exaggerate the effect of the State’s failure to disclose the contemporaneous statement of Henry Williams. That statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante*, at 1570. But I think it is hyperbole to say that the statement would have “substantially reduced or destroyed” the value of Williams’ testimony. *Ante*, at 1569. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54 (Dec. 6, 1984), and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 1570, showing how Smallwood’s testimony could have been discredited to such a degree as to “rais[e] a substantial implication that the prosecutor had coached him to give it.” *Ibid.* Perhaps so, but that is all irrelevant to this appeal, since all of that impeaching material (except the “facial identification” point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 1570–1571, n. 14. In sum, the undisclosed statements, credited with everything they could possibly have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood) barely affected (he saw “only” the killer’s face); and one prosecution witness (Williams) somewhat impaired (his description of the killer’s height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality

inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept the basic thesis that all four witnesses were mistaken. I think it plainly *469 is not. No witness involved in the case ever identified anyone but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright daylight from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was “[n]o doubt in my mind” that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say “I know it was him.... I seen his face and I know the color of his skin. I know it. I know it’s him,” *id.*, at 383; heard Smallwood say “I’m positive ... [b]ecause that’s the man who I seen kill that woman,” *id.*, at 387; and heard Williams say “[n]o doubt in my mind,” *id.*, at 391. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either.

There remains the argument that is the major contribution of today’s opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that “the effective impeachment of **1583 one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before.” *Ante*, at 1571 (citing *Agurs v. United States*, 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401–2402, n. 21). It would be startling if we had “said [this] before,” since it assumes irrational jury conduct. The weakening of one witness’s testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion’s only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that “[a *Brady*] omission must be evaluated in the context of the entire record,” *470 427 U.S., at 112, 96 S.Ct., at 2401. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness’s testimony could have been destroyed by withheld evidence that contradicts the witness.⁴ That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) some other corroborating witness.

The physical evidence confirms the immateriality of the

nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse and other belongings. Inside his home they found, behind the kitchen stove, the .32-caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a homemade shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32-caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38-caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun, and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains credulity to the breaking point.

*471 The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante*, at 1572. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment.⁵ Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id.*, at 351 (petitioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id.*, at 352. Only appellate judges could swallow such a tale. Petitioner's **1584 only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id.*, at 262–263. Burns's credibility on the stand can perhaps best be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] chosen to totally disregard everything that [Burns] has said," App. 35. See also *id.*, at 165 (District Court opinion) ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been *472 tried and convicted for killing Beanie. See *State v. Burnes*, 533 So.2d 1029 (La.App.1988).⁶

Petitioner did not claim that the ammunition had been planted. The police found a .22-caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38-caliber rounds, another containing only .32-caliber rounds of the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32-caliber shells as security for a loan, but that he had taken the .22-caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32-caliber gun. As the Fifth Circuit wrote, "[t]he more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32 caliber ammunition because he possessed a .32 caliber firearm." 5 F.3d, at 817.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense *473 in this case"). The Court disposes of the pet food evidence as follows:

"The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped." *Ante*, at 1574–1575; see also *ante*, at 1574, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands of pet food, several different brands at a time. *Id.*, at 179, 180. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan, and Puss n' Boots. *Id.*, at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id.*, at 188. Since we know that Mrs. Dye had been shopping that day

and that the murderer made off with her goods, petitioner’s possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to ****1585** buy 15 cans of pet food that very day (keep in mind that petitioner was a very poor man, see *id.*, at 329, who supported a common-law wife, a mistress, and four children), petitioner gave the reason that “it was on sale.” *Id.*, at 341. The State, however, introduced testimony from the Schwegmann’s advertising director that the pet food was *not* on sale that day. *Id.*, at 395. The dissenting judge below tried to rehabilitate petitioner’s testimony ***474** by interpreting the “on sale” claim as meaning “for sale,” a reference to the pricing of the pet food (*e.g.*, “3 for 89 cents”), which petitioner claimed to have read on a shelf sign in the store. *Id.*, at 343. But unless petitioner was parodying George Leigh Mallory, “because it was *for* sale” would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann’s employee also testified that store policy was not to put signs on the shelves at all. *Id.*, at 398–399. The sum of it is that petitioner, far from explaining the presence of the pet food, doubled the force of the State’s evidence by perjuring himself before the jury, as the state trial judge observed. See *supra*, at 1584.⁷

I will not address the list of cars in the Schwegmann’s parking lot and the receipt, found in the victim’s car, that bore petitioner’s fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner’s automobile, would only have served to rebut

the State’s introduction of a photograph purporting to show petitioner’s car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. See 5 F.3d, at 816. ***475** Thus its rebuttal value would have been marginal at best. The receipt—although it showed that petitioner must at some point have been both in Schwegmann’s and in the murdered woman’s car—was as consistent with petitioner’s story as with the State’s. See *ante*, at 1575.

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State’s case can only be called immaterial. For the same reasons I reject petitioner’s claim that the *Brady* materials would have created a “residual doubt” sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.

All Citations

514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490, 63 USLW 4303

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- ¹ The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 1577. We explain, *infra*, at 1569, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not “substitute speculation” for the “considered opinions” of two lower courts. 483 U.S., at 785, 107 S.Ct., at 3121. No one could disagree that “speculative” claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles’s *Brady* claim.
- ² The record reveals that statements were taken from Edward Williams and Lionel Plick, both waiting for a bus nearby; Isaac Smallwood, Willie Jones, and Henry Williams, all working in the Schwegmann’s parking lot at the time of the murder; and Robert Territo, driving a truck waiting at a nearby traffic light at the moment of the shooting, who gave a statement to police on Friday, the day after the murder.
- ³ Because the informant had so many aliases, we will follow the convention of the court below and refer to him throughout this opinion as Beanie.
- ⁴ Johnny Burns is the brother of a woman known as Pinky Burns. A number of trial witnesses referred to the relationship between Kyles and Pinky Burns as a common-law marriage (Louisiana’s civil law notwithstanding). Kyles is the father

of several of Pinky Burns's children.

- 5 According to photographs later introduced at trial, Kyles's car was actually a Mercury and, according to trial testimony, a two-door model. Tr. 210 (Dec. 7, 1984).
- 6 Pending appeal, Kyles filed a motion under [Federal Rules of Civil Procedure 60\(b\)\(2\) and \(6\)](#) to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people ... [who] I think ... were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D.A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to the State's wishes only after the police and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.
- The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a [Rule 60\(b\)](#) motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his [Rule 60\(b\)](#) motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.
- 7 The Court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." [Agurs](#), 427 U.S., at 103, 96 S.Ct., at 2397 (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.
- 8 This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 1579–1580 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), 1580 ("[T]he jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken"), 1582 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 1583 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").
- 9 See also [Hill v. Lockhart](#), 28 F.3d 832, 839 (CA8 1994) ("[I]t is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").
- 10 The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion, at Part IV–D, *infra*.
- 11 The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.
- 12 The record makes numerous references to Kyles being approximately six feet tall and slender; photographs in the record tend to confirm these descriptions. The description of Beanie in the text comes from his police file. Record photographs of Beanie also depict a man possessing a medium build.
- 13 The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer

murder as early as September, he was not interviewed by the police about it until after Kyles's second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding Justice SCALIA's suggestion that Beanie would have been "stupid" to inject himself into the investigation, *post*, at 1579, the *Brady* evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports). See *supra*, at 1525–1526. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV–B, *infra*.

- 14 The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car." Tr. 50–51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face." *Id.*, at 52, 54. The State contends that this change actually cuts in its favor under *Brady*, since it provided Kyles's defense with grounds for impeachment without any need to disclose Smallwood's statement. Brief for Respondent 17–18. This is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted. While Smallwood's testimony at the first trial was similar to his contemporaneous account in some respects (for example, he said he looked around only after he heard the gunshot and that Dye was already on the ground), it differed in one of the most important: Smallwood's version at the first trial already included his observation of the gunman outside the car. Defense counsel was not, therefore, clearly put on notice that Smallwood's capacity to identify the killer's body type was open to serious attack; even less was he informed that Smallwood had answered "no" when asked if he had seen the killer outside the car. If Smallwood had in fact seen the gunman only after the assailant had entered Dye's car, as he said in his original statement, it would have been difficult if not impossible for him to notice two key characteristics distinguishing Kyles from Beanie, their heights and builds. Moreover, in the first trial, Smallwood specifically stated that the killer's hair was "kind of like short ... knotted up on his head." Tr. 60 (Nov. 26, 1984). This description was not inconsistent with his testimony at the second trial but directly contradicted his statement at the scene of the murder that the killer had shoulder-length hair. The dissent says that Smallwood's testimony would have been "barely affected" by the expected impeachment, *post*, at 1582; that would have been a brave jury argument.
- 15 The dissent, *post*, at 1580, suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. See discussion of purse and gun, *infra*, at 1572–1573.
- 16 The dissent, rightly, does not contend that Beanie would have had a hard time planting the purse in Kyles's garbage. See *post*, at 1583 (arguing that it would have been difficult for Beanie to plant the gun and homemade holster). All that would have been needed was for Beanie to put the purse into a trash bag out on the curb. See Tr. 97, 101 (Dec. 6, 1984) (testimony of Detective Dillman; garbage bags were seized from "a common garbage area" on the street in "the early morning hours when there wouldn't be anyone on the street").
- 17 The dissent, *post*, at 1579, argues that it would have been stupid for Beanie to have tantalized the police with the prospect of finding the gun one day before he may have planted it. It is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated: the suppressed evidence indicates that within a period of a few hours after he first called police Beanie gave three different accounts of Kyles's recovery of the purse (and gave yet another about a month later).
- 18 The dissent would rule out any suspicion because Beanie was said to have worn a "tank-top" shirt during his visits to the apartment, *post*, at 1583; we suppose that a small handgun could have been carried in a man's trousers, just as a witness for the State claimed the killer had carried it, Tr. 52 (Dec. 6, 1984) (Williams). Similarly, the record photograph of the homemade holster indicates that the jury could have found it to be constructed of insubstantial leather or cloth, duct tape, and string, concealable in a pocket.
- 19 In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and

reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262–263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 1583–1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

20 Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big ... [i]t was a little bitty piece of slip ... on the shelf." *Id.*, at 342. Subsequently, the prices were revealed as in fact being "[t]hree for 89 [cents]" and "two for 77 [cents]," *id.*, at 343, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id.*, at 396. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id.*, at 398–399. The dissent suggests, *post*, at 1584–1585, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the 15 cans of pet food found in Kyles's apartment would have been \$5.67. See Tr. 188, 395 (Dec. 7, 1984). Rather than being "damning," *post*, at 1584, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra*, at 1574.

21 The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt would have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53–54.

22 See *supra*, at 1571. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra* at 1564.

1 The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that he had driven the dead woman's car*, Beanie repeatedly inquired whether he himself was a suspect. See *ante*, at 1569, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

2 There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i.e.*, sufficient] evidence to convict even if the favorable evidence had been disclosed." *Ante*, at 1566, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 1569.

3 Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "stru [t]" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id.*, at 29–30.

- 4 “If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.’ ” *Agurs*, 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401, n. 21 (quoting Comment, *Brady v. Maryland* and The Prosecutor’s Duty to Disclose, 40 U.Chi.L.Rev. 112, 125 (1972)).
- 5 The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id.*, at 298 (Cathora Brown) (6 adults, 4 children); *id.*, at 326 (petitioner) (“about 16 ... about 18 or 19”); *id.*, at 340 (petitioner) (13 people).
- 6 The Court notes that “neither observation could possibly have affected the jury’s appraisal of Burns’s credibility at the time of Kyles’s trials.” *Ante*, at 1573, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns’s credibility from the jury and no direct method of asking what they thought, the only way that we can assess the jury’s appraisal of Burns’s credibility is by asking (1) whether the state trial judge, who saw Burns’s testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible—a question on which his later behavior towards his “best friend” is highly probative.
- 7 I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were “seven or eight more cats around there.” Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept “in the country” for a month and half, and was brought back just the week before petitioner was arrested. *Id.*, at 337–338. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id.*, at 336–337, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner’s home since at least six months before the trial, *id.*, at 254, while Cathora Brown said that although Pinky, petitioner’s wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id.*, at 304–305. The police found no evidence of any kind that any pets lived in petitioner’s home at or near the time of the murder. *Id.*, at 75 (Dec. 6, 1984).

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119 S.Ct. 1936
 Supreme Court of the United States

Tommy David STRICKLER, Petitioner,
 v.
 Fred W. GREENE, Warden.

No. 98–5864.

Argued March 3, 1999.

Decided June 17, 1999.

Synopsis

Following affirmance of capital murder conviction and death sentence, [241 Va. 482](#), [404 S.E.2d 227](#), and affirmance of denial of state habeas corpus petition, [249 Va. 120](#), [452 S.E.2d 648](#), state prisoner petitioned for habeas corpus. Writ was granted by the United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., Senior District Judge. The Court of Appeals for the Fourth Circuit, [149 F.3d 1170](#), vacated in part and remanded, and certiorari was granted. The Supreme Court, Justice [Stevens](#), held that: (1) undisclosed documents impeaching eyewitness testimony as to circumstances of abduction of victim were favorable to petitioner for purposes of *Brady*; (2) petitioner reasonably relied on prosecution’s open file policy and established cause for procedural default in raising *Brady* claim; but (3) petitioner could not show either materiality under *Brady* or prejudice that would excuse petitioner’s procedural default.

Affirmed.

Justice [Thomas](#) joined in part.

Justice [Souter](#), with whom Justice [Kennedy](#) joined in part, filed an opinion concurring in part and dissenting in part.

****1939 *263 Syllabus***

The Commonwealth of Virginia charged petitioner with capital murder and related crimes. Because an open file policy gave petitioner access to all of the evidence in the

prosecutor’s files, petitioner’s counsel did not file a pretrial motion for discovery of possible exculpatory evidence. At the trial, Anne Stoltzfus gave detailed eyewitness testimony about the crimes and petitioner’s role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with Stoltzfus, and letters written by Stoltzfus to the detective, that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty, and he was sentenced to death. The Virginia Supreme Court affirmed. In subsequent state habeas corpus proceedings, petitioner advanced an ineffective-assistance-of-counsel claim based, in part, on trial counsel’s failure to file a motion under *Brady v. Maryland*, [373 U.S. 83](#), [83 S.Ct. 1194](#), [10 L.Ed.2d 215](#), for disclosure of all exculpatory evidence known to the prosecution or in its possession. In response, the Commonwealth asserted that such a motion was unnecessary because of the prosecutor’s open file policy. The trial court denied relief. The Virginia Supreme Court affirmed. Petitioner then filed a federal habeas petition and was granted access to the exculpatory Stoltzfus materials for the first time. The District Court vacated petitioner’s capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose those materials and that petitioner had not, in consequence, received a fair trial. The Fourth Circuit reversed because petitioner had procedurally defaulted his *Brady* claim by not raising it at his trial or in the state collateral proceedings. In addition, the Fourth Circuit concluded that the claim was, in any event, without merit.

Held: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. Pp. 1948–1955.

(a) There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it ****1940** is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The record in this case unquestionably ***264** establishes two of those components. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial statement to the detective that the incident seemed a trivial episode suffices to establish the impeaching character of the undisclosed documents. Moreover, with respect to some of those documents, there is no dispute that they were known to the Commonwealth but not disclosed to trial counsel. It is the third

component—whether petitioner has established the necessary prejudice—that is the most difficult element of the claimed *Brady* violation here. Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, this Court must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were “material” for *Brady* purposes, see 373 U.S., at 87, 83 S.Ct. 1194, their suppression did not give rise to sufficient prejudice to overcome the procedural default. Pp. 1948–1949.

(b) Petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution’s open file policy as fulfilling the prosecution’s duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner’s reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, and *Amadeo v. Zant*, 486 U.S. 214, 222, 108 S.Ct. 1771, 100 L.Ed.2d 249. *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457, and *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517, distinguished. This Court need not decide whether any one or two of the foregoing factors would be sufficient to constitute cause, since the combination of all three surely suffices. Pp. 1949–1952.

(c) However, in order to obtain relief, petitioner must convince this Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490. Here, other evidence in the record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached or her testimony excluded entirely. Notwithstanding the obvious significance *265 of that testimony, therefore, petitioner cannot show prejudice sufficient to excuse his procedural default. Pp. 1952–1955.

149 F.3d 1170, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O’CONNOR, SCALIA, GINSBURG, and BREYER, JJ., joined in full, in which KENNEDY and SOUTER, JJ., joined as to Part III, and in which THOMAS, J., joined as to Parts I and IV. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined as to Part II, *post*, p. 1955.

Attorneys and Law Firms

Miguel A. Estrada, Washington, DC, for petitioner.

Pamela A. Rumpz, for respondent.

Opinion

**1941 Justice STEVENS delivered the opinion of the Court.†

The District Court for the Eastern District of Virginia granted petitioner’s application for a writ of habeas corpus and vacated his capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose important exculpatory evidence and that petitioner had not, in consequence, received a fair trial. The Court of Appeals for the Fourth Circuit reversed because petitioner had not raised his constitutional claim at his trial or in state collateral proceedings. In addition, the Fourth Circuit concluded that petitioner’s claim was, “in any event, without merit.” App. 418, n. 8.¹ Finding the legal question presented by this *266 case considerably more difficult than the Fourth Circuit, we granted certiorari, 525 U.S. 809, 119 S.Ct. 40, 142 L.Ed.2d 31 (1998), to consider (1) whether the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny; (2) whether there was an acceptable “cause” for petitioner’s failure to raise this claim in state court; and (3), if so, whether he suffered prejudice sufficient to excuse his procedural default.

I

In the early evening of January 5, 1990, Leanne Whitlock, an African-American sophomore at James Madison University, was abducted from a local shopping center and robbed and murdered. In separate trials, both

petitioner and Ronald Henderson were convicted of all three offenses. Henderson was convicted of first-degree murder, a noncapital offense, whereas petitioner was convicted of capital murder and sentenced to death.²

At both trials, a woman named Anne Stoltzfus testified in vivid detail about Whitlock's abduction. The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by Stoltzfus, and notes of interviews with her, that impeach significant portions of her testimony. We begin, however, by noting that, even without the Stoltzfus testimony, the evidence in the record was sufficient to establish petitioner's guilt on the murder charge. Whether petitioner would have been convicted of capital murder and received the death sentence if she had not testified, or if she had been sufficiently impeached, is less clear. To put the question in context, we review the trial testimony at some length.

The Testimony at Trial

At about 4:30 p.m. on January 5, 1990, Whitlock borrowed a 1986 blue Mercury Lynx from her boyfriend, John Dean, *267 who worked in the Valley Shopping Mall in Harrisonburg, Virginia. At about 6:30 or 6:45 p.m., she left her apartment, intending to return the car to Dean at the mall. She did not return the car and was not again seen alive by any of her friends or family.

Petitioner's mother testified that she had driven petitioner and Henderson to Harrisonburg on January 5. She also testified that petitioner always carried a hunting knife that had belonged to his father. Two witnesses, a friend of Henderson's and a security guard, saw petitioner and Henderson at the mall that afternoon. The security guard was informed around 3:30 p.m. that two men, one of whom she identified at trial as petitioner, were attempting to steal a car in the parking lot. She had them under observation during the remainder of the afternoon but lost sight of them at about 6:45.

At approximately 7:30 p.m., a witness named Kurt Massie saw the blue Lynx at a location in Augusta County about 25 miles from Harrisonburg and a short distance from the cornfield where Whitlock's body was later found. Massie identified petitioner as the driver of the vehicle; he also saw a white woman in the front seat and another man in the back. Massie noticed that the car was muddy, and that it turned off Route 340 onto a dirt road.

**1942 At about 8 p.m., another witness saw the Lynx at Buddy's Market, with two men sitting in the front seat. The witness did not see anyone else in the car. At approximately 9 p.m., petitioner and Henderson arrived at

Dice's Inn, a bar in Staunton, Virginia, where they stayed for about four or five hours. They danced with several women, including four prosecution witnesses: Donna Kay Tudor, Nancy Simmons, Debra Sievers, and Carolyn Brown. While there, Henderson gave Nancy Simmons a watch that had belonged to Whitlock. Petitioner spent most of his time with Tudor, who was later arrested for grand larceny based on her possession of the blue Lynx.

*268 These four women all testified that Tudor had arrived at Dice's at about 8 p.m. Three of them noticed nothing unusual about petitioner's appearance, but Tudor saw some blood on his jeans and a cut on his knuckle. Tudor also testified that she, Henderson, and petitioner left Dice's together after it closed to search for marijuana. Henderson was driving the blue Lynx, and petitioner and Tudor rode in back. Tudor related that petitioner was leaning toward Henderson and talking with him; she overheard a crude conversation that could reasonably be interpreted as describing the assault and murder of a black person with a "rock crusher." Tudor stated that petitioner made a statement that implied that he had killed someone, so they "wouldn't give him no more trouble." App. 99. Tudor testified that while she, petitioner, and Henderson were driving around, petitioner took out his knife and threatened to stab Henderson because he was driving recklessly. Petitioner then began driving.

At about 4:30 or 5 a.m. on January 6, petitioner drove Henderson to Kenneth Workman's apartment in Timberville.³ Henderson went inside to get something, and petitioner and Tudor drove off without waiting for him. Workman testified that Henderson had blood on his pants and stated he had killed a black person.

Petitioner and Tudor then drove to a motel in Blue Ridge. A day or two later they went to Virginia Beach, where they spent the rest of the week. Petitioner gave Tudor pearl earrings that Whitlock had been wearing when she was last seen. Tudor saw Whitlock's driver's license and bank card in the glove compartment of the car. Tudor testified that petitioner unsuccessfully attempted to use Whitlock's bank card when they were in Virginia Beach.

When petitioner and Tudor returned to Augusta County, they abandoned the blue Lynx. On January 11, the police identified the car as Dean's, and found petitioner's and Tudor's *269 fingerprints on both the inside and the outside of the car. They also found shoe impressions that matched the soles of shoes belonging to petitioner. Inside the car, they retrieved a jacket that contained identification papers belonging to Henderson.

The police also recovered a bag at petitioner's mother's

house that Tudor testified she and petitioner had left when they returned from Virginia Beach. The bag contained, among other items, three identification cards belonging to Whitlock and a black “tank top” shirt that was later found to have human blood and semen stains on it. Tr. 707.

On January 13, a farmer called the police to advise them that he had found Henderson’s wallet; a search of the area led to the discovery of Whitlock’s frozen, nude, and battered body. A 69-pound rock, spotted with blood, lay nearby. Forensic evidence indicated that Whitlock’s death was caused by “multiple blunt force injuries to the head.” App. 109. The location of the rock and the human blood on the rock suggested that it had been used to inflict these injuries. Based on the contents of Whitlock’s stomach, the medical examiner determined that she died fewer than six hours after she had last eaten.⁴

A number of Caucasian hair samples were found at the scene, three of which were probably petitioner’s. Given the weight of the rock, the prosecution argued that one of ****1943** the killers must have held the victim down while the other struck her with the murder weapon.

Donna Tudor’s estranged husband, Jay Tudor, was called by the defense and testified that in March she had told him that she was present at the murder scene and that petitioner did not participate in the murder. Jay Tudor’s testimony was inconsistent in several respects with that of other witnesses. For example, he testified that several days elapsed ****270** between the time that petitioner, Henderson, and Donna Tudor picked up Whitlock and the time of Whitlock’s murder.

Anne Stoltzfus’ Testimony

Anne Stoltzfus testified that on two occasions on January 5 she saw petitioner, Henderson, and a blonde girl inside the Harrisonburg mall, and that she later witnessed their abduction of Whitlock in the parking lot. She did not call the police, but a week and a half after the incident she discussed it with classmates at James Madison University, where both she and Whitlock were students. One of them called the police. The next night a detective visited her, and the following morning she went to the police station and told her story to Detective Claytor, a member of the Harrisonburg City Police Department. Detective Claytor showed her photographs of possible suspects, and she identified petitioner and Henderson “with absolute certainty” but stated that she had a slight reservation about her identification of the blonde woman. *Id.*, at 56.

At trial, Stoltzfus testified that, at about 6 p.m. on January 5, she and her 14-year-old daughter were in the Music

Land store in the mall looking for a compact disc. While she was waiting for assistance from a clerk, petitioner, whom she described as “Mountain Man,” and the blonde girl entered.⁵ ****271** Because petitioner was “revved up” and “very impatient,” she was frightened and backed up, bumping into Henderson (whom she called “Shy Guy”), and thought she felt something hard in the pocket of his coat. *Id.*, at 36–37.

Stoltzfus left the store, intending to return later. At about 6:45, while heading back toward Music Land, she again encountered the threesome: “Shy Guy” walking by himself, followed by the girl, and then “Mountain Man” yelling “Donna, Donna, Donna.” The girl bumped into Stoltzfus and then asked for directions to the bus stop.⁶ The three then left.

At first Stoltzfus tried to follow them because of her concern about petitioner’s behavior, but she “lost him” and then headed back to Music Land. The clerk had not returned, so she and her daughter went to their car. While driving to another store, they saw a shiny dark blue car. The driver was “beautiful,” “well dressed and she was happy, she was singing....” *Id.*, at 41. When the blue car was stopped behind a minivan at a stop sign, Stoltzfus saw petitioner for the third time.

She testified:

“ ‘Mountain Man’ came tearing out of the Mall entrance door and went up to the driver of the van and ... was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where ‘Shy Guy’ and ‘Blonde Girl’ was standing [T]hen we left [and before the van and a white pickup truck could turn] ‘Mountain Man’ came out again....” *Id.*, at 42–43.

After first going to the passenger side of the pickup truck, petitioner came back to the black girl’s car, “pounded on” the passenger ****1944** window, shook the car, yanked the door open and jumped in. When he motioned for “Blonde Girl” and “Shy ****272** Guy” to get in, the driver stepped on the gas and “just laid on the horn” but she could not go because there were people walking in front of the car. The horn “blew a long time” and petitioner

“started hitting her ... on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the ‘Blonde Girl’ got in the back and ‘Shy Guy’ followed and got behind him.” *Id.*, at 44–45.

Stoltzfus pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask repeatedly if the other driver was “O.K.” The driver looked “frozen” and mouthed an inaudible response. Stoltzfus started to drive away and then realized “the only word that it could possibly be, was help.” *Id.*, at 47. The blue car then drove slowly around her, went over the curb with its horn honking, and headed out of the mall. Stoltzfus briefly followed, told her daughter to write the license number on a “3x4 [inch] index card,”⁷ and then left for home because she had an empty gas tank and “three kids at home waiting for supper.” *Id.*, at 48–49.

At trial Stoltzfus identified Whitlock from a picture as the driver of the car and pointed to petitioner as “Mountain Man.” When asked if pretrial publicity about the murder had influenced her identification, Stoltzfus replied “absolutely not.” She explained:

“[F]irst of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an *273 emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification.” *Id.*, at 58.

The Commonwealth did not produce any other witnesses to the abduction. Stoltzfus’ daughter did not testify.

The Stoltzfus Documents

The materials that provide the basis of petitioner’s *Brady* claim consist of notes taken by Detective Claytor during his interviews with Stoltzfus, and letters written by Stoltzfus to Claytor. They cast serious doubt on Stoltzfus’ confident assertion of her “exceptionally good memory.” Because the content of the documents is critical to petitioner’s procedural and substantive claims, we summarize their content.

Exhibit 1⁸ is a handwritten note prepared by Detective Claytor after his first interview with Stoltzfus on January 19, 1990, just two weeks after the crime. The note indicates that she could not identify the black female victim. The only person Stoltzfus apparently could identify at this time was the white female. *Id.*, at 306.

Exhibit 2 is a document prepared by Detective Claytor some time after February 1. It contains a summary of his interviews with Stoltzfus conducted on January 19 and January 20, 1990.⁹ At that time “she was not sure whether she could identify the white males but felt sure she could identify the white female.”

*274 Exhibit 3 is entitled “Observations” and includes a summary of the abduction.

Exhibit 4 is a letter written by Stoltzfus to Claytor three days after their first interview “to clarify some of my confusion for you.” The letter states that she had not remembered being at the mall, but that her daughter had helped jog her memory. Her description of the abduction includes the **1945 comment: “I have a very vague memory that I’m not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off.... Then the guy I saw came running up to the black girl’s window. Were those 2 memories the same person?” *Id.*, at 316. In a postscript she noted that her daughter “doesn’t remember seeing the 3 people get into the black girl’s car....” *Ibid.*

Exhibit 5 is a note to Claytor captioned “My Impressions of ‘The Car,’ ” which contains three paragraphs describing the size of the car and comparing it with Stoltzfus’ Volkswagen Rabbit, but not mentioning the license plate number that she vividly recalled at the trial. *Id.*, at 317–318.

Exhibit 6 is a brief note from Stoltzfus to Claytor dated January 25, 1990, stating that after spending several hours with John Dean, Whitlock’s boyfriend, “looking at current photos,” she had identified Whitlock “beyond a shadow of a doubt.”¹⁰ *Id.*, at 318. The District Court noted that by the time of trial her identification had been expanded to include a description of her clothing and her appearance as a college kid who was “singing” and “happy.” *Id.*, at 387–388.

Exhibit 7 is a letter from Stoltzfus to Detective Claytor, dated January 16, 1990, in which she thanks him for his “patience with my sometimes muddled memories.” She states that if the student at school had not called the police, “I never would have made any of the associations that you helped me make.” *Id.*, at 321.

*275 In Exhibit 8, which is undated and summarizes the events described in her trial testimony, Stoltzfus commented:

“So where is the 3x4 card?... It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU.... Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag.” *Id.*, at 326.

There is a dispute between the parties over whether petitioner’s counsel saw Exhibits 2, 7, and 8 before trial. The prosecuting attorney conceded that he himself never saw Exhibits 1, 3, 4, 5, and 6 until long after petitioner’s trial, and they were not in the file he made available to petitioner.¹¹ For purposes of this case, therefore, we assume that petitioner proceeded to trial without having seen Exhibits 1, 3, 4, 5, and 6.¹²

***276 State Proceedings**

Petitioner was tried in Augusta County, where Whitlock’s body was found, on charges of capital murder, robbery, and abduction. Because the prosecutor maintained an open file policy, which gave petitioner’s counsel access to all of the evidence in the Augusta County prosecutor’s files,¹³ petitioner’s counsel ***1946** did not file a pretrial motion for discovery of possible exculpatory evidence.¹⁴ In closing argument, petitioner’s lawyer effectively conceded that the evidence was sufficient to support the robbery and abduction charges, as well as the lesser offense of first-degree murder, but argued that the evidence was insufficient to prove that petitioner was guilty of capital murder. *Id.*, at 192–193.

The judge instructed the jury that petitioner could be found guilty of the capital charge if the evidence established beyond a reasonable doubt that he “jointly participated in the fatal beating” and “was an active and immediate participant ***277** in the act or acts that caused the victim’s death.” *Id.*, at 160–161. The jury found petitioner guilty of abduction, robbery, and capital murder. *Id.*, at 200–201. After listening to testimony and arguments presented during the sentencing phase, the jury made findings of “vileness” and “future dangerousness,” and unanimously recommended the death sentence that the judge later imposed.

The Virginia Supreme Court affirmed the conviction and sentence. *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991). It held that the trial court had properly instructed the jury on the “joint perpetrator” theory of capital murder and that the evidence, viewed most favorably in support of the verdict, amply supported the prosecution’s theory that both petitioner and Henderson were active participants in the actual killing.¹⁵

In December 1991, the Augusta County Circuit Court appointed new counsel to represent petitioner in state habeas corpus proceedings. State habeas counsel advanced an ***278** ineffective-assistance-of-counsel claim based, in part, on trial counsel’s failure to file a motion under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10

L.Ed.2d 215 (1963), “to have the Commonwealth disclose to the defense all exculpatory evidence known to it—or in its possession.” App. 205–206. In answer to that claim, the Commonwealth asserted that such a motion was unnecessary because the prosecutor had maintained an open file policy.¹⁶ The Circuit Court dismissed the petition, and the State Supreme Court affirmed. *Strickler v. Murray*, 249 Va. 120, 452 S.E.2d 648 (1995).

Federal Habeas Corpus Proceedings

In March 1996, petitioner filed a federal habeas corpus petition in the Eastern District ***1947** of Virginia. The District Court entered a sealed, *ex parte* order granting petitioner’s counsel the right to examine and to copy all of the police and prosecution files in the case. Record, Doc. No. 20. That order led to petitioner’s counsel’s first examination of the Stoltzfus materials, described *supra*, at 1945–1947.

Based on the discovery of those exhibits, petitioner for the first time raised a direct claim that his conviction was invalid because the prosecution had failed to comply with the rule of *Brady v. Maryland*. The District Court granted the Commonwealth’s motion to dismiss all claims except for petitioner’s contention that the Commonwealth violated *Brady*, that he received ineffective assistance of counsel,¹⁷ and that he was denied due process of law under the Fifth and Fourteenth Amendments. In its order denying the Commonwealth’s motion to dismiss, the District Court found that petitioner had “demonstrated cause for his failure to raise this claim earlier [because] [d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner’s state habeas proceeding.” App. 287.

***279** After reviewing the Stoltzfus materials, and making the assumption that the three disputed exhibits had been available to the defense, the District Court concluded that the failure to disclose the other five was sufficiently prejudicial to undermine confidence in the jury’s verdict. *Id.*, at 396. It granted summary judgment to petitioner and granted the writ.

The Court of Appeals vacated in part and remanded. It held that petitioner’s *Brady* claim was procedurally defaulted because the factual basis for the claim was available to him at the time he filed his state habeas petition. Given that he knew that Stoltzfus had been interviewed by Harrisonburg police officers, the court opined that “reasonably competent counsel would have sought discovery in state court” of the police files, and that in response to this “simple request, it is likely the

state court would have ordered the production of the files.” App. 421. Therefore, the Court of Appeals reasoned, it could not address the *Brady* claim unless petitioner could demonstrate both cause and actual prejudice.

Under Fourth Circuit precedent a party “cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.” App. 423 (citing *Stockton v. Murray*, 41 F.3d 920, 925 (1994)). Having already decided that the claim was available to reasonably competent counsel, the Fourth Circuit stated that the basis for finding procedural default also foreclosed a finding of cause. Moreover, the Court of Appeals reasoned, petitioner could not fault his trial lawyers’ failure to make a *Brady* claim because they reasonably relied on the prosecutor’s open file policy. App. 423–424.¹⁸

As an alternative basis for decision, the Court of Appeals also held that petitioner could not establish prejudice because *280 “the Stoltzfus materials would have provided little or no help ... in either the guilt or sentencing phases of the trial.” *Id.*, at 425. With respect to guilt, the court noted that Stoltzfus’ testimony was not relevant to petitioner’s argument that he was only guilty of first-degree murder rather than capital murder because Henderson, rather than he, actually killed Whitlock. With respect to sentencing, the court concluded that her testimony “was of no import” because the findings of future dangerousness and vileness rested on other evidence. Finally, the court noted that even if it could get beyond the procedural default, the *Brady* claim would fail on the merits because of the absence of prejudice. App. 425, n. 11. The Court of Appeals, therefore, reversed the District Court’s judgment and remanded the case with instructions to dismiss the petition.

****1948 II**

The first question that our order granting certiorari directed the parties to address is whether the Commonwealth violated the *Brady* rule. We begin our analysis by identifying the essential components of a *Brady* violation.

[1] [2] [3] In *Brady*, this Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S., at 87, 83 S.Ct. 1194. We have since held that the duty to

disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.*, at 682, 105 S.Ct. 3375; see also *Kyles v. Whitley*, 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence “known only to police *281 investigators and not to the prosecutor.” *Id.*, at 438, 115 S.Ct. 1555. In order to comply with *Brady*, therefore, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” *Kyles*, 514 U.S., at 437, 115 S.Ct. 1555.

[4] These cases, together with earlier cases condemning the knowing use of perjured testimony,¹⁹ illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[5] [6] This special status explains both the basis for the prosecution’s broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term “*Brady* violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence²⁰—that is, to any suppression of so-called “*Brady* material”—although, strictly speaking, there is never a real “*Brady* violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, *282 either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

[7] [8] Two of those components are unquestionably established by the record in this case. The contrast between (a) the terrifying incident that Stoltzfus

confidently described in her testimony and (b) her initial perception of that event “as a trivial episode of college kids carrying on” that her daughter did not even notice, suffices to establish the impeaching character of the undisclosed documents.²¹ Moreover, with respect to at ****1949** least five of those documents, there is no dispute about the fact that they were known to the Commonwealth but not disclosed to trial counsel. It is the third component—whether petitioner has established the prejudice necessary to satisfy the “materiality” inquiry—that is the most difficult element of the claimed *Brady* violation in this case.

Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were “material” for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default.

III

Respondent expressly disavows any reliance on the fact that petitioner’s *Brady* claim was not raised at trial. Brief ***283** for Respondent 17–18, n. 6. He states that the Commonwealth has consistently argued “that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not.” *Ibid.* Despite this concession, it is appropriate to begin the analysis of the “cause” issue by explaining why petitioner’s reasons for failing to raise his *Brady* claim at trial are acceptable under this Court’s cases.

[9] [10] [11] Three factors explain why trial counsel did not advance this claim: The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy;²² and trial counsel were not aware of the factual basis for the claim. The first and second factors—*i.e.*, the nondisclosure and the open file policy—are both fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel’s access to the factual basis for making a *Brady* claim.²³ As we explained in *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986), it is just such factors that ordinarily establish the existence of cause for a procedural default.²⁴

[12] ***284** If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray* we expressly noted that “the standard for cause should not vary depending on the timing of a procedural default.” *Id.*, at 491, 106 S.Ct. 2639.

****1950** [13] Respondent contends, however, that the prosecution’s maintenance of an open file policy that did not include all it was purported to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to state habeas counsel. He presses two factors to support this assertion. First, he argues that an examination of Stoltzfus’ trial testimony,²⁵ as well as a letter published in a local newspaper,²⁶ made it clear that she had had several interviews with Detective Claytor. Second, the fact that the Federal District Court entered an order allowing discovery of the Harrisonburg police files indicates that diligent counsel could ***285** have obtained a similar order from the state court. We find neither factor persuasive.

Although it is true that petitioner’s lawyers—both at trial and in post-trial proceedings—must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that Stoltzfus sent to the detective, existed and had been suppressed.²⁷ Indeed, if respondent is correct that Exhibits 2, 7, and 8 were in the prosecutor’s “open file,” it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld. The prosecutor must have known about the newspaper articles and Stoltzfus’ meetings with Claytor, yet he did not believe that his prosecution file was incomplete.

[14] [15] [16] [17] Furthermore, the fact that the District Court entered a broad discovery order even before federal habeas counsel had advanced a *Brady* claim does not demonstrate that a state court also would have done so.²⁸ Indeed, as we understand Virginia law and respondent’s position, petitioner would not have been entitled to such discovery in state habeas ***286** proceedings without a showing of good cause.²⁹ Even pursuant to the broader discovery provisions afforded at trial, petitioner would not have had access to these materials under Virginia law, except as modified by *Brady*.³⁰ Mere speculation that ****1951** some exculpatory material may have been withheld is unlikely to establish good cause for a

discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support. Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them. The presumption, well established by “ ‘tradition and experience,’ ” that prosecutors have fully “ ‘discharged their official duties,’ ” *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional *287 error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

Respondent’s position on the “cause” issue is particularly weak in this case because the state habeas proceedings confirmed petitioner’s justification for his failure to raise a *Brady* claim. As already noted, when he alleged that trial counsel had been incompetent because they had not advanced such a claim, the warden responded by pointing out that there was no need for counsel to do so because they “were voluntarily given full disclosure of everything known to the government.”³¹ Given that representation, petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial.³²

Respondent also argues that our decisions in *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), and *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), preclude the conclusion that the cause for petitioner’s default was adequate. In both of those cases, however, the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier. See *Gray*, 518 U.S., at 161, 116 S.Ct. 2074; *McCleskey*, 499 U.S., at 498–499, 111 S.Ct. 1454. In the context of a *Brady* claim, a defendant cannot conduct the “reasonable *288 and diligent investigation” mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State.³³

The controlling precedents on “cause” are *Murray v. Carrier*, 477 U.S., at 488, 106 S.Ct. 2639, and *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). As we explained in the latter case:

“If the District Attorney’s memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner’s lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse **1952 his procedural default

under this Court’s precedents.” *Id.*, at 222, 108 S.Ct. 1771.³⁴

[18] There is no suggestion that tactical considerations played any role in petitioner’s failure to raise his *Brady* claim in state court. Moreover, under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” *Agurs*, 427 U.S., at 110, 96 S.Ct. 2392.

*289 In summary, petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution’s open file policy as fulfilling the prosecution’s duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner’s reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received “everything known to the government.”³⁵ We need not decide in this case whether any one or two of these factors would be sufficient to constitute cause, since the combination of all three surely suffices.

IV

[19] The differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issue of prejudice. Unlike the Fourth Circuit, we do not believe that “the Stoltzfus [*sic*] materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial.” App. 425. Without a doubt, Stoltzfus’ testimony was prejudicial in the sense that it made petitioner’s conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial.

That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that “there is a reasonable probability” that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles*: “[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence *290 he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” 514 U.S., at 434, 115 S.Ct. 1555.

[20] The Court of Appeals’ negative answer to that question rested on its conclusion that, without considering Stoltzfus’ testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect. As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions. *Id.*, at 434–435, 115 S.Ct. 1555. Rather, the question is whether “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.*, at 435, 115 S.Ct. 1555.

The District Judge decided not to hold an evidentiary hearing to determine whether Exhibits 2, 7, and 8 had been disclosed to the defense, because he was satisfied that the “potentially devastating impeachment material” contained in the other five warranted the entry of summary judgment in petitioner’s favor. App. 392. The District Court’s ****1953** conclusion that the admittedly undisclosed documents were sufficiently important to establish a violation of the *Brady* rule was supported by the prosecutor’s closing argument. That argument relied on Stoltzfus’ testimony to demonstrate petitioner’s violent propensities and to establish that he was the instigator and leader in Whitlock’s abduction and, by inference, her murder. The prosecutor emphasized the importance of Stoltzfus’ testimony in proving the abduction:

“[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don’t. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened.” App. 169.

***291** Given the record evidence involving Henderson,³⁶ the District Court concluded that, without Stoltzfus’ testimony, the jury might have been persuaded that Henderson, rather than petitioner, was the ringleader. He reasoned that a “reasonable probability of conviction” of first-degree, rather than capital, murder sufficed to establish the materiality of the undisclosed Stoltzfus materials and, thus, a *Brady* violation. App. 396.

The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus’ testimony might have produced a different result, either at the guilt or sentencing phases. Petitioner did, for example, introduce substantial mitigating evidence about abuse he had

suffered as a child at the hands of his stepfather.³⁷ As the District Court recognized, however, petitioner’s burden is to establish a reasonable *probability* of a different result. *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555.

[21] ***292** Even if Stoltzfus and her testimony had been entirely discredited, the jury might still have concluded that petitioner was the leader of the criminal enterprise because he was the one seen driving the car by Kurt Massie near the location of the murder and the one who kept the car for the following week.³⁸ In addition, Tudor testified that petitioner threatened Henderson with a knife later in the evening.

[22] More importantly, however, petitioner’s guilt of capital murder did not depend on proof that he was the dominant partner: Proof that he was an equal participant with Henderson was sufficient under the judge’s instructions.³⁹ Accordingly, the strong evidence ****1954** that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.⁴⁰

***293** Furthermore, there was considerable forensic and other physical evidence linking petitioner to the crime.⁴¹ The weight and size of the rock,⁴² and the character of the fatal injuries to the victim,⁴³ are powerful evidence supporting the conclusion that two people acted jointly to commit a brutal murder.

We recognize the importance of eyewitness testimony; Stoltzfus provided the only disinterested, narrative account of what transpired on January 5, 1990. However, Stoltzfus’ vivid description of the events at the mall was not the only evidence that the jury had before it. Two other eyewitnesses, the ***294** security guard and Henderson’s friend, placed petitioner and Henderson at the Harrisonburg Valley Shopping Mall on the afternoon of Whitlock’s murder. One eyewitness later saw petitioner driving Dean’s car near the scene of the murder.

The record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached. The jury was instructed on two predicates for capital murder: robbery with a deadly weapon and abduction with intent to defile.⁴⁴ On state habeas, the Virginia Supreme Court rejected as procedurally barred petitioner’s challenge to this jury instruction on the ground that “abduction with intent to defile” was not a predicate for capital murder for a victim over the age of 12.⁴⁵ That issue is not before us. Even assuming, however, that this predicate was erroneous, armed robbery still would have supported the capital

murder conviction.

****1955** Petitioner argues that the prosecution’s evidence on armed robbery “flowed almost entirely from inferences from Stoltzfus’ testimony,” and especially from her statement that Henderson had a “hard object” under his coat at the mall. Brief for Petitioner 35. That argument, however, ignores the fact that petitioner’s mother and Tudor provided direct evidence that petitioner had a knife with him on the day of the crime. ***295** In addition, the prosecution contended in its closing argument that the rock—not the knife—was the murder weapon.⁴⁶ The prosecution did advance the theory that petitioner had a knife when he got in the car with Whitlock, but it did not specifically argue that petitioner used the knife during the robbery.⁴⁷

Petitioner also maintains that he suffered prejudice from the failure to disclose the Stoltzfus documents because her testimony impacted on the jury’s decision to impose the death penalty. Her testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase.⁴⁸ With respect to the jury’s discretionary decision to impose the death penalty, it is true that Stoltzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking at Dice’s or the powerful message conveyed by the 69-pound ***296** rock that was part of the record before the jury. Notwithstanding the obvious significance of Stoltzfus’ testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Petitioner has satisfied two of the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution. Petitioner has also demonstrated cause for failing to raise this claim during trial or on state postconviction review. However, petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice **SOUTER**, with whom Justice **KENNEDY** joins as to Part II, concurring in part and dissenting in part.

I look at this case much as the Court does, starting with its view in Part III (which I join) that Strickler has shown cause to excuse the procedural default of his *Brady* claim. Like the Court, I think it clear that the materials withheld were exculpatory as devastating ammunition for impeaching Stoltzfus.¹ See *ante*, at 1948–1949. Even on ****1956** the question of prejudice ***297** or materiality,² over which I ultimately part company with the majority, I am persuaded that Strickler has failed to establish a reasonable probability that, had the materials withheld been disclosed, he would not have been found guilty of capital murder. See *ante*, at 1953–1955. As the Court says, however, the prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: the jury’s consideration of aggravating, death-qualifying facts, the jury’s discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge’s discretionary decision to follow the jury’s recommendation. See *ante*, at 1954–1955. It is with respect to the penultimate step in determining the sentence that I think Strickler has carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure of the Stoltzfus materials would have led the jury to recommend life, not death, and I respectfully dissent.

I

Before I get to the analysis of prejudice I should say something about the standard for identifying it, and about the unfortunate phrasing of the shorthand version in which the standard is customarily couched. The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a “reasonable probability” of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended ***298** by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See *ante*, at 1952–1953; *Kyles v. Whitley*, 514 U.S. 419, 434–435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether “ ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence’ ” in the outcome. *Ante*, at 1952–1953 (quoting *Kyles, supra*, at

435, 115 S.Ct. 1555).

Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term “probability” raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, “more likely than not.” While any short phrases for what the cases are getting at will be “inevitably imprecise,” *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), I think “significant possibility” would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.

To see that this is so, we need to recall *Brady’s* evolution since the appearance of the rule as originally stated, that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* itself did not explain what it meant by “material” (perhaps assuming the term would be given its usual meaning in the law of evidence, see *United States v. Bagley*, 473 U.S. 667, 703, n. 5, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in ***1957** *United States v. Agurs, supra*, where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testimony, ***299** reversal was required if there was “any reasonable likelihood” that the false testimony had affected the verdict. *Agurs, supra*, at 103, 96 S.Ct. 2392 (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in turn quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). We have treated “reasonable likelihood” as synonymous with “reasonable possibility” and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. *Bagley, supra*, at 678–680, and n. 9, 105 S.Ct. 3375 (opinion of Blackmun, J.). See also *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no “‘reasonable possibility’ that trial error contributed to the verdict”); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (same). In *Agurs*, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between

the more-likely-than-not level and yet another criterion, whether the reviewing court’s “‘conviction [was] sure that the error did not influence the jury, or had but very slight effect.’ ” 427 U.S., at 112, 96 S.Ct. 2392 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Finally, in *United States v. Bagley, supra*, we embraced “reasonable probability” as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. *Strickland* in turn cited two cases for its formulation, *Agurs* (which did not contain the expression “reasonable probability”) and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873–874, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (which held that sanctions against the Government for deportation of a potential defense witness were appropriate only ***300** if there was a “reasonable likelihood” that the lost testimony “could have affected the judgment of the trier of fact”).

The circuitous path by which the Court came to adopt “reasonable probability” of a different result as the rule of *Brady* materiality suggests several things. First, while “reasonable possibility” or “reasonable likelihood,” the *Kotteakos* standard, and “reasonable probability” express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers’ reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and “more likely than not” is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term “probability,” which is naturally read as the cognate of “probably” and thus confused with “more likely than not,” see *Morris v. Mathews*, 475 U.S. 237, 247, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (apparently treating “reasonable probability” as synonymous with “probably”); *id.*, at 254, n. 3, 106 S.Ct. 1032 (Blackmun, J., concurring in judgment) (cautioning against confusing “reasonable probability” with more likely than not). We would be better off speaking of a “significant possibility” of a different result to characterize the *Brady* materiality standard. Even then, given the soft edges of all these phrases,³ the ***1958** touchstone of the enquiry ***301** must remain whether the evidentiary suppression “undermines our confidence” that the factfinder would have reached the same result.

Even keeping in mind these caveats about the appropriate level of materiality, applying the standard to the facts of this case does not give the Court easy answers, as the Court candidly acknowledges. See *ante*, at 1952. Indeed, the Court concedes that discrediting Stoltzfus’s testimony “might have changed the outcome of the trial,” *ibid.*, and that the District Court was “surely correct” to find a “reasonable possibility that either a total, or just a substantial, discount of Stoltzfus’ testimony might have produced a different result, either at the guilt or sentencing phases,” *ante*, at 1953.

In the end, however, the Court finds the undisclosed evidence inadequate to undermine confidence in the jury’s sentencing *302 recommendation, whereas I find it sufficient to do that. Since we apply the same standard to the same record, our differing conclusions largely reflect different assessments of the significance the jurors probably ascribed to the Stoltzfus testimony. My assessment turns on two points. First, I believe that in making the ultimate judgment about what should be done to one of several participants in a crime this appalling the jurors would very likely have given weight to the degree of initiative and leadership exercised by that particular defendant. Second, I believe that no other testimony comes close to the prominence and force of Stoltzfus’s account in showing Strickler as the unquestionably dominant member of the trio involved in Whitlock’s abduction and the aggressive and moving figure behind her murder.

Although Stoltzfus was not the prosecution’s first witness, she was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury. From the start of Stoltzfus’s testimony, Strickler was “Mountain Man” and his male companion “Shy Guy,” labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus’s observation. According to her, when she first saw Strickler she “just sort of instinctively backed up because I was frightened.” App. 36. Unlike retiring “Shy Guy,” Strickler was “revved up.” *Id.*, at 39, 60. Even in describing her first encounter with Strickler inside the mall, Stoltzfus spoke of him as domineering, a “very impatient” character yelling at his female companion, “Blonde Girl,” to join him. *Id.*, at 36, 38–39.

**1959 After describing in detail how “Mountain Man” and “Blonde Girl” were dressed, Stoltzfus said that “‘Mountain Man’ came tearing out of the Mall entrance door and went up to the driver of [a] van and ... was just

really mad and ran back and banged on back of the backside of the van” *303 while “Shy Guy” and “Blonde Girl” hung back. *Id.*, at 43. “Mountain Man” approached a pickup truck, then “pounded on” the front passenger side window of Whitlock’s car, “shook and shook the car door,” “banging and banging on the window” while Whitlock checked to see if the door was locked. *Ibid.* Finally, “he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he jumped in ... and faced her.” *Id.*, at 43–44. While Whitlock tried to push him away, “Mountain Man” “motioned for ‘Blonde Girl’ and ‘Shy Guy’ to come” and the girl did as she was bidden. She “started to jump into the car,” but “jumped back” when Whitlock stepped on the gas. *Id.*, at 44. Then “Mountain Man” started “hitting [Whitlock] on the left shoulder, her right shoulder and then ... the head,” finally “open[ing] the door again” so “the ‘Blonde Girl’ got in the back and ‘Shy Guy’ followed and got behind him.” *Id.*, at 45. “Shy Guy” passed “Mountain Man” his tan coat, which “Mountain Man” “fiddled with” for “what seemed like a long time,” then “sat back up and ... faced” Whitlock while “the other two in the back seat sat back and relaxed.” *Ibid.* Stoltzfus then claimed that she got out of her car and went over to Whitlock’s, whereupon unassertive “Shy Guy” “instinctively jumped, you know, laid over on the seat to hide from me.” *Id.*, at 46. Stoltzfus pulled up next to Whitlock’s car and repeatedly asked, “[A]re you O.K.[?],” but Whitlock responded only with eye contact; “she didn’t smile, there was no expression,” and “[j]ust very serious, looked down to her right,” suggesting Strickler was holding a weapon on her. *Id.*, at 46, 47. Finally, Whitlock mouthed something, which Stoltzfus demonstrated for the jury and then explained she realized must have been the word, “help.” *Id.*, at 47.

Without rejecting the very notion that jurors with discretion in sentencing would be influenced by the relative dominance of one accomplice among others in a shocking crime, I could not regard Stoltzfus’s colorful testimony as anything but significant on the matter of sentence. It was Stoltzfus *304 alone who described Strickler as the initiator of the abduction, as the one who broke into Whitlock’s car, who beckoned his companions to follow him, and who violently subdued the victim while “Shy Guy” sat in the back seat. The bare content of this testimony, important enough, was enhanced by one of the inherent hallmarks of reliability, as Stoltzfus confidently recalled detail after detail. The withheld documents would have shown, however, that many of the details Stoltzfus confidently mentioned on the stand (such as Strickler’s appearance, Whitlock’s appearance, the hour of day when the episode occurred, and her daughter’s alleged notation of the license plate number of

Whitlock's car) had apparently escaped her memory in her initial interviews with the police. Her persuasive account did not come, indeed, until after her recollection had been aided by further conversations with the police and with the victim's boyfriend. I therefore have to assess the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus as adequate to raise a significant possibility of a different recommendation, as sufficient to undermine confidence that the death recommendation would have been the choice. All it would have taken, after all, was one juror to hold out against death to preclude the recommendation actually given.

The Court does not, of course, deny that evidence of dominant role would probably have been considered by the jury; the Court, instead, doubts that this consideration, and the evidence bearing on it, would have figured so prominently in a juror's mind as to be a fulcrum of confidence. I am not convinced by the Court's reasons.

The Court emphasizes the brutal manner of the killing and Strickler's want of remorse as jury considerations diminishing the relative importance of Strickler's position as ringleader. See *ante*, at 1955. Without doubt the jurors considered these to be important factors, and without doubt they may have been treated as sufficient to warrant *1960 death. But as the Court says, sufficiency of other evidence and the *305 facts it supports is not the *Brady* standard, and the significance of both brutality and sangfroid must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder.

The Court concludes that Stoltzfus's testimony is unlikely to have had significant influence on the jury's sentencing recommendation because the prosecutor made no mention of her testimony in his closing statement at the sentencing proceeding. See *ante*, at 1955. But although the Court is entirely right that the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage, the Commonwealth's closing actually did include two brief references to Strickler's behavior in "just grabbing a complete stranger and abducting her," 19 Record 919; see also *id.*, at 904, as relevant to the jury's determination of future dangerousness. And since Strickler's criminal record had no convictions involving actual violence, a point defense counsel stressed in his closing argument, see *id.*, at 913, the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group when they came to assess his future dangerousness.

What is more important, common experience, supported

by at least one empirical study, see Bowers, Sandys, & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 *Cornell L.Rev.* 1476, 1486–1496 (1998), tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence. True, Stoltzfus's testimony directly discussed only the circumstances of Whitlock's abduction, but its impact on the jury was almost certainly broader, as the prosecutor recognized. After the jury rendered its verdict on guilt, for example, the defense moved for a judgment of acquittal on the capital murder charge based on insufficiency of the evidence. In the prosecutor's argument to the court he replied that

*306 "the evidence clearly shows that this man was the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him ..., he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall, so you start with the principle that he is the aggressor." 20 Record 15.

Stoltzfus's testimony helped establish the "principle," as the prosecutor put it, that Strickler was "the aggressor," the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction. If the defense could have called Stoltzfus's credibility into question, the jurors' belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death.

The Court suggests that the jury might have concluded that Strickler was the leader based on three other pieces of evidence: Kurt Massie's identification of Strickler as the driver of Whitlock's car on its way toward the field where she was killed; Donna Tudor's testimony that Strickler kept the car the following week; and Tudor's testimony that Strickler threatened Henderson with a knife later on the evening of the murder. But if we are going to look at other testimony we cannot stop here. The accuracy of both Massie's and Tudor's testimony was open to question,⁴ and all of it was subject to some evidence that Henderson had taken a major role in the murder. The Court has quoted the District *307 Court's summation of evidence against him, *ante*, at 1953, n. 36: Henderson's wallet was found near the body, his clothes were bloody, he presented a woman friend with the victim's watch at a postmortem *1961 celebration (which he left driving the victim's car), and he confessed to a friend that he had just killed an unidentified black person. Had this been the totality of the evidence, the jurors could well have had

little certainty about who had been in charge. But they could have had no doubt about the leader if they believed Stoltzfus.

Ultimately, I cannot accept the Court’s discount of Stoltzfus in the *Brady* sentencing calculus for the reason I have repeatedly emphasized, the undeniable narrative force of what she said. Against this, it does not matter so much that other witnesses could have placed Strickler at the shopping mall on the afternoon of the murder, *ante*, at 1954, or that the Stoltzfus testimony did not directly address the aggravating factors found, *ante*, at 1955. What is important is that her evidence presented a gripping story, see E. Loftus & J. Doyle, *Eyewitness Testimony: Civil and Criminal* 5 (3d ed. 1997) (“[R]esearch redoundingly proves that the story format is a powerful key to juror decision making”). Its message was that Strickler was the madly energetic leader of two morally apathetic accomplices, who were passive but for his

direction. One cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story. I would accordingly vacate the sentence and remand for reconsideration, and to that extent I respectfully dissent.

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- † Justice THOMAS joins Parts I and IV of this opinion. Justice KENNEDY joins Part III.
- 1 The opinion of the Court of Appeals is unreported. The judgment order is reported, *Strickler v. Pruett*, 149 F.3d 1170 (C.A.4 1998). The opinion of the District Court is also unreported.
- 2 Petitioner was tried in May 1990. Henderson fled the Commonwealth and was later apprehended in Oregon. He was tried in March 1991.
- 3 Workman was called as a defense witness.
- 4 Whitlock’s roommate testified that Whitlock had dinner at 6 p.m. on January 5, 1990, just before she left for the mall to return Dean’s car.
- 5 She testified to their appearances in great detail. She stated that petitioner had “a kind of multi layer look.” He wore a grey T-shirt with a Harley Davidson insignia on it. The prosecutor showed Stoltzfus the shirt, stained with blood and semen, that the police had discovered at petitioner’s mother’s house. He asked if it were the same shirt she saw petitioner wearing at the mall. She replied, “That could have been it.” App. 37, 39. Henderson “had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren’t just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort.” *Id.*, at 37. The woman “had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face.” *Id.*, at 60.
- 6 Stoltzfus stated that the girl caught a button in Stoltzfus’ “open weave sweater, which is why I remember her attire.” *Id.*, at 39.
- 7 “I said to my fourteen[-year]-old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, ‘No Kids Alone 243,’ and I said remember, 243 is my age.” *Id.*, at 48.
- 8 These materials were originally attached to an affidavit submitted with petitioner’s motion for summary judgment on his federal petition for habeas corpus. Because both the District Court and the Court of Appeals referred to the documents by their exhibit numbers, we have done the same.

9 As the District Court pointed out, however, it omits reference to the fact that Stoltzfus originally said that she could not identify the victim—a fact recorded in his handwritten notes. *Id.*, at 387.

10 Stoltzfus’ trial testimony made no mention of her meeting with Dean.

11 The prosecutor recalled that Exhibits 2, 7, and 8 had been in his open file, *id.*, at 365–368, but the lawyer who represented Henderson at his trial swore that they were not in the file, *id.*, at 330; the recollection of petitioner’s trial counsel was somewhat equivocal. Lead defense counsel was sure he had not seen the documents, *id.*, at 300, while petitioner’s other lawyer signed an affidavit to the effect that he does “remember the information contained in [the documents]” but “cannot recall if I have seen these specific documents,” *id.*, at 371.

12 Although the parties have not advanced an explanation for the non-disclosure of the documents, perhaps it was an inadvertent consequence of the fact that Harrisonburg is in Rockingham County and the trial was conducted by the Augusta County prosecutor. We note, however, that the prosecutor is responsible for “any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Thus, the Commonwealth, through its prosecutor, is charged with knowledge of the Stoltzfus materials for purposes of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

13 In the federal habeas proceedings, the prosecutor gave the following sworn answer to an interrogatory requesting him to state what materials were disclosed by him to defense counsel pursuant to *Brady*: “I disclosed my entire prosecution file to Strickler’s defense counsel prior to Strickler’s trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness statements in the file.” App. 368. Petitioner’s trial counsel had shared the prosecutor’s understanding of the “open file” policy. In an affidavit filed in the state habeas proceeding, they stated that they “thoroughly investigated” petitioner’s case. “In this we were aided by the prosecutor’s office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files.... As a result of this cooperation, they introduced nothing at trial of which we were previously unaware.” *Id.*, at 223.

14 In its pleadings on state habeas, the Commonwealth explained: “From the inception of this case, the prosecutor’s files were open to the petitioner’s counsel. Each of the petitioner’s attorneys made numerous visits to the prosecutor’s offices and reviewed *all* the evidence the Commonwealth intended to present.... Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [*Brady*] motion.” *Id.*, at 212–213.

15 “The Commonwealth’s theory of the case was that Strickler and Henderson had acted jointly to accomplish the actual killing. It contended at trial, and argues on appeal, that the physical evidence points to a violent struggle between the assailants and the victim, in which Strickler’s hair had actually been torn out by the roots. Although Leanne had been beaten and kicked, none of her injuries would have been sufficient to immobilize her until her skull was crushed with the 69-pound rock. Because, the Commonwealth’s argument goes, the rock had been dropped on her head at least twice, while she was on the ground, leaving two bloodstained depressions in the frozen earth, it would have been necessary that she be held down by one assailant while the other lifted the rock and dropped it on her head.

“The weight and dimensions of the 69-pound bloodstained rock, which was introduced in evidence as an exhibit, made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down. The bloodstains on Henderson’s jacket as well as on Strickler’s clothing further tended to corroborate the Commonwealth’s theory that the two men had been in the immediate presence of the victim’s body when the fatal blows were struck and, hence, had jointly participated in the killing.” *Strickler*, 241 Va., at 494, 404 S.E.2d, at 235.

16 See n. 14, this page.

17 Petitioner later voluntarily dismissed this claim. App. 384.

18 For reasons we do not entirely understand, the Court of Appeals thus concluded that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for postconviction counsel to do so.

19 See, e.g., *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (*per curiam*); *Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Napue v. Illinois*, 360 U.S. 264, 269–270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

- 20 Consider, for example, this comment in the dissenting opinion in *Kyles v. Whitley*: “It is petitioner’s burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner’s guilt.” 514 U.S., at 460, 115 S.Ct. 1555 (opinion of SCALIA, J.).
- 21 We reject respondent’s contention that these documents do not fall under *Brady* because they were “inculpatory.” Brief for Respondent 41. Our cases make clear that *Brady*’s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).
- 22 While the precise dimensions of an “open file policy” may vary from jurisdiction to jurisdiction, in this case it is clear that the prosecutor’s use of the term meant that his entire prosecution file was made available to the defense. App. 368; see also n. 13, *supra*.
- 23 We certainly do not criticize the prosecution’s use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.
- 24 “[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed v. Ross*, 468 U.S., at 16, 104 S.Ct. 2901, or that ‘some interference by officials,’ *Brown v. Allen*, 344 U.S. 443, 486, 73 S.Ct. 397, 97 L.Ed. 469 (1953), made compliance impracticable, would constitute cause under this standard.” *Murray*, 477 U.S., at 488, 106 S.Ct. 2639; see also *Amadeo v. Zant*, 486 U.S. 214, 221–222, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).
- 25 Stoltzfus testified to meeting with Claytor at least three times. App. 55–56.
- 26 In her letter, which appeared on July 18, 1990 (after petitioner’s trial) in the Harrisonburg Daily News-Record, Stoltzfus stated: “It never occurred to me that I was witnessing an abduction. In fact, if it hadn’t been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn’t realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture.” *Id.*, at 250. Stoltzfus also gave a pretrial interview to a reporter with the Roanoke Times that conflicted in some respects with her trial testimony, principally because she identified the blonde woman at the mall as Tudor. *Id.*, at 373.
- 27 The defense could not discover copies of these notes from Stoltzfus herself, because she refused to speak with defense counsel before trial. *Id.*, at 370.
- 28 The parties have been unable to provide, and the record does not illuminate, the factual basis on which the District Court entered the discovery order. It was granted *ex parte* and under seal and furnished broad access to any records relating to petitioner. District Court Record, Doc. No. 20. The Fourth Circuit has since found that federal district courts do not possess the authority to issue *ex parte* discovery orders in habeas proceedings. *In re Pruett*, 133 F.3d 275, 280 (1997). We express no opinion on the Fourth Circuit’s decision on this question. However, we note that it is unlikely that petitioner would have been granted in state court the sweeping discovery that led to the Stoltzfus materials, since Virginia law limits discovery available during state habeas. Indeed, it is not even clear that he had a right to such discovery in federal court. See n. 29, this page.
- 29 Virginia law provides that “no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding.” *Va. Sup.Ct. Rule 4:1(b)(5)(3)(b)* (1998); see also *Yeatts v. Murray*, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995). Respondent acknowledges that petitioner was not entitled to discovery under Virginia law. Brief for Respondent 25.
- 30 See *Va. Sup.Ct. Rule 3A:11* (1998). This rule expressly excludes from defendants “the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except [for scientific reports of the accused or alleged victim].” The Virginia Supreme Court found that petitioner had been afforded all the discovery he was entitled to on direct review.

“Limited discovery is permitted in criminal cases by the Rules of Court.... Strickler had the benefit of all the discovery to which he was entitled under the Rules. Those rights do not extend to general production of evidence, except in the limited areas prescribed by Rule 3A:11.” *Strickler v. Commonwealth*, 241 Va. 482, 491, 404 S.E.2d 227, 233 (1991).

31 This statement is quoted in full at n. 14, *supra*. Respondent argues that this representation is not dispositive because it was made in his motion to dismiss and therefore cannot excuse the failure to include a *Brady* claim in the petitioner’s original state habeas pleading. We find the timing of the statement irrelevant, since the warden’s response merely summarizes the Commonwealth’s “open file” policy, instituted by the prosecution at the inception of the case.

32 Furthermore, in its opposition to petitioner’s motion during state habeas review for funds for an investigator, the Commonwealth argued: “Strickler’s Petition contains 139 separate habeas claims. By requesting appointment of an investigator ‘to procure the necessary factual basis to support certain of Petitioner’s claims’ (Motion, p. 1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees.” App. 242.

In light of these assertions, we fail to see how the Commonwealth believes petitioner could have shown “good cause” sufficient to get discovery on a *Brady* claim in state habeas.

33 We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them. Although *Gray* involved a procedurally defaulted *Brady* claim, in that case, the Court found that the petitioner had made “no attempt to demonstrate cause or prejudice for his default.” *Gray*, 518 U.S., at 162, 116 S.Ct. 2074.

34 It is noteworthy that both of the reasons on which we relied in *McCleskey* to distinguish *Amadeo* also apply to this case: “This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey’s knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition.” 499 U.S., at 501–502, 111 S.Ct. 1454.

35 Because our opinion does not modify *Brady*, we reject respondent’s contention that we announce a “new rule” today. See *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

36 The District Court summarized the evidence against Henderson. “Henderson’s clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice’s Inn. Tr. 541. Henderson left Dice’s Inn driving Whitlock’s car. Henderson’s wallet was found in the vicinity of Whitlock’s body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson’s jeans.” App. 395.

37 At sentencing, the trial court discussed the mitigation evidence: “On the charge of capital murder ... it is difficult ... to sit here and listen to the testimony of [petitioner’s mother] and Mr. Strickler’s two sisters and not feel a great, great deal of sympathy for, for any person who has a childhood and a life like Mr. Strickler has had. He was in no way responsible for the circumstances of his birth. He was brutalized from the minute he’s, almost from the minute he was born and certainly with his ... limitations and his ability with which he was born, it would have been extremely difficult for him to, to help himself. And difficult, when you look at a case like that to feel but anything but sympathy for him.” Sentencing Hearing, 20 Record 57–58.

38 As the trial court stated at petitioner’s sentencing hearing: “The facts in this case which support this jury verdict are one that Mr. Strickler was ... in control of this situation. He was in control at the shopping center in Harrisonburg. He was in control when the car went into the field up here on the 340 north of Waynesboro. He was in control thereafter, he ended up with the car. There is no question who ... was in control of this entire situation.” *Id.*, at 22.

39 The judge gave the following instruction at petitioner’s trial: “You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim’s death.” *Strickler v. Commonwealth*, 241 Va., at 493–494, 404 S.E.2d, at 234–235. The Virginia Supreme Court affirmed the propriety of this instruction on petitioner’s direct appeal. *Id.*, at 495, 404 S.E.2d, at 235.

40 It is also consistent with the fact that Henderson was convicted of first-degree murder but acquitted of capital murder after his jury, unlike petitioner’s, was instructed that they could convict him of capital murder only if they found that he had “ ‘infect[ed] the fatal blows.’ ” Henderson’s jury was instructed, “ ‘One who is present aiding and abetting the actual

killing, but who does not inflict the fatal blows that cause death is a principle [sic] in the second degree, and may not be found guilty of capital murder. Before you can find the defendant guilty of capital murder, the evidence must establish beyond a reasonable doubt that the defendant was an active and immediate participant in the acts that caused the death.’ ” 2 App. in No. 97–29(CA4), p. 777.

Henderson’s trial took place before the Virginia Supreme Court affirmed the trial instruction, and the “joint perpetrator” theory it embodied, given at petitioner’s trial. *Strickler v. Commonwealth*, 241 Va., at 494, 404 S.E.2d, at 235. Petitioner’s trial judge rejected one of petitioner’s proffered instructions, which would have required the Commonwealth to prove that “the defendant was the person who actually delivered the blow that killed Leanne Whitlock.” *Ibid.* Petitioner’s trial judge recused himself from presiding over Henderson’s trial, indicating that he had already formed his own opinion about what had happened the night of Whitlock’s murder. 21 Record 2.

41 For example, the police recovered hairs on a bra and shirt found with Whitlock’s body that “were microscopically alike in all identifiable characteristics” to petitioner’s hair. App. 135. The shirt recovered from the car at Strickler’s mother’s house had human blood on it. Petitioner’s fingerprints were found on the outside and inside of the car taken from Whitlock. *Id.*, at 128–129. Tudor testified that petitioner’s pants had blood on them, and he had a cut on his knuckle. *Id.*, at 95.

42 The trial judge thought the shape of the rock so significant to the jury’s conclusion that he instructed the lawyers to have “detailed, high quality photographs taken of [the rock] ... and I want it put in the record of the case.” Sentencing Hearing, 20 Record 53.

43 The Deputy Chief Medical Examiner, who performed the autopsy, testified that the object that produced the fractures in Whitlock’s skull caused “severe lacerations to the brain,” and any two of the four fractures would have been fatal. App. 112.

44 The trial court instructed the jury that, to convict petitioner of capital murder, it must find beyond a reasonable doubt that (1) “the defendant killed Leanne Whitlock”; (2) “the killing was willful, deliberate and premeditated”; and (3) “the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.” *Strickler v. Murray*, 249 Va. 120, 124–125, 452 S.E.2d 648, 650 (1995).

45 In its motion to dismiss petitioner’s state habeas petition, the Commonwealth conceded that the instruction on intent to defile was erroneously given in this case as a predicate for capital murder. App. 218.

46 In his closing argument, the prosecutor stated that there was “really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn’t a knife. It was this thing here, it is to[o] big to be called a rock and to[o] small to be called a boulder.” *Id.*, at 167.

47 The instructions given to the jury defined a deadly weapon as “any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used.” *Id.*, at 160.

48 The jury recommended death after finding the predicates of “future dangerousness” and “vileness.” Neither of these predicates depended on Stoltzfus’ testimony. The trial court instructed the jury, “Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives. One, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing, continuing serious threat to society or two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman and that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.” Tr. 899–900.

1 The Court notes that the District Court did not resolve whether all eight of the Stoltzfus documents had been withheld, as Strickler claimed, or only five. For purposes of its decision granting summary judgment for Strickler, the District Court assumed that only five had not been disclosed. See *ante*, at 1952–1953, 1947. The Court of Appeals also left the dispute unresolved, see App. 418, n. 8, though granting summary judgment for respondent based on a lack of prejudice would presumably have required that court to assume that all eight documents had been withheld. Because this Court affirms the grant of summary judgment for respondent based on lack of prejudice and because it relies on at least one of the disputed documents in its analysis, see *ante*, at 1948–1949, I understand it to have assumed that none of the eight documents was disclosed. I proceed based on that assumption as well. If one thought the difference between five and eight documents withheld would affect the determination of prejudice, a remand to resolve that factual question would be necessary.

- 2 In keeping with suggestions in a number of our opinions, see *Schlup v. Delo*, 513 U.S. 298, 327, n. 45, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *ante*, at 1948–1949, 1951–1952, 1955. I follow the Court’s lead.
- 3 Each of these phrases or standards has been used in a number of contexts. This Court has used “reasonable possibility,” for example, in defining the level of threat of injury to competition needed to make out a claim under the Robinson-Patman Act, see, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); the standard for judging whether a grand jury subpoena should be quashed under Federal Rule of Criminal Procedure 17(c), see *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991); and the debtor’s burden in establishing that certain collateral is necessary to reorganization and thus exempt from the Bankruptcy Code’s automatic stay provision, see *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375–376, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). We have adopted the standard established in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), for determining the harmlessness of nonconstitutional errors on direct review as the criterion for the harmlessness enquiry concerning constitutional errors on collateral review. See *Brecht v. Abrahamson*, 507 U.S. 619, 637–638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). We have used “reasonable probability” to define the plaintiff’s burden in making out a claim under § 7 of the Clayton Act, see, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *FTC v. Morton Salt Co.*, 334 U.S. 37, 55–61, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) (Jackson, J., dissenting in part) (contrasting “reasonable possibility” and “reasonable probability” and arguing for latter as appropriate standard under Robinson-Patman Act); the standard for granting certiorari, vacating, and remanding in light of intervening developments, see, e.g., *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (*per curiam*); and the standard for exempting organizations from otherwise valid disclosure requirements in light of threats or harassment resulting from the disclosure, see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 74, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). We have recently used “significant possibility” in explaining the circumstances under which nominal compensation is an appropriate award in a suit under the Longshore and Harbor Workers’ Compensation Act, see *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 123, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997), but we most commonly use that term in defining one of the requirements for the granting of a stay pending certiorari. The three-part test requires a “reasonable probability” that the Court will grant certiorari or note probable jurisdiction, a “significant possibility” that the Court will reverse the decision below, and a likelihood of irreparable injury absent a stay. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 114 S.Ct. 1036, 127 L.Ed.2d 530 (1994) (REHNQUIST, C.J., in chambers).
- 4 Massie’s identification was open to some doubt because it occurred at night as one car passed another on a highway. Moreover, he testified that he first saw four people in the car, then only three, and that none of the occupants was black. App. 66–67, 70–73. Tudor, as defense counsel brought out on cross-examination, testified pursuant to a cooperation agreement with the government and admitted that the story she told on the stand was different from what she had told the defense investigator before trial. *Id.*, at 100–101, 103–104.

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [U.S. v. Lebron](#), M.D.Fla., October 2, 2012

126 S.Ct. 2188
Supreme Court of the United States

Denver A. YOUNGBLOOD, Jr., Petitioner,
v.
WEST VIRGINIA.

No. 05-6997.
|
June 19, 2006.

Synopsis

Background: Defendant was convicted in the Circuit Court, Morgan County, [David H. Sanders, J.](#), of two counts of sexual assault, two counts of brandishing firearm, wanton endangerment involving firearm, and indecent exposure. He petitioned for appeal. The West Virginia Supreme Court of Appeals affirmed, [217 W.Va. 535, 618 S.E.2d 544](#), and defendant petitioned for writ of certiorari.

[Holding:] The United States Supreme Court held that defendant clearly presented a federal constitutional *Brady* claim on appeal by alleging that state trooper suppressed note indicating that defendant’s sexual encounters with victim were consensual, warranting remand to allow West Virginia Supreme Court of Appeals to address the *Brady* issue before United States Supreme Court reached the merits.

Certiorari granted; vacated and remanded.

Justice [Scalia](#) filed dissenting opinion in which Justice [Thomas](#) joined.

Justice [Kennedy](#) filed dissenting opinion.

Opinion

**2189 PER CURIAM.

*868 In April 2001, the State of West Virginia indicted petitioner Denver A. Youngblood, Jr., on charges including abduction of three young women, Katara, Kimberly, and Wendy, and two instances of sexual assault upon Katara. The cases went to trial in 2003 in the Circuit Court of Morgan County, where a jury convicted Youngblood of two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure. The conviction rested principally on the testimony of the three women that they were held captive by Youngblood and a friend of his, statements by Katara that she was forced at gunpoint to perform oral sex on Youngblood, and evidence consistent with a claim by Katara about disposal of certain physical evidence of their sexual encounter. Youngblood was sentenced to a combined term of 26 to 60 years’ imprisonment, with 25 to 60 of those years directly attributable to the sexual-assault convictions.

Several months after being sentenced, Youngblood moved to set aside the verdict. He claimed that an investigator working on his case had uncovered new and exculpatory evidence, in the form of a graphically explicit note that both squarely contradicted the State’s account of the incidents and directly supported Youngblood’s consensual-sex defense. The note, apparently written by Kimberly and Wendy, taunted Youngblood and his friend for having been “played” for fools, warned them that the girls had vandalized the house where Youngblood brought them, and mockingly thanked Youngblood for performing oral sex on Katara. The note was said to have been shown to a state trooper investigating the sexual-assault allegations against Youngblood; the trooper allegedly read the note but declined to take possession of it, and told the person who produced it to destroy it. Youngblood argued that the suppression of this evidence violated the State’s federal constitutional obligation to disclose evidence favorable to the defense, and in support *869 of his argument he referred to cases citing and applying *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The trial court denied Youngblood a new trial, saying that the note provided only impeachment, but not exculpatory, evidence. The trial court did not discuss *Brady* or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with Youngblood’s counsel. See App. C to Pet. for Cert. (Tr. 22-23 (Sept. 25, 2003)).

A bare majority of the Supreme Court of Appeals of West Virginia affirmed, finding no abuse of discretion on the part of the trial court, but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence. 217 W.Va. 535, 548, 618 S.E.2d 544, 557 (2005) (*per curiam*). Justice Davis, dissenting in an opinion that Justice Starcher joined, unambiguously characterized the trooper's instruction to discard the new evidence as a *Brady* violation. 217 W.Va., at 550-552, 618 S.E.2d, at 559-561. The dissenters concluded that the note indicating that Youngblood engaged in consensual sex with Katara had been suppressed and was material, *id.*, at 550, n. 6, 618 S.E.2d, at 559, n. 6 (citing *Kyles v. Whitley*, 514 U.S. 419, 435, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)), both because it was at odds with the testimony provided by the State's three chief witnesses (Katara, Kimberly, and Wendy) and also because it was entirely consistent with Youngblood's defense at trial that his sexual encounters with Katara were consensual, **2190 217 W.Va., at 551-552, 618 S.E.2d, at 560-561. Youngblood then filed this petition for a writ of certiorari.

[1] [2] [3] [4] A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U.S., at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn *870 over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles*, 514 U.S., at 438, 115 S.Ct. 1555. See *id.*, at 437, 115 S.Ct. 1555 ("[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"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley*, *supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

[5] Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court, see Brief for

Appellant in No. 31765 (Sup.Ct.App.W.Va.), pp. 42-47, as he had to the trial court, see App. C to Pet. for Cert. (Tr. 6, 44-45, 50, 51 (Sept. 25, 2003)); *id.*, at 13, 17 (Sept. 29, 2003). And, as noted, the dissenting justices discerned the significance of the issue raised. If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue. We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

In *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (*per curiam*), we greatly expanded our "no-fault V & R practice" (GVR) *871 beyond its traditional bounds. *Id.*, at 179, 116 S.Ct. 604 (SCALIA, J., dissenting). At the time, I remarked that "[t]he power to 'revise and correct' for error has become a power to void for suspicion" of error, *id.*, at 190, 116 S.Ct. 604 (quoting *Marbury v. Madison*, 1 Cranch 137, 175, 2 L.Ed. 60 (1803); alterations omitted). And I predicted that "'GVR'd for clarification of _____'" would "become a common form of order, drastically altering the role of this Court." 516 U.S., at 185, 116 S.Ct. 604. Today, by vacating the judgment of a state court simply because "[i]f this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue," *ante*, at 2190, the Court brings this prediction to fulfillment.

In *Lawrence*, I identified three narrow circumstances in which this Court could, consistent with the traditional understanding of our appellate jurisdiction (or at least consistent with entrenched practice), justify **2191 vacating a lower court's judgment *without first identifying error*: "(1) where an intervening factor has arisen [*e.g.*, new legislation or a recent judgment of this Court] that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below." 516 U.S., at 191-192, 116 S.Ct.

604 (dissenting opinion). Needless to say, today’s novel GVR order falls into none of these categories. There has been no intervening change in law that might bear upon the judgment. Our jurisdiction is not in doubt, see *ante*, at 2190; *State v. Frazier*, 162 W.Va. 935, 942, n. 5, 253 S.E.2d 534, 538, n. 5 (1979) (petitioner’s *Brady* claim was properly presented in his motion for a new trial). And the State has confessed no error—not even on the broadest and least supportable theory of what constitutes an error justifying vacatur. See, e.g., *872 *Alvarado v. United States*, 497 U.S. 543, 545, 110 S.Ct. 2995, 111 L.Ed.2d 439 (1990) (Rehnquist, C.J., dissenting) (vacating when the Solicitor General confessed error in the lower court’s “ ‘analysis,’ ” but not its judgment); *Stutson v. United States*, 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996) (*per curiam*) (vacating when the Solicitor General confessed error in a position taken before the Court of Appeals, on which the court *might* have relied; discussed in *Lawrence*, *supra*, at 184-185, 116 S.Ct. 604 (SCALIA, J., dissenting)); *Department of Interior v. South Dakota*, 519 U.S. 919, 921, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996) (SCALIA, J., dissenting) (vacating when “the Government, having *lost* below, wishes to try out a new legal position”). Here, the Court vacates and remands *in light of nothing*.

Instead, the Court remarks tersely that it would be “better” to have “the benefit” of the West Virginia court’s views on petitioner’s *Brady* claim, should we eventually decide to take the case. *Ante*, at 2190. The Court thus purports to conscript the judges of the Supreme Court of Appeals of West Virginia to write what is essentially an *amicus* brief on the merits of an issue they have already decided, in order to facilitate our *possible* review of the merits at some later time. It is not at all clear why it would be so much “better” to have the full court below address the *Brady* claim. True, we often prefer to review reasoned opinions that facilitate our consideration—though we *may* review even a summary disposition. See *Lawrence*, *supra*, at 186, 116 S.Ct. 604 (SCALIA, J., dissenting). But the dissenting judges in the case below discussed petitioner’s *Brady* claim at some length (indeed, at greater length than appears in many of the decisions we agree to review), and argued that it was meritorious. See 217 W.Va. 535, 549-552, 618 S.E.2d 544, 558-561 (2005) (Davis, J., joined by Starcher, J., dissenting). Since we sometimes review judgments with no opinion, and often review judgments with opinion only on one side of the issue, it is not clear why we need opinions on *both* sides here.

To tell the truth, there is only one obvious sense in which it might be “better” to have the West Virginia court revisit *873 the *Brady* issue: If the majority suspects that the court below erred, there is a chance that the

GVR-in-light-of-nothing will induce it to change its mind on remand, sparing us the trouble of correcting the suspected error. It is noteworthy that, to justify its GVR order, the Court does not invoke even the flabby standard adopted in *Lawrence*, namely, whether there is “a **2192 reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration,” 516 U.S., at 167, 116 S.Ct. 604. That is because (there being no relevant intervening event to create such a probability) the only *possibility* that the West Virginia court will alter its considered judgment *is created by this Court’s GVR order itself*. A case such as this, which meets none of the usual, outcome-neutral criteria for granting certiorari set forth in this Court’s Rules 10(a)-(c), could attract our notice only if we suspected that the judgment appealed from was in error. Those whose judgments we review have sometimes viewed even our legitimate, intervening-event GVR orders as polite directives that they reverse themselves. See, e.g., *Sharpe v. United States*, 712 F.2d 65, 67 (C.A.4 1983) (Russell, J., dissenting) (“Once again, I think the majority has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do”). How much more is that suspicion justified when the GVR order rests on nothing more than our statement that it would be “better” for the lower court to reconsider its decision (much as a mob enforcer might suggest that it would be “better” to make protection payments).

Even when we suspect error, we may have many reasons not to grant certiorari outright in a case such as this—an overcrowded docket, a reluctance to correct “the misapplication of a properly stated rule of law,” this Court’s Rule 10, or (in this particular case) even a neo-Victorian desire to keep the lurid phrases of the “graphically explicit note,” *874 *ante*, at 2189, out of the U.S. Reports. But none of these reasons justifies “a tutelary remand, as to a schoolboy made to do his homework again.” *Lawrence*, 516 U.S., at 185-186, 116 S.Ct. 604 (SCALIA, J., dissenting). In “the nature of the appellate system created by the Constitution and laws of the United States,” *id.*, at 178, 116 S.Ct. 604, state courts and lower federal courts are constitutionally distinct tribunals, independently authorized to decide issues of federal law. They are not, as we treat them today, “the creatures and agents of this body,” *id.*, at 178-179, 116 S.Ct. 604. If we suspect that a lower court has erred and wish to correct its error, we should grant certiorari and decide the issue ourselves in accordance with the traditional exercise of our appellate jurisdiction.

It is particularly ironic that the Court inaugurates its

“GVR-in-light-of-nothing” practice by vacating the judgment of a *state* court. Our no-fault GVR practice had its origins “in situations calling forth the special deference owed to state law and state courts in our system of federalism.” *Id.*, at 179, 116 S.Ct. 604. We first used it to allow the state court to decide the effect of an intervening change in state law. *Ibid.* (citing *Missouri ex rel. Wabash R. Co. v. Public Serv. Comm’n*, 273 U.S. 126, 47 S.Ct. 311, 71 L.Ed. 575 (1927)). Likewise, our other legitimate category of no-fault GVR—to ensure our own jurisdiction—“originate[d] in the special needs of federalism.” *Lawrence*, 516 U.S., at 181, 116 S.Ct. 604. In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the “special deference owed to ... state courts,” *id.*, at 179, 116 S.Ct. 604. Like the Ouroboros swallowing its tail, our GVR practice has ingested its own original justification.

Chief Justice Marshall wrote in *Marbury v. Madison* that “[i]t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted” 1 Cranch, at 175, 2 L.Ed. 60. At best, today’s unprecedented decision rests on a finding that the **2193 state court’s “opinion, though arguably correct, [is] incomplete and unworkmanlike,” *875 *Lawrence*, 516 U.S., at 189, 116 S.Ct. 604 (SCALIA, J., dissenting)-which all Members of the Court in *Lawrence* agreed was an illegitimate basis for a GVR, see *id.*, at 173, 116 S.Ct. 604 (*per curiam*). At worst, it is an implied threat to the lower court, not backed by a judgment of our own, that it had “better” reconsider its holding.

I suppose it would be available to the West Virginia Supreme Court of Appeals, on remand, simply to reaffirm

its judgment without further elaboration. Or it could instead enter into a full discussion of the *Brady* issue, producing either a reaffirmance or a revision of its judgment. The latter course will of course encourage and stimulate our new “GVR-in-light-of-nothing” jurisprudence. *Verb. sap.*

For these reasons, I respectfully dissent.

Justice KENNEDY, dissenting.

The Court’s order to grant, vacate, and remand (GVR) in *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (*per curiam*), had my assent. In that case there was a new administrative interpretation that the Court of Appeals did not have an opportunity to consider. *Id.*, at 174, 116 S.Ct. 604. The Court today extends the GVR procedure well beyond *Lawrence* and the traditional practice of issuing a GVR order in light of some new development. See *id.*, at 166-167, 116 S.Ct. 604. Since the issuance of a GVR order simply for further explanation is, as Justice SCALIA explains, see *ante*, p. 2192 (dissenting opinion), both improper and contrary to our precedents, I respectfully dissent.

All Citations

547 U.S. 867, 126 S.Ct. 2188, 165 L.Ed.2d 269, 74 USLW 3701, 06 Cal. Daily Op. Serv. 5273, 2006 Daily Journal D.A.R. 7635, 19 Fla. L. Weekly Fed. S 297

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by *Prystash v. Davis*, 5th Cir.(Tex.), April 26, 2017

136 S.Ct. 1002
Supreme Court of the United States

Michael WEARRY
v.
Burl CAIN, Warden.

No. 14–10008.
|
March 7, 2016.

Synopsis

Background: After defendant’s state capital murder conviction and death sentence were affirmed on direct appeal, 931 So.2d 297, he sought postconviction relief alleging a *Brady* violation. The 21st Judicial District Court, Livingston Parish, No. 01–FELN–015992, Div. A, denied relief, and the Louisiana Supreme Court denied application for supervisory and/or remedial writs.

[Holding:] Upon granting certiorari, the United States Supreme Court held that State’s failure to disclose material evidence including inmates’ statements casting doubt on credibility of State’s star witness violated defendant’s due process rights.

Reversed and remanded.

Justice Alito filed a dissenting opinion in which Justice Thomas joined.

Opinion

*1002 PER CURIAM.

Michael Wearry is on Louisiana’s death row. Urging that the prosecution failed to disclose evidence supporting his innocence and that his counsel provided ineffective assistance at trial, Wearry unsuccessfully sought postconviction relief in state court. Contrary to the state postconviction court, we conclude that the prosecution’s failure to disclose material evidence violated Wearry’s due process rights. We reverse the state postconviction

court’s judgment on that account, and therefore do not reach Wearry’s ineffective-assistance-of-counsel claim.

*1003 I

A

Sometime between 8:20 and 9:30 on the evening of April 4, 1998, Eric Walber was brutally murdered. Nearly two years after the murder, Sam Scott, at the time incarcerated, contacted authorities and implicated Michael Wearry. Scott initially reported that he had been friends with the victim; that he was at work the night of the murder; that the victim had come looking for him but had instead run into Wearry and four others; and that Wearry and the others had later confessed to shooting and driving over the victim before leaving his body on Blahut Road. In fact, the victim had not been shot, and his body had been found on Crisp Road.

Scott changed his account of the crime over the course of four later statements, each of which differed from the others in material ways. By the time Scott testified as the State’s star witness at Wearry’s trial, his story bore little resemblance to his original account. According to the version Scott told the jury, he had been playing dice with Wearry and others when the victim drove past. Wearry, who had been losing, decided to rob the victim. After Wearry and an acquaintance, Randy Hutchinson, stopped the victim’s car, Hutchinson shoved the victim into the cargo area. Five men, including Scott, Hutchinson, and Wearry, proceeded to drive around, at one point encountering Eric Brown—the State’s other main witness—and pausing intermittently to assault the victim. Finally, Scott related, Wearry and two others killed the victim by running him over. On cross-examination, Scott admitted that he had changed his account several times.

Consistent with Scott’s testimony, Brown testified that on the night of the murder he had seen Wearry and others with a man who looked like the victim. Incarcerated on unrelated charges at the time of Wearry’s trial, Brown acknowledged that he had made a prior inconsistent statement to the police, but had recanted and agreed to testify against Wearry, not for any prosecutorial favor, but solely because his sister knew the victim’s sister. The State commented during its opening argument that Brown “is doing 15 years on a drug charge right now, [but] hasn’t asked for a thing.” 7 Record 1723 (Tr., Mar. 2,

2002). During closing argument, the State reiterated that Brown “has no deal on the table” and was testifying because the victim’s “family deserves to know.” Pet. for Cert. 19.

Although the State presented no physical evidence at trial, it did offer additional circumstantial evidence linking Wearry to the victim. One witness testified that he saw Wearry in the victim’s car on the night of the murder and, later, holding the victim’s class ring. Another witness said he saw Wearry throwing away the victim’s cologne. In some respects, however, these witnesses contradicted Scott’s account. For example, the witness who reported seeing Wearry in the victim’s car did not place Scott in the car.

Wearry’s defense at trial rested on an alibi. He claimed that, at the time of the murder, he had been at a wedding reception in Baton Rouge, 40 miles away. Wearry’s girlfriend, her sister, and her aunt corroborated Wearry’s account. In closing argument, the State stressed that all three witnesses had personal relationships with Wearry. The State also presented two rebuttal witnesses: the bride at the wedding, who reported that the reception had ended by 8:30 or 9:00 (potentially leaving sufficient time for Wearry to have committed the crime); and three jail employees, who testified that they had overheard *1004 Wearry say that he was a bystander when the crime occurred.

The jury convicted Wearry of capital murder and sentenced him to death. His conviction and sentence were affirmed on direct appeal.¹

B

After Wearry’s conviction became final, it emerged that the prosecution had withheld relevant information that could have advanced Wearry’s plea. Wearry argued during state postconviction proceedings that three categories of belatedly revealed information would have undermined the prosecution and materially aided Wearry’s defense at trial.

First, previously undisclosed police records showed that two of Scott’s fellow inmates had made statements that cast doubt on Scott’s credibility. One inmate had reported hearing Scott say that he wanted to “ ‘make sure [Wearry] gets the needle cause he jacked over me.’ ” *Id.*, at 22 (quoting inmate affidavit).² The other inmate had told investigators—at a meeting Scott orchestrated—that he had witnessed the murder, but this inmate recanted the

next day. “Scott had told him what to say,” he explained, and had suggested that lying about having witnessed the murder “would help him get out of jail.” Pet. Exh. 13 in No. 01–FELN–015992, pp. 104, 107. See also Pet. for Cert. 22 (quoting police notes).

Second, the State had failed to disclose that, contrary to the prosecution’s assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. The police had told Brown that they would “ ‘talk to the D.A. if he told the truth.’ ” Pet. for Cert. 19 (quoting police notes).

*1005 Third, the prosecution had failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson’s medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a [ruptured patellar tendon](#). *Id.*, at 10–11, 15–16, 32.³ An expert witness, Dr. Paul Dworak, testified at the state collateral-review hearing that Hutchinson’s surgically repaired knee could not have withstood running, bending, or lifting substantial weight. The State presented an expert witness who disagreed with Dr. Dworak’s appraisal of Hutchinson’s physical fitness.

During state postconviction proceedings, Wearry also maintained that his trial attorney had failed to uncover exonerating evidence. Wearry’s trial attorney admitted at the state collateral-review hearing that he had conducted no independent investigation into Wearry’s innocence and had relied solely on evidence the State and Wearry had provided.⁴ For example, despite Wearry’s alibi, his attorney undertook no effort to locate independent witnesses from among the dozens of guests who had attended the wedding reception.

Counsel representing Wearry on collateral review conducted an independent investigation. This investigation revealed many witnesses lacking any personal relationship with Wearry who would have been willing to corroborate his alibi had they been called at trial. Collateral-review counsel’s investigation also revealed that Scott’s brother and sister-in-law would have been willing to testify at trial, as they did at the collateral-review hearing, that Scott was with them, mostly at a strawberry festival, until around 11:00 on the night of the murder.

Based on this new evidence, Wearry alleged violations of his due process rights under [Brady v. Maryland](#), 373 U.S.

83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and of his Sixth Amendment right to effective assistance of counsel. Acknowledging that the State “probably ought to have” disclosed the withheld evidence, App. to Pet. for Cert. B–6, and that Wearry’s counsel provided “perhaps not the best defense that could have been rendered,” *id.*, at B–5, the postconviction court denied relief. Even if Wearry’s constitutional rights were violated, the court concluded, he had not shown prejudice. *Id.*, at B–5, B–7. In turn, the Louisiana Supreme Court also denied relief. *Id.*, at A–1. Chief Justice Johnson would have granted Wearry’s petition on the ground that he received ineffective assistance of counsel. *Id.*, at A–2.⁵

***1006 II**

[1] [2] [3] Because we conclude that the Louisiana courts’ denial of Wearry’s *Brady* claim runs up against settled constitutional principles, and because a new trial is required as a result, we need not and do not consider the merits of his ineffective-assistance-of-counsel claim. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady, supra*, at 87, 83 S.Ct. 1194. See also *Giglio v. United States*, 405 U.S. 150, 153–154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility). Evidence qualifies as material when there is “‘any reasonable likelihood’ ” it could have “‘affected the judgment of the jury.’ ” *Giglio, supra*, at 154, 92 S.Ct. 763 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). To prevail on his *Brady* claim, Wearry need not show that he “more likely than not” would have been acquitted had the new evidence been admitted. *Smith v. Cain*, 565 U.S. 73, ———, 132 S.Ct. 627, 629–631, 181 L.Ed.2d 571 (2012) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to “undermine confidence” in the verdict. *Ibid.*⁶

[4] Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry’s conviction. The State’s trial evidence resembles a house of cards, built on the jury crediting Scott’s account rather than Wearry’s alibi. See *United States v. Agurs*, 427 U.S. 97, 113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (“[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.”). The dissent asserts that, apart from the testimony of Scott and Brown, there was independent

evidence pointing to Wearry as the murderer. See *post*, at 1010 (opinion of ALITO, J.). But all of the evidence the dissent cites suggests, at most, that someone in Wearry’s group of friends may have committed the crime, and that Wearry may have been involved in events related to the murder *after* it occurred. Perhaps, on the basis of this evidence, Louisiana might have charged Wearry as an accessory after the fact. *La.Rev.Stat. Ann. § 14:25 (West 2007)* (providing a maximum prison term of five years for accessories after the fact). But Louisiana instead charged Wearry with capital murder, and the only evidence directly tying him to that crime was Scott’s dubious testimony, corroborated by the similarly suspect testimony of Brown.⁷

As the dissent recognizes, “Scott did not have an exemplary record of veracity.” *Post*, at 1009. Scott’s credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal *1007 score.⁸ Moreover, any juror who found Scott more credible in light of Brown’s testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister’s relationship with the victim’s sister—as the prosecution had insisted in its closing argument—but by the possibility of a reduced sentence on an existing conviction. See *Napue, supra*, at 270, 79 S.Ct. 1173 (even though the State had made no binding promises, a witness’ attempt to obtain a deal before testifying was material because the jury “might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution’s] favor”). Even if the jury—armed with all of this new evidence—*could* have voted to convict Wearry, we have “no confidence that it *would* have done so.” *Smith, supra*, at 1009, 132 S.Ct. at 630.

Reaching the opposite conclusion, the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, see *Kyles v. Whitley*, 514 U.S. 419, 441, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (requiring a “cumulative evaluation” of the materiality of wrongfully withheld evidence), emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, cf. *Porter v. McCollum*, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*) (“it was not reasonable to discount entirely the effect that [a defendant’s expert’s] testimony might have had on the jury” just because the State’s expert provided contrary

testimony), and failed even to mention the statements of the two inmates impeaching Scott.

III

In addition to defending the judgment of the Louisiana courts, the dissent criticizes the Court for deciding this “intensely factual question ... without full briefing and argument.” *Post*, at 1011. But the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law. See, e.g., *Mullenix v. Luna*, ante, at — U.S. —, —, 136 S.Ct. 305, 311, 193 L.Ed.2d 255 (2015) (*per curiam*); *Stanton v. Sims*, 571 U.S. —, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *Parker v. Matthews*, 567 U.S. —, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (*per curiam*); *Coleman v. Johnson*, 566 U.S. —, 132 S.Ct. 2060, 182 L.Ed.2d 978 (2012) (*per curiam*); *Wetzel v. Lambert*, 565 U.S. —, 132 S.Ct. 1195, 182 L.Ed.2d 35 (2012) (*per curiam*); *Ryburn v. Huff*, 565 U.S. —, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012) (*per curiam*); *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (*per curiam*); *Porter v. McCollum*, supra.

Because “[t]he petition does not ... fall into a category in which the Court has previously evinced an inclination to police factbound errors,” the dissent continues, “nothing warned the State,” when it was *1008 drafting its brief in opposition, that the Court might summarily reverse Weary’s conviction. *Post*, at 1010 – 1011. Contrary to the dissent, however, summarily deciding a capital case, when circumstances so warrant, is hardly unprecedented. See *Sears*, supra, at 951–952, 130 S.Ct. 3259 (vacating a state postconviction court’s denial of relief on a penalty-phase ineffective-assistance-of-counsel claim); *Porter*, supra, at 38–40, 130 S.Ct. 447 (attorney provided ineffective assistance of counsel by conducting a constitutionally inadequate investigation into mitigating evidence). Perhaps anticipating the possibility of summary reversal, the State devoted the bulk of its 30–page brief in opposition to a point-by-point rebuttal of Weary’s claims. Given this brief, as well as the State’s lower court filings similarly concentrating on evidence supporting its position, the chances that further briefing or argument would change the outcome are vanishingly slim.

[5] The dissent also inveighs against the Court’s “depart[ure] from our usual procedures ... [to] decide petitioner’s fact-intensive *Brady* claim at this stage ... [rather than] allow[ing] petitioner to raise that claim in a federal habeas proceeding.” *Post*, at 1011. This Court, of

course, has jurisdiction over the final judgments of state postconviction courts, see 28 U.S.C. § 1257(a), and exercises that jurisdiction in appropriate circumstances. Earlier this Term, for instance, we heard argument in *Foster v. Chatman*, No. 14–8349, which involves the Georgia courts’ denial of postconviction relief to a capital defendant raising a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See also *Smith*, 565 U.S., at —, 132 S.Ct., at 629–630 (reversing a state postconviction court’s denial of relief on a *Brady* claim); *Sears*, supra, at 946, 130 S.Ct. 3259. Reviewing the Louisiana courts’ denial of postconviction relief is thus hardly the bold departure the dissent paints it to be. The alternative to granting review, after all, is forcing Weary to endure yet more time on Louisiana’s death row in service of a conviction that is constitutionally flawed.

* * *

Because Weary’s due process rights were violated, we grant his petition for a writ of certiorari and motion for leave to proceed *in forma pauperis*, reverse the judgment of the Louisiana postconviction court, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

Without briefing or argument, the Court reverses a 14–year–old murder conviction on the ground that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over certain information that tended to exculpate petitioner. There is no question in my mind that the prosecution should have disclosed this information, but whether the information was sufficient to warrant reversing petitioner’s conviction is another matter. The failure to turn over exculpatory information violates due process only “ ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ” *Kyles v. Whitley*, 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.)).

The Court argues that the information in question here could have affected the jury’s verdict and that petitioner’s conviction must therefore be reversed. The Court ably

makes the case for reversal, *1009 but there is a reasonable contrary argument that petitioner’s conviction should stand because the undisclosed information would not have affected the jury’s verdict. I will briefly discuss the main points made in the *per curiam*, not for the purpose of showing that they are necessarily wrong, but to show that the *Brady* issue is not open and shut. For good reason, we generally do not decide cases without allowing the parties to file briefs and present argument. Questions that seem quite simple at first glance sometimes look very different after both sides are given a chance to make their case. Of course, this process means extra work for the Court. But it leads to better results, and it gives the losing side the satisfaction of knowing that at least its arguments have been fully heard. There is no justification for departing from our usual procedures in this case.

I

The first item of information discussed by the Court is a police report that recounts statements made about Sam Scott, a key witness for the prosecution, by a fellow inmate. According to this report, Scott told the inmate: “I’m gonna make sure Mike [*i.e.*, petitioner] gets the needle cause he jacked over me.” Pet. Exh. 13 in No. 01–FELN–015992, p. 103. Scott, who had been serving a sentence on unrelated drug charges, reportedly told the inmate that he had been expecting to be released but that he “still [had not] gone home because of this,” *i.e.*, petitioner’s prosecution. *Id.*, at 102. As stated in the report, Scott said that he was now facing the possibility of a 10–year sentence, apparently for his admitted role in the events surrounding the murder. The report did not provide any further explanation for Scott’s alleged statement that petitioner had “jacked [him] over.”

The Court reads the report to suggest that Scott implicated petitioner in the murder “to settle a personal score.” *Ante*, at 1012. But if petitioner’s counsel had actually attempted to use this evidence at trial, the net effect might well have been harmful, not helpful, to the defense. The undisclosed police report on which the Court relies may be read to mean that Scott blamed petitioner for putting him in the position of having to admit his own role in the events surrounding the murder and thereby expose himself to the 10–year sentence and lose an opportunity to secure early release from prison on the drug charges. If defense counsel had attempted to impeach Scott with this police report, the effort could have backfired by allowing the prosecution to return the jury’s focus to a point the State emphasized often during trial, namely, that Scott’s accusations were credible precisely because Scott had no

motive to tell a story that was contrary to his own interests. See, *e.g.*, 10 Record 2307 (Tr., Mar. 5, 2002) (“If [Scott] keeps his mouth shut, he is out in less than five more months.... [But] [i]nstead of getting out in 180 days, he is going to be doing more time”).¹

The Court next turns to an allegation that Scott had coached another prisoner to make up lies against petitioner. This prisoner never testified at trial, and there is a *1010 basis for arguing that this information would not have made a difference to the jury, which was well aware that Scott did not have an exemplary record of veracity. Scott himself admitted to fabricating information that he told the police during their investigations. In addition, a witness who *did* testify against petitioner at trial also accused Scott of asking him to lie, although admittedly this witness later denied making this accusation. Given that the jury convicted even with these quite serious strikes against Scott’s credibility, there is reason to question whether the jury would have seriously considered a different verdict because of an accusation from someone who never took the stand.

Third, the Court observes that the prosecution failed to turn over evidence that another witness, Eric Brown, had asked for favorable treatment from the district attorney in exchange for testifying against petitioner. It is true—and troubling—that the prosecutor claimed in her opening statement that Brown had not sought favorable treatment. But even so, it is far from clear that disclosing the contradictory information had real potential to affect the trial’s outcome. For one thing, there is no evidence that Brown (unlike Scott) actually received any deal, despite defense counsel’s efforts in cross-examination to establish that Brown’s testimony might have earned him leniency from the State. Moreover, Brown admitted during the exchange that he had manipulated his initial story to the police to avoid implicating himself in criminal activity. We know, then, that the jury harbored no illusions about the purity of Brown’s motives, notwithstanding the prosecutor’s opening misstatement.

Finally, the Court says that the medical records of Randy Hutchinson would have cast doubt on Scott’s trial testimony that Hutchinson repeatedly dragged the victim into and out of a car and bludgeoned him with a stick. The records reveal that Hutchinson had knee surgery to repair his patellar tendon just nine days before the murder. But one of the State’s witnesses testified at trial that he had seen records showing that Hutchinson had had surgery on his knee “about nine days before the homicide happened.” 10 Record 2261 (Tr., Mar. 5, 2002); see also *id.*, at 2263. The jury thus knew the most salient fact revealed by these records—that Scott had attributed significant strength and

mobility to a man nine days removed from knee surgery.² Given that these particular details about Hutchinson’s actions were a relatively minor part of Scott’s account of the crime and the State’s case against petitioner, the significance of the undisclosed medical records is subject to reasonable dispute.

While the Court highlights the exculpatory quality of the withheld information, the Court downplays the considerable evidence of petitioner’s guilt. Aside from Scott’s and Brown’s testimony, three witnesses told the jury that they saw petitioner and others driving around shortly after the murder in the victim’s red car, which according to one of these witnesses had blood on its exterior. Petitioner offered to sell an Albany High School class ring to *1011 one of these witnesses and a set of new speakers to another. The third witness said he saw petitioner throw away a bottle of Tommy Hilfiger cologne. Meanwhile, the victim’s mother testified that her son wore an Albany High class ring that was not recovered with his body, had received speakers as a gift shortly before his murder, and had a bottle of Tommy Hilfiger cologne with him on the night when he was killed. In addition, three jailers testified that petitioner called his father after his eventual arrest and stated that “he didn’t know what he was doing in jail because he didn’t do anything [and] was just an innocent bystander.” 9 Record 2120 (Tr., Mar. 4, 2002); see also *id.*, at 2124, 2126.

In short, this is far from a case in which the withheld information would have allowed the defense to undermine “the *only* evidence linking [petitioner] to the crime.” *Smith v. Cain*, 565 U.S. 73, —, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012).

II

Whether disclosing the information at issue realistically could have changed the trial’s outcome is indisputably an intensely factual question. Under *Brady*, we must evaluate the significance of the withheld information in light of *all* the proof at petitioner’s trial. See *Kyles*, 514 U.S., at 435, 115 S.Ct. 1555 (*Brady* is violated when the withheld “evidence could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict” (emphasis added)); *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (*Brady* materiality “must be evaluated in the context of *the entire record*” (emphasis added)). It is unusual and, in my judgment, unreasonable for us to decide such a question without full briefing and argument.

At this stage, all that we have from the State is its brief in opposition to the petition for certiorari. And the State had ample reason to believe when it submitted that brief that the question on the table was whether the Court should hear the case, not whether petitioner’s conviction should be reversed. The State undoubtedly knew that we generally deny certiorari on factbound questions that do not implicate any disputed legal issue. See, *e.g.*, this Court’s Rule 10; S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013). Nothing warned the State that this petition was likely to produce an exception to that general rule. The petition does not, for instance, fall into a category in which the Court has previously evinced an inclination to police factbound errors. Cf. *Cash v. Maxwell*, 565 U.S. —, —, 132 S.Ct. 611, 616–617, 181 L.Ed.2d 785 (2012) (Scalia, J., dissenting from denial of certiorari) (listing cases from one such category).

To the contrary, we have previously told litigants that petitions like the one here, challenging a state court’s denial of postconviction relief, are particularly *unlikely* to be granted: We “ ‘rarely gran[t] review at this stage’ ” of litigation, even when a petition raises “ ‘arguably meritorious federal constitutional claims,’ ” because we prefer that the claims be reviewed first by a district court and court of appeals in a federal habeas proceeding. *Lawrence v. Florida*, 549 U.S. 327, 335, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (quoting *Kyles v. Whitley*, 498 U.S. 931, 932, 111 S.Ct. 333, 112 L.Ed.2d 298 (1990) (Stevens, J., concurring in denial of stay of execution)).³

*1012 Why, then, has the Court decided to depart from our usual procedures and decide petitioner’s fact-intensive *Brady* claim at this stage? Why not allow petitioner to raise that claim in a federal habeas proceeding? If the case took that course, it would not reach us until a district court and a court of appeals had studied the record and evaluated the likely impact of the information in question.

One consequence of waiting until the claim was raised in a federal habeas proceeding is that our review would then be governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, relief could be granted only if it could be said that the state court’s rejection of the claim represented an “unreasonable application” of *Brady*. 28 U.S.C. § 2254(d)(1). By intervening now before AEDPA comes into play, the Court avoids the application of that standard and is able to exercise plenary review. But if the *Brady* claim is as open-and-shut as the Court maintains, AEDPA would not present an obstacle to the granting of habeas

relief. On the other hand, if reasonable jurists could disagree about the application of *Brady* to the facts of this case, there is no good reason to dispose of this case summarily. The State should be given the opportunity to make its full case.

In my view, therefore, summary reversal is highly inappropriate. The Court is anxious to vacate petitioner’s conviction before the State has the opportunity to make its case. But if we are going to intervene at this stage, we should grant the petition and hear the case on the merits. There is room on our docket to give this case the careful

consideration it deserves.

All Citations

136 S.Ct. 1002, 194 L.Ed.2d 78, 14 Cal. Daily Op. Serv. 2495, 2016 Daily Journal D.A.R. 2275, 26 Fla. L. Weekly Fed. S 17

Footnotes

- 1 Weary argued, *inter alia*, that the trial court improperly denied his for-cause challenges, and that the prosecution discriminated on the basis of race in jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Finding both jury-selection claims credible, then-Justice Johnson dissented from the affirmance of Weary’s conviction. *State v. Weary*, 2003–3067 (La.4/2/06), 931 So.2d 297, 328–337. (Weary’s name is misspelled in the direct-appeal case caption.)
- 2 Illustrative of the liberties the dissent takes with the record is the assertion that “Scott blamed [Weary] for putting him in the position of having to admit his own role in the events surrounding the murder.” *Post*, at 1009 (opinion of ALITO, J.). Introducing the inmate’s statement, the dissent therefore suggests, might have “backfired by allowing the prosecution to return the jury’s focus to a point the State emphasized often during trial, namely, that Scott’s accusations were credible precisely because Scott had no motive to tell a story that was contrary to his own interests.” *Id.*, at 1009 – 1010. True, according to the inmate, Scott had complained that his identification of Weary had resulted in a lengthier prison term. The inmate, however, did not suggest that Scott was angry with Weary *because* he had suffered adverse consequences as a result of Weary’s crime. Instead, the inmate separately stated that Scott “wouldn’t tell me who did it”—*i.e.*, who killed Eric Walber—“but he said I’m gonna make sure Mike gets the needle cause he jacked over me.” Pet. Exh. 13 in No. 01–FELN–015992, p. 103. See also *ibid.* (“If [Scott] would have told me who did this I would tell because I have a heart and what they did wasn’t right”). Scott’s refusal to identify Weary as the culprit—while also endeavoring to “make sure Mike gets the needle,” *ibid.*—suggests that weary did *not* commit the crime, but Scott had decided to bring him down anyway. Nor, contrary to the dissent, is there any reason to believe that Scott anticipated his participation in this case would cost him additional years in prison. Notably, in the first of his five accounts to police, Scott reported that he had not been present at the time of the murder and had learned about it only after the fact. Indeed, it is at least as plausible as the dissent’s hypothesis that Scott believed implicating Weary might win him early release on his existing conviction.
- 3 The dissent emphasizes a State’s witness’ testimony that “Hutchinson had had surgery on his knee ‘about nine days before the homicide happened.’ ” *Post*, at 1010 (quoting 10 Record 2261 (Tr., Mar. 5, 2002)). But from this witness’ statement, neither Weary nor the jury had any way of knowing what the medical records would have revealed: Hutchinson had undergone a patellar-tendon repair rather than a routine minor procedure.
- 4 Weary’s trial attorney did ask the public defender’s investigator to look into the backgrounds of the State’s witnesses and to speak with Weary’s family members. But the attorney testified at the collateral-review hearing that he did not know what persons the investigator contacted and, in any event, he had serious doubts about the investigator’s qualifications and competence. Moreover, there is no indication that the investigator ever engaged in inquiries regarding Scott’s background or his whereabouts on the night of the murder.
- 5 Justice Crichton would have granted Weary’s petition and remanded for the trial court to address his claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). App. to Pet. for Cert. A–15. Weary does not raise his *Atkins* claim in his petition for a writ of certiorari.
- 6 Given this legal standard, Weary can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury’s verdict.
- 7 As for the three jailers who testified to overhearing Weary call himself an “innocent bystander,” *post*, at 1010, so characterizing oneself is the opposite of an admission of guilt.

- 8 Because the inmate who told police that Scott may have wanted to settle a score did so close to the end of trial, the State argues, the inmate's "statement was probably ... never seen by anyone involved with the actual trial until ... it was [all] over, [i]f at all." Brief in Opposition 18. But "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 869–870, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (*per curiam*) (internal quotation marks omitted). See also *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (rejecting Louisiana's plea for a rule that would not hold the State responsible for failing to disclose exculpatory evidence about which prosecutors did not learn until after trial when that evidence was in the possession of police investigators at the time of trial).
- 1 The majority claims that Scott's unwillingness to tell this fellow inmate who killed the victim somehow exculpates petitioner. See *ante*, at 1004, n. 2. In my view, one cannot reasonably infer from the inmate's statement, "[Scott] wouldn't tell me who did it but he said I'm gonna make sure Mike gets the needle cause he jacked over me," that Scott believed petitioner Michael Wearry to be innocent—especially against the backdrop of Scott's complaints about his increased imprisonment. Pet. Exh. 13 in No. 01–FELN–015992, p. 103.
- 2 The *per curiam* argues that the medical records might have had a greater effect on the jury because they mentioned the particular type of knee surgery that petitioner had undergone, and that is certainly possible. But what is important at this stage is that the basic fact—that petitioner had recently undergone knee surgery—was known to the jury, and the incremental impact of the additional details supplied by the medical records is far from clear. Even at the postconviction evidentiary hearing, the defense's and State's medical experts disagreed about whether the particular procedure at issue would have left the then–20–year–old Hutchinson incapable of the acts Scott described.
- 3 The Court implies that meritorious claims in capital cases do constitute a category of factbound errors that the Court has shown willingness to correct on certiorari papers alone. *Ante*, at 1007. In support, it cites *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (*per curiam*), and *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*). Notably, *Porter* did not arise directly from state postconviction proceedings, but in federal habeas. And in neither case did the Court take the dramatic step it takes here and summarily reverse a long-final state conviction for capital murder; both cases addressed errors related to the defendants' sentences.

JUDGMENT OF PROBATED SUSPENSION AFFIRMED

Opinion and Judgment Signed and Delivered December 17, 2015.



**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

No. 55649

WILLIAM ALLEN SCHULTZ, APPELLANT

v.

**COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE**

On Appeal from the Evidentiary Panel 14-3 (Denton) for the
State Bar of Texas District 14 Grievance Committee

SBOT Case No. D0121247202

Opinion and Judgment on Appeal

COUNSEL:

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Discipline of the State Bar of Texas.

OPINION

In this attorney discipline case of first impression, we must determine whether the Texas Disciplinary Rules of Professional Conduct Rule 3.09(d) codifies the constitutional duty to disclose exculpatory evidence imposed under *Brady v. Maryland*, 373 U.S. 83 (1963).¹ No Texas appellate court has yet determined whether the ethical duty of a prosecutor to disclose to the defense information that “tends to negate the guilt of the accused” pursuant to Rule 3.09(d) is limited to the scope of “materiality” in *Brady*. Based on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, we hold that Rule 3.09(d) is broader than *Brady*.

The evidentiary panel found that William Allen Schultz violated Rules 3.09(d) and 3.04(a), Tex. Disciplinary Rules Prof'l Conduct, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (“Rule(s)”), and imposed a six-month fully probated suspension.² Rule 3.09(d) requires a prosecutor in a criminal case to:

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 3.04(a) requires that:

a lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

¹ The United States Supreme Court has issued numerous opinions modifying or clarifying the original holding in *Brady v. Maryland*. This opinion will refer to those cases collectively simply as “*Brady*,” mindful that the prosecutor's ethical duty to disclose impeachment evidence is specifically discussed in *Giglio v. United States*, 405 U.S. 150 (1972).

² Schultz completed the six-month probation prior to submission of this appeal. He does not challenge the disciplinary sanction imposed but only the findings of misconduct.

Schultz, Assistant District Attorney for Denton County, admitted during the underlying criminal proceedings and during the disciplinary hearing that he did not disclose to the defense the limited ability of the state's key witness to identify her attacker because he did not think it was either exculpatory or material. He relied on his interpretation of what was required under *Brady* in his own defense that disclosure of this information was not legally required.

Schultz later conceded at the disciplinary hearing that the information should have been disclosed. Further, the District Attorney's office stipulated during the criminal proceeding that the information should have been disclosed. The trial judge in the criminal case found that Schultz's failure to disclose the information violated *Brady* and granted a mistrial to which double jeopardy attached.

Schultz argues that he did not violate Rule 3.09(d) because the evidence in question was not material or exculpatory; therefore, his ethical duty under Rule 3.09(d) cannot exceed the legal obligations of *Brady*. He further asserts that any failure to disclose information would violate Rule 3.09(d) only if there were a reasonable probability that the information or evidence withheld would be admissible and make a difference in the outcome of the trial. Schultz also argues that he lacked actual knowledge of some of the information in question. Moreover, as to Rule 3.04(a) he argues that the rule prohibits only intentional destruction of evidence and he did not intend to conceal evidence. Finally, for the first time on appeal, Schultz challenges the term "unlawfully" in Rule 3.04(a) as unconstitutionally vague.

The Commission for Lawyer Discipline³ ("Commission") argues that the disciplinary judgment should be affirmed based on the evidence in the record that Schultz knew and failed to

³ The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas that exercises all rights characteristically reposed in a client in lawyer disciplinary and disability proceedings. Tex. Rules Disciplinary P. R. 1.06D and 4.06A, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013). The Chief Disciplinary Counsel of the State Bar of Texas represents the Commission in disciplinary proceedings.

disclose to the defense that the state's key witness had only assumed her assailant to be her husband, i.e. the identification was based on indirect factors as opposed to actually seeing his face. The Commission also argues that limiting Rule 3.09(d) to the constitutional duty to disclose exculpatory, impeaching, and mitigation evidence under *Brady* is not supported by the plain language or purpose of the rule. The Commission further contends that Schultz argues for an intent element not found in Rule 3.04(a). Finally, the Commission urges that we should affirm the judgment because there is substantial evidence in this record that Schultz violated *Brady*.

We hold that the materiality standard under *Brady* does not apply to Rule 3.09(d). We further hold that failure to disclose information otherwise required by law to be disclosed, regardless of intent, constitutes unlawfully obstructing another party's access to evidence in violation of Rule 3.04(a). Finally, there is substantial evidence in this record to support the findings that Schultz failed to make timely disclosure of all evidence known to him that tended to negate the accused's guilt and, in so doing, unlawfully obstructed another party's access to evidence. Therefore, we affirm.

I. Background

A. Underlying criminal prosecution

This disciplinary case arises out of the Denton County District Attorney's prosecution of Silvano Uriostegui for aggravated assault with a deadly weapon of his estranged wife, Maria Uriostegui. She was attacked and stabbed in the bedroom of her apartment at night. The only light in the apartment was from a TV in another room. When interviewed, Maria told the police that Silvano had attacked her. She later testified in a hearing on a protective order that Silvano had attacked her. Maria's primary language is Spanish. During the various interviews and hearings made a part of this

record, most of the questions to her were translated into Spanish, and her statements and testimony were translated into English.

Appellant Schultz was assigned to prosecute the Uriostegui case in 2011 when he became the head of the family violence section of the Denton County District Attorney's office. He was the second assistant district attorney assigned as the lead prosecutor. Schultz was licensed to practice law in Texas in 1995 and had been a state and federal prosecutor for over 16 years.

Victor Amador was appointed to defend Silvano in March 2011. He was Silvano's third defense attorney. Amador requested and received the initial production of discovery from Mike Shovlin, the original prosecutor. In June, 2011 Amador requested additional discovery, including broad requests for all evidence favorable to the defendant. He met with Schultz several times to discuss discovery.

In January 2012, one month before the case was set for trial, Schultz and several other people from his office met with Maria. During the interview, Maria disclosed that she thought the person who attacked her was Silvano Uriostegui based on his smell, the sole of his boot, and his stature as seen in his shadow. Maria, through a translator, said "I couldn't see his face." Schultz did not believe that any of this information was exculpatory. Schultz did not disclose Maria's statements to the defense.

B. Sentencing hearing and mistrial

On February 13, 2012 Silvano entered a plea of guilty to the indictment, but exercised his right to have a jury determine his sentence. On February 14, 2012, after a jury was selected, the State began its case-in-chief at sentencing. Schultz called Maria as a witness. Maria testified that she did not see her attacker's face and that she did not know whether her attacker was Silvano. Maria also testified that she had told the prosecutor earlier that she did not see who had attacked her. She

explained that she had testified at the protective order hearing that Silvano was her attacker because she had assumed it was him from his smell and boot.

Schultz told the trial court that Maria had told him that she had identified Silvano by his smell, boot, and stature, but that he did not think that the information was exculpatory. Schultz believed her statement that she did not see her attacker's face was at most a prior inconsistent statement. Counsel for Schultz makes a similar argument on appeal. Both the evidentiary panel and this Board reject this argument based on Schultz's own actions: during his investigation, Schultz had enough concern that Maria's attacker might be Alvero Malagon, a man who had previously assaulted her that he investigated and confirmed that Malagon was incarcerated on the date of the attack. The defense attorney was unaware of any of this until the testimony during the sentencing trial. Based on Maria's testimony, defense counsel moved for a mistrial. The court found that the undisclosed information was exculpatory and granted the mistrial.

C. Habeas corpus hearing

Defense counsel filed an application for writ of habeas corpus seeking to have double jeopardy attach to Silvano's mistrial (thereby preventing a retrial)⁴ because the evidence was exculpatory, violated *Brady*, and was intentionally suppressed. The district judge who had presided at the criminal trial heard the habeas application. Two assistant district attorneys representing the state at the habeas hearing stipulated that the manner in which the victim had identified her assailant could have been useful to the defendant and should have been disclosed.⁵

Schultz was called as a witness at the hearing on the writ of habeas corpus. Schultz testified

⁴ Double jeopardy may attach where a defendant's mistrial was "necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence." *Ex parte Masonheimer*, 220 S.W.3d 494, 507-08 (Tex. Crim. App. 2007).

⁵ The state also stipulated that neither Shovlin nor Schultz had disclosed the lack of direct identifying information to either of Silvano's former attorneys.

that he did not directly ask Maria during the January interview whether she actually saw her attacker's face. He knew before trial that Maria had not seen her attacker's face but did not disclose it to the defendant because "I had no doubts that she was telling me that he [Silvano] is the attacker." It never occurred to Schultz that this could be *Brady* material. In hindsight, though, Schultz said that he should have told the defense how Maria arrived at the conclusion that Silvano was her attacker.

Forest Beadle was Schultz's co-counsel in the Uriostegui case. He testified at the hearing that he first learned that Maria had not seen her attacker's face during the January interview when he heard the statement from the translator. He knew he had information favorable to the defense before the plea but told no one. In retrospect, he agreed that the information should have been disclosed.⁶

The court granted the habeas relief and allowed Silvano to withdraw his guilty plea. The court further held that double jeopardy attached because the state had purposefully withheld exculpatory information and intentionally goaded the defense into pleading and seeking a mistrial.

Thereafter, the Denton District Attorney reported Schultz's conduct to the State Bar of Texas but excused it as unintentional. Amador obtained a copy of the letter sent to the State Bar by the District Attorney after receiving an opinion from the Texas Attorney General that the letter should be released. Amador then filed a grievance against Schultz with the State Bar that is the basis of this disciplinary proceeding.

II. Standard of review

This case requires BODA to review both legal issues interpreting the substantive rules of professional conduct and the evidentiary panel's fact findings of misconduct. BODA reviews the legal conclusions of the evidentiary panel *de novo*. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994)

⁶ According to the record on appeal, a disciplinary case against co-counsel was opened but ultimately dismissed.

(questions of law are always subject to *de novo* review); *Comm'n for Lawyer Discipline v. A Texas Attorney*, 2015 WL 5130876 *2 (Texas Bd. Disp. App. 55619, August 27, 2015; no appeal); *Weir v. Comm'n for Lawyer Discipline*, 2005 WL 6283558 at *2 (Texas Bd. Disp. App. 32082, June 30, 2005; no appeal).

BODA reviews the evidence supporting the findings of fact leading to the conclusion that an attorney committed professional misconduct under a substantial evidence standard. Tex. Gov't Code Ann. § 81.072(b)(7) (West Supp. 2014); Tex. Rules Disciplinary P. R. 2.24; *Wilson v. Comm'n for Lawyer Discipline*, 2011 WL 683809 *2 (Tex. Bd. Disp. App. 46432, January 30, 2011; aff'd March 3, 2012). BODA is not subject to the Texas Administrative Procedure Act, Tex. Gov't Code Ann. §§ 2001.001—2001.092, but cases construing substantial evidence under the Act are instructive. *In re Humphreys*, 880 S.W.2d at 404. “At its core, the substantial evidence rule is a reasonableness test or a rational basis test.” *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). BODA must affirm a judgment “if it may be upheld on any basis that has support in the evidence under any theory of law applicable to the case.” *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Under the substantial evidence standard, the reviewing court focuses on whether there is a reasonable basis in the record for the decision below rather than on the correctness of the decision. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d at 185. “The findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise.” *Id.* Showing the record lacks substantial evidence is a difficult burden for the appellant to meet:

Although substantial evidence is more than a mere scintilla, *Alamo Express, Inc. v. Union City Transfer*, 158 Tex. 234, 309 S.W.2d 815, 823 (1958), the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. *Lewis v. Metropolitan Savings and*

Loan Association, 550 S.W.2d 11, 13 (Tex. 1977). . . . A reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis for the action taken by the agency. *Railroad Commission v. City of Austin*, 524 S.W.2d 262, 279 (Tex. 1975). Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *Suburban Utility Corp. v. Public Utility Commission*, 652 S.W.2d 358, 364 (Tex. 1983).

Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452-53 (Tex. 1984).

III. Duty to disclose under Texas Disciplinary Rules of Professional Conduct Rule 3.09(d)

Schultz asks BODA to limit the scope of the ethical duty to disclose information under Rule 3.09(d) to the due process requirement to disclose exculpatory evidence under *Brady*. Schultz's main justification for limiting the duty to disclose information under Rule 3.09(d) to material evidence under *Brady* is to avoid multiple confusing standards for prosecutors that could result in an unfair sanction when no constitutional violation of the right to a fair trial has occurred. He argues that expanding Rule 3.09(d) beyond the materiality standard of *Brady* would result in strict liability for prosecutors.

We do not find this argument persuasive, particularly because of the recent amendment to Texas criminal procedure that now mandates the same standard for disclosure as Rule 3.09(d):

Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

Tex. Code Crim. Proc. Ann. art. 39.14(h) (West Supp. 2014) (effective January 1, 2014). Although art. 39.14 is not dispositive in this case, its promulgation refutes Schultz's position that imposing a broader duty on prosecutors to disclose information to the defense than *Brady* creates an unworkable burden. That "unworkable burden," if there is one, already exists.

A. Rule 3.09(d) is unambiguous

The disciplinary rules are treated like statutes, *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988). A fundamental rule of statutory construction is to ascertain and give effect to the drafter's intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Rule 3.09(d) is identical to the American Bar Association Model Rule 3.8(d). Model Rules of Prof'l Conduct 3.8(d) (2015). The goal of Rule 3.09(d) is to impose on a prosecutor a professional obligation to “see that the defendant is accorded procedural justice, that the defendant’s guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor.” Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1. Unlike *Brady*, the rule imposes this obligation on the prosecutor without regard for the anticipated impact of the information on the outcome of a trial. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

Ethically, under Rule 3.09(d) the prosecution must turn over any information that “tends to negate the guilt” or mitigate the offense. There is no materiality requirement. No analysis is necessary to determine whether disclosure would probably have led to a different outcome of the trial. The information need not be admissible at trial, and the information must be disclosed “timely,” that is, “as soon as reasonably practicable so that the defense can make meaningful use of it.” ABA Formal Op. 09-454. In addition, unlike *Brady*, Rule 3.09(d) limits the information to that actually known by the prosecutor. Under the disciplinary rules, actual knowledge may be inferred from circumstances. Tex. Disciplinary Rules Prof'l Conduct Terminology; *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 699 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The ethics rules acknowledge that a prosecutor shall not make a determination of materiality in his ethical obligation to disclose information to the defense. In an adversarial system,

it is the role of both parties to develop arguments why certain evidence is irrelevant, immaterial, and inadmissible. It is the prosecutor's role to disclose impeachment information, the defense lawyer's role to present the impeaching information as evidence, and the trial court's role to determine whether the information is admissible evidence. Rule 3.09(d) is specifically intended to advise—and prevent—a prosecutor from making an incorrect judgment call, such as that Maria's "inconsistent statements" did not rise to the level of *Brady*-mandated disclosure. The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: if there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure.

B. Distinct and independent duty from *Brady*

The goal of *Brady* and its progeny, on the other hand, is to ensure that a criminal conviction is not tainted by the failure of the justice system to provide constitutional due process. Rather than demanding individual accountability, as does Rule 3.09(d), *Brady* holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Whether the prosecutor deliberately withheld evidence or negligently failed to disclose it is irrelevant: "inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999).

The state is not required under *Brady* to turn over evidence that is only "generally useful" to the defense. *Iness v. State*, 606 S.W.2d 306, 311 (Tex. Crim. App. 1980). For nondisclosure to result in a due process violation, the evidence in question must be "material." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Hampton v. State*,

86 S.W.3d 603, 612 (Tex. Crim. App. 2002). A “reasonable probability” is probability sufficient to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Materiality applies to suppressed evidence “collectively, not item by item.” *Kyles v. Whitley*, 514 U.S. at 436. The question is not whether the defendant would have received a different verdict with the disclosed evidence, but “whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. at 434.

A *Brady* violation is established by showing “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. at 435. “Harmless error analysis does not apply.” *Id.* “*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant.” *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir. 2006) (citing *Giglio v. United States*, 405 U.S. 150 (1972)).

Thus, *Brady* seeks to protect the integrity of the outcome of a trial without regard for any individual prosecutor’s culpability. The ethics rule and disciplinary proceedings serve an entirely different purpose: protection of the public. The ethics rule protects the public, in part, because prosecutors have absolute immunity from suit, regardless of malicious or dishonest action, under 42 U.S.C. § 1983, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), or under state law. *Charleston v. Allen*, 420 S.W.3d 134, 137-38 (Tex. App.—Texarkana 2012, no pet.).

The ethical standard’s independent purpose of protecting the public is further apparent in this case where the withheld information came to light during the proceeding. Determining the materiality of undisclosed evidence by applying a *Brady* test in the context of an aborted prosecution is speculative. Therefore, limiting the ethical duty, as opposed to the constitutional duty, to disclose information would limit prosecutors’ accountability to the public because the failure to disclose would only arise if a conviction had occurred.

Courts and commentators have recognized that the ethical obligation to disclose is more extensive than the constitutional duty. The United States Supreme Court has acknowledged that the ethical duty to turn over information to the defense is broader than the *Brady* requirements: “[t]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate...” *Kyles v. Whitley*, 514 U.S. at 437 (also citing ABA Model Rule 3.8(d)). “[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.” *Cone v. Bell*, 556 U.S. 449, 470 n. 15 (2009) (citing ABA Model Rule 3.8(d)).

The ABA has explained in detail that the Model Rule does not codify *Brady*: “Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence... without regard to the anticipated impact of the evidence or information on a trial’s outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.” ABA Formal Op. 09-454. The drafters of Model Rule 3.8(d) deliberately made no attempt to codify the evolving constitutional law. *Id.* “A prosecutor’s timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions.” *Id.* The opinion also notes that the requirement that the prosecutor have actual knowledge of the evidence or information “limits what might otherwise appear to be an obligation substantially more onerous than [the] prosecutor’s legal obligations under other law.” *Id.*

The ABA opinion further explains that the ethical obligation’s usefulness to the defense in plea bargaining is a key difference from the duty under *Brady*. “Among the most significant purposes for which disclosure must be made under [the rule] is to enable defense counsel to advise the defendant regarding whether to plead guilty.” Thus, timely disclosure requires a prosecutor to disclose

information under the rule prior to a guilty plea proceeding. *Id.* “[T]he ethical duty of disclosure ... also requires disclosure of favorable information [t]hough possibly inadmissible itself ... [that] may lead a defendant’s lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations.” *Id.*

The ABA opinion also emphasizes that evaluating the usefulness of the information is up to the defense. “Nothing suggests a *de minimus* exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or that the favorable evidence is highly unreliable.” *Id.* “The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.” *Id.*

In a disciplinary proceeding against a prosecutor arising from a criminal case similar to the one here, the D.C. Court of Appeals held that the “retrospective materiality analysis” of *Brady* does not apply to Rule 3.08(e).⁷ *In re Kline*, 113 A.3d 202, 208 (D.C. Cir. 2015). The reliability of the state’s eyewitness was the principal issue at trial. The victim had originally told police that he did not know who shot him. The police made Kline aware of this statement but Kline told the defense only that he did not have any truly exculpatory evidence. Kline defended his disciplinary case by testifying that he did not believe that the evidence was *Brady* material and that the “gist” of the undisclosed evidence was in the police reports turned over to the defense.

The trial court challenged Kline that his assumptions prevented him from recognizing exculpatory evidence: “Because you are sure you have the guy, no one could conjure up a *Brady* argument? ... That is why *Brady* doesn’t leave it up to the prosecutor, for that very reason. You are

⁷ District of Columbia Rules of Professional Conduct Rule 3.8(e) prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused. *In re Kline*, 113 A.3d 202, 204 (D.C. Cir. 2015).

always sure you have got the right guy or you wouldn't be prosecuting.” *Id.* at 205. The court affirmed the disciplinary judgment, holding that where the prosecutor consciously decided that information was not exculpatory and therefore did not have to be produced, he had acted deliberately and therefore intentionally. *Id.* at 214.

The North Dakota Supreme Court emphasized the plain wording of the disciplinary rule and the fundamentally different purposes of the underlying criminal action and the disciplinary proceeding in holding that its rule 3.8(d)⁸ did not require a materiality element. *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 14, 820 N.W.2d 672 (2012). The court was not persuaded by that respondent's argument that interpreting North Dakota's Rule 3.8(d) in a “wholly separate way from the well-established discovery doctrine” of *Brady* would result in an “unworkable system.” *Id.* at ¶ 12. The court also stated that potential prejudice to the defendant might affect the sanction imposed but should not affect the initial determination whether a violation had occurred. *Id.* at ¶ 13. The court further held that Rule 3.8(d) could be violated negligently, noting that the plain language of the rule does not create an exception for unintentional violations. *Id.* at ¶¶ 18-19.

Schultz has attempted to minimize during this appeal whether his conduct violated *Brady*, despite the trial judge's determination that there was a *Brady* violation and the relief granted as a result of the *Brady* violation. The judge, who was in the best position to determine whether the information was material and whether nondisclosure was intentional, found the prosecutors so “evasive” and “disingenuous” that he banned Schultz and his co-counsel from appearing in his court.⁹

⁸ North Dakota Rule of Professional Conduct 3.8(d) provides that a prosecutor in a criminal case shall “disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . .” *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 11, 820 N.W.2d 672 (2012).

⁹ At the conclusion of the habeas hearing the judge remarked:

I can't fathom how they do not understand this is a *Brady* violation only in retrospect. My jaw dropped to the ground when Mrs. Uriostegui testified the way that she did. I was shocked. And for the state to actually know this and not disclose it..., the only good thing I can say from this miserable

A *Brady* violation—which requires a finding of materiality—is a higher evidentiary standard and carries with it significant legal relief. On the contrary, a prosecutor’s Rule 3.09(d) violation alone provides no legal relief for a criminal defendant and would not have prevented Silvano from being re-tried absent a *Brady* violation.

IV. Texas Disciplinary Rules of Professional Conduct Rule 3.04(a)

Tex. Disciplinary Rules Prof’l Conduct R. 3.04(a) requires that a “lawyer shall not unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.” Schultz argues that (1) he did not violate Rule 3.04(a) because he did not intentionally commit an affirmative act to obstruct a party’s access to evidence, (2) at most he acted negligently, and (3) Rule 3.04(a) is unconstitutionally vague on its face. We hold that the evidentiary panel correctly construed the rule to apply to the situation where a prosecutor failed to disclose information tending to negate the guilt of the accused as required by Rule 3.09(d) or other law, regardless of intent. We also hold that the plain language of Rule 3.04(a) is not vague. Therefore, we overrule Schultz’s challenges to whether he violated Rule 3.04(a).

hearing is at least Forrest Beadle told the truth and was not evasive and was straightforward. I don’t particularly like his answers, but he at least was honest.

I can’t fathom how somebody who’s been to law school, let alone practiced law for this period of time, doesn’t understand *Brady*, doesn’t understand the law. And based upon their answers, the way they were answered – the questions were answered, the original conduct in trial, I can only find that they intentionally goaded the defense into having to make a motion for mistrial, that they purposefully withheld *Brady* material.

And how disingenuous it is to get up here and testify that you don’t think that it’s *Brady* that the victim can’t identify by face or by anything other than smell and a boot who the attacker is, to indicate, as I hear indicated in the original trial that the state even had some doubt as to who the attacker was because she – because the victim could not identify the face, because she had previously been assaulted, but that individual was in prison at the time that this assault occurred.

I don’t know what’s going on. And on the basis of my ruling, I’m going to have to ban both Mr. Beadle and Mr. Schultz from my courtroom. They’re not allowed to appear in this courtroom until I rule otherwise.

A. Justiciability

At no prior point during the disciplinary process has Schultz argued that Rule 3.04(a) is vague, let alone that the Rule should be declared unconstitutional and stricken altogether. Schultz did not challenge the rule either on its face or as applied to him during the evidentiary hearing, and he has not cited to any authority that would permit him to raise the issue for the first time on appeal.

The Court of Criminal Appeals has spoken clearly that a facial challenge to a statute or rule cannot be raised for the first time on appeal. *In re Karenev*, 281 S.W.3d 428 (Tex. Crim. App. 2009); *Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio, 2009, no pet.). Statutes are presumed to be constitutional until it is determined otherwise. *Flores v. State*, 245 S.W.3d 432, 438 (Tex.Crim.App.2008); *Doe v. State*, 112 S.W.3d 532, 539 (Tex. Crim. App. 2003). Similarly, the Texas Supreme Court requires that a constitutional claim be raised in the trial court before it may be considered on appeal. *Wood v. Wood*, 159 Tex. 350, 357, 320 S.W.2d 807, 812 (1959); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993).

We hold that the analysis in *Karenev* and *Wood* similarly applies in a facial challenge to the Texas Disciplinary Rules of Professional Conduct. This standard has been consistently applied throughout the courts of appeals. *See, e.g., State Bar v. Leighton*, 956 S.W.2d 667, 671 (Tex. App.—San Antonio 1997), (constitutional due process claim can be waived if not presented to trial court), *pet. denied per curiam*, 964 S.W.2d 944 (1998); *Hernandez v. State Bar of Texas*, 812 S.W.2d 75, 78 (Tex. App.—Corpus Christi 1991, no writ) (failure to assert constitutionality arguments to the trial court); *compare Brown v. Comm’n for Lawyer Discipline*, 980 S.W.2d 675 (Tex. App.—San Antonio 1998) (court went to some length to find that the constitutional issue was raised and preserved for appeal.¹⁰) Having failed to raise his vagueness challenge to Rule 3.04(a) to the evidentiary panel,

¹⁰ The appellate court in *Brown* decided that reference in *Brown*’s closing argument to “most of those [provisions], when challenged, as applied to specific facts, have been held to be unconstitutionally vague and

Schultz may not now do so for the first time on appeal.

B. “Unlawfully” is not unconstitutionally vague

But even if Schultz had raised his challenge the constitutionality of the term “unlawfully” in Rule 3.04(a) before the evidentiary panel, we find that the Rule is not unconstitutionally vague. “To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids.” *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (discussing, *inter alia*, whether Tex. Disciplinary Rules Prof’l Conduct R. 3.06(d) prohibiting certain contact with jurors post-trial was unconstitutionally vague). “[I]n scrutinizing a disciplinary rule directed solely at lawyers we ask whether the ordinary lawyer, with ‘the benefit of guidance provided by case law, court rules and the lore of the profession,’ could understand and comply with it.” *Id.* “Disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes.” *Id.* at 438.¹¹

A facial challenge is difficult to sustain because the individual advancing the challenge must establish that no set of circumstances exists under which the statute is valid. *Brown v. State*, 468 S.W.3d 158, 173-74 (Tex. App.—Houston [14th Dist.] 2015, pet. filed July 30, 2015); *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d 133, 138 (Tex. App.—Amarillo 2014, no pet.); *Shaffer v. State*, 184 S.W.3d 353, 364 (Tex. App.—Fort Worth 2006, pet. ref’d). A complainant who engages in some conduct that is clearly proscribed “cannot complain of the vagueness of the law as applied to the conduct of others.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. “A court should therefore examine the complainant’s conduct before analyzing the other hypothetical applications of the law.” *Hoffman*

unenforceable under both Texas law and federal law” was sufficient to preserve the point for appeal. *Brown v. Comm’n for Lawyer Discipline*, 980 S.W.3d at 681.

¹¹ See discussion under Intent below that “unlawfully” can readily be defined as failure to disclose or concealment contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure.

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 495; *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. Schultz has conceded that a violation of the duty to disclose material evidence under *Brady* would violate Rule 3.04(a). Therefore, he has not met his burden of showing that there are no circumstances under which the rule can be valid.

C. Intent not required

Finally Schultz argues for an interpretation of Rule 3.04(a) to require an intentional affirmative act of concealment or destruction of evidence. Again, we start with the plain and unambiguous language of the rule. The rule contains no intent *mens rea* but requires only that the attorney “unlawfully obstruct a party’s access to evidence.” Schultz’s interpretation of “unlawful” as “illegal” or “criminally punishable” is too narrow. “Unlawfully” in this context means to conceal or fail to disclose contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure. 48A Robert P. Schuwerk and Lillian B. Hardwick, *Texas Practice Series: Handbook of Lawyer and Judicial Ethics* § 8:4 (2015 ed.) (The predecessor to Rule 3.04(a), Texas Code of Professional Responsibility DR-7-102(A)(3), provided that a lawyer shall not “conceal or knowingly fail to disclose that which he is required by law to reveal.”). We have already determined that Schultz had a duty to disclose the information under both Rule 3.09(d) and *Brady*. Because he failed to do so, he violated Rule 3.04(a).

At least two jurisdictions with counterparts identical to Rule 3.04(a) have held that the rule carries no culpable mental state. *People v. Head*, 332 P.3d 117, 131 (O.P.D.J. Colo. 2013); *State of Oklahoma ex rel. Okla. Bar Assn v. Miller*, 2013 OK 49, 309 P.3d 108, 121 (Okla. 2013) (prosecutor violated 3.4(a) by failing to disclose to the defense attempts to assist one of the state’s witnesses with his own criminal proceedings). Professor Robert P. Schuwerk, one of the drafters of the Texas rules, concurs: “a lawyer need only be negligent to violate this Rule. A lawyer need not have known of the

evidentiary value of the materials or even recklessly disregarded the possibility that they might have such value, if a competent lawyer would have recognized that fact. Thus, under this rule, a lawyer cannot ‘escape liability ... by closing his eyes to what he saw and could readily understand.’ ” 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4.

We note that although Rule 3.04(a) does not require intent, the record here contains substantial evidence that Schultz acted intentionally as it pertains to Schultz’s “as-applied” challenge.¹² First, Schultz evaluated the information that Maria could identify her attacker only indirectly and decided that it was not exculpatory. This is at least some evidence that his decision not to reveal the information to the defense was deliberate. Second, Schultz understood the significance of the deficiencies of Maria’s identification because he took the further step of investigating and confirming that Alvero Malagon, another possible suspect, was incarcerated on the date of the attack. Third, and most importantly, there is substantial evidence that Schultz then affirmatively represented to the defense that he had disclosed all exculpatory evidence when he had not. By misrepresenting that he had provided full discovery, Schultz perpetuated the defense’s mistaken belief that it had received all exculpatory evidence. *See, State v. Doyle*, 2010 UT App. 351, 245 P.3d 206, 211, *cert. denied*, 251 P.3d 245 (Utah 2011) (prosecutor’s failure to disclose key witness’s plea deal in response to defense counsel’s request for all exculpatory evidence was “serious misconduct” and violated Utah counterpart to Rule 3.04(a)).¹³

¹² While intent is not required to violate Rule 3.04(a), intent could be considered in assessing the appropriate sanction. *See, Tex. Rules Disciplinary P. R. 2.18*; 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4, fn. 17.

¹³ *State v. Doyle* illustrates how a prosecutor’s failure to disclose information to the defense can be professional misconduct absent a *Brady* violation.

V. Conclusion

Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) imposes a duty to disclose any information that tends to negate the guilt of the accused without regard to whether the information is material under the standard imposed by *Brady v. Maryland* and subsequent cases. This result is consistent with the language and purpose of the disciplinary rule to protect the public and is now codified by Texas Code Crim. Proc. Ann. art. 39.14. Accordingly, we find that there is substantial evidence in the record that (1) Schultz had actual knowledge that the state's key witness could not identify her attacker directly and that he failed to disclose it to the defense and (2) that Schultz's failure to disclose the limited nature of the witness's ability to identify her attacker constituted material evidence under *Brady*. We affirm the finding that Schultz violated Rule 3.09(d).

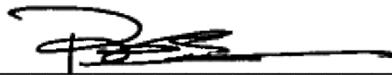
Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a) encompasses failure to disclose evidence contrary to a duty under other law to do so and does not require intent to conceal or destroy evidence. Accordingly, Schultz's failure to disclose evidence to the defense required by Rule 3.09(d) constitutes a violation of Rule 3.04(a). We affirm the finding that Schultz violated Rule 3.04(a).

The Judgment of Partially Probated Suspension is AFFIRMED in all respects.

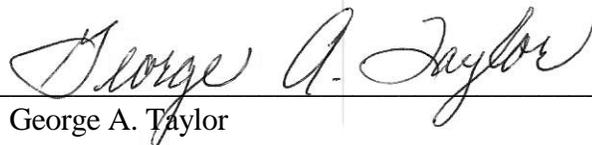
IT IS SO ORDERED.



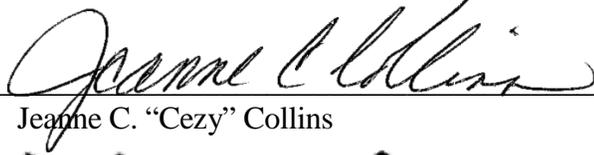
David N. Kitner, Chair



Ramon Luis Echevarria II, Vice Chair



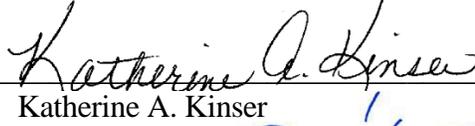
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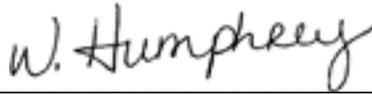
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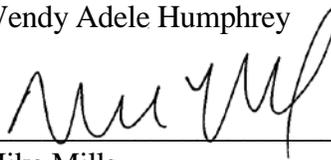
Katherine A. Kinser



David M. González



Wendy Adele Humphrey



Mike Mills

Board Members Robert A. Black, John J. McKetta III, and Deborah Pullum not sitting.

JUDGMENT OF DISBARMENT AFFIRMED

Opinion and Judgment Signed and Delivered February 8, 2016.



BEFORE THE BOARD OF DISCIPLINARY APPEALS

**APPOINTED BY
THE SUPREME COURT OF TEXAS**

No. 56406

CHARLES J. SEBESTA, JR., APPELLANT

v.

**COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE**

On Appeal from the Evidentiary Panel for the
State Bar of Texas District 08-2

SBOT Case No. 201400539

Opinion and Judgment on Appeal

COUNSEL:

Jane Webre, Steve McConnico, Robyn B. Hargrove, Kim Gustafson Bueno, Scott Douglass & McConnico LLP, Austin, Texas, for Appellant Charles J. Sebesta, Jr.

Linda A. Acevedo, Chief Disciplinary Counsel, Laura Bayouth Poppo, Deputy Counsel for Administration, Cynthia Canfield Hamilton, Senior Appellate Counsel, Office of the Chief Disciplinary Counsel of the State Bar of Texas, Austin, Texas, for Appellee Commission for Lawyer Discipline of the State Bar of Texas.

OPINION

In this attorney discipline case, we determine whether changes to the Texas Rules of Disciplinary Procedure in 2004 result in a *res judicata* effect when a Summary Disposition Panel dismisses a grievance upon a determination that Just Cause does not exist.¹ We hold that the legal principles established in cases pre-dating the 2004 rule changes remain unchanged: summary dismissals of grievances, prior to commencement of any evidentiary proceeding, have no *res judicata* effect. The judgment of disbarment is affirmed.

I. Background

A. Procedural status

On June 11, 2015, an Evidentiary Panel of the State Bar District 8-2 grievance committee entered judgment disbaring Charles J. Sebesta, Jr. The grievance was initiated by Anthony Graves on January 29, 2014. The Chief Disciplinary Counsel determined that Just Cause existed. An Evidentiary Panel was appointed and an evidentiary petition was served. Sebesta's answer included three affirmative defenses: *res judicata*, equitable estoppel, and quasi-estoppel.² Sebesta filed a pre-hearing Motion on Res Judicata and Estoppel. After briefing and argument, the Evidentiary Panel denied the motion. Following a four-day evidentiary hearing, the Evidentiary Panel found violations of Disciplinary Rules 3.03(a)(1), 3.03(a)(5), 3.09(d), 8.04(a)(1), and 8.04(a)(3) and entered a Judgment of Disbarment. Sebesta filed an appeal, which he limited "to

¹ Summary Disposition Panels are governed by Tex. Rules Disciplinary P. R. 2.13. "Just Cause" means "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney ... has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed...." Tex. Rules Disciplinary P. R. 1.06.U. If "Just Cause" is determined to exist, then an evidentiary proceeding will be initiated – either in a district court or before an Evidentiary Panel, at the Respondent's election. Tex. Rules Disciplinary P. R. 2.14 & 2.15.

² Sebesta did not plead, and does not argue in this appeal, any theory that the grievance against him is barred by limitations.

only the Panel's rulings on the legal issues raised by Respondent in his Motion on Res Judicata and Estoppel."

B. Underlying facts

The Evidentiary Panel made the following findings of fact, which are not challenged in this appeal.

In 1994 Anthony Graves was convicted of the murder in 1992 of six persons. He was sentenced to death. As district attorney, Sebesta was the lead prosecutor of Graves.

Sebesta had earlier obtained the conviction of Robert Carter, who was sentenced to death for the six murders. Carter had admitted his presence at the murders and had implicated Graves. After Carter's conviction, Sebesta and Carter negotiated (through Carter's appellate counsel) for Carter's testimony in the upcoming trial against Graves. Because no physical evidence linked Graves to the murders, Carter's testimony would be critical to the prosecution of Graves.

The night before Carter was to testify against Graves, Carter told Sebesta that he had committed the murders alone. This statement necessarily excluded Graves as a participant in the murders. Sebesta never disclosed this information to the defense. This failure to disclose violated Disciplinary Rule 3.09(d).

Sebesta also presented false trial testimony both by Carter and by the lead investigator that (except for earlier grand jury testimony) all Carter's statements implicated Graves. That false trial testimony contradicted the undisclosed fact that Carter had told Sebesta the night before Graves' trial that Carter had committed the murders alone. Sebesta took no steps to correct the false testimony of Carter or of the lead investigator or to bring the perjured statement to the court's attention. Sebesta's use of testimony that he knew to be false violated Disciplinary Rule 3.03(a)(5).

Graves presented an alibi defense. Before the defense called Graves' critical alibi witness, Sebesta falsely stated in open court that the alibi witness was a suspect in the murders and would possibly be indicted. The witness then refused to testify and left the courthouse. Sebesta had no evidence or information tending to show any involvement by the alibi witness in the murders. Sebesta's false statement to the court violated Disciplinary Rule 3.03(a)(1).

Additionally, Sebesta told defense counsel that Carter had implicated a person named "Red" in the murders. Sebesta knew, but did not disclose to defense counsel, (i) that law enforcement had identified "Red" as Kevin Dwayne Vincent and had ruled him out as a suspect and (ii) that Carter himself had confirmed that Vincent was not involved. Sebesta's failure to disclose this information to the defense violated Disciplinary Rule 3.09(d).

Sebesta also failed to disclose to defense counsel that an important prosecution witness was currently under indictment on other charges. Sebesta's failure to disclose this information to the defense violated Disciplinary Rule 3.09(d).

The Evidentiary Panel also found that Sebesta violated Disciplinary Rules 8.04(a)(1) and 8.04(a)(3).

From 1994 to 2006, Graves was in prison on death row. In 2006, his conviction was reversed and remanded for new trial based on Sebesta's misconduct. In 2010, a special prosecutor determined that there was no credible evidence that Graves had any involvement in the murders. Graves was released following 16 years in prison.

C. Dismissal of prior grievance

On January 31, 2007, Houston attorney Robert S. Bennett filed a grievance against Sebesta. The grievance was initially classified as an Inquiry and dismissed. On Bennett's appeal, the grievance was determined to be a Complaint, and the Office of Chief Disciplinary Counsel was

directed to investigate further. Sebesta filed a written response to Bennett's grievance.³ After an investigation, the Chief Disciplinary Counsel determined that no Just Cause existed. On August 16, 2007, the Office of Chief Disciplinary Counsel wrote Sebesta (i) that the Summary Disposition Panel had determined that the grievance should be dismissed and (ii) that "our file on this matter has been closed and this office will take no further action." Sebesta's affidavit in 2014 says that J. M. Richards, Senior Investigator of the Office of Chief Disciplinary Counsel, discussed with Sebesta (i) that Sebesta had passed a lie detector test, and (ii) that Anthony Graves had failed a lie detector test. Sebesta's affidavit says that Richards told him, "That's all we needed."

The 2007 grievance was based on substantially the same allegations of misconduct as the 2014 grievance. Sebesta asserts that the 2014 prosecution should have been barred either by *res judicata* or by quasi-estoppel.

II. Standard of Review

To the extent that Sebesta has limited his appeal to legal issues, the Evidentiary Panel's legal determinations are reviewed under a *de novo* standard.⁴ Any factual determinations are reviewed under the substantial evidence standard.⁵

³ The written response in 2007 stated facts substantially contradictory to the facts later found by the Evidentiary Panel in 2015, which are unchallenged in this appeal.

⁴ *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012).

⁵ *Comm'n for Lawyer Discipline v. A Texas Attorney*, No. 55619, 2015 WL 5130876, at *2 (Tex. Bd. Disc. App., July 24, 2015).

III. *Res Judicata*

A. Law prior to the 2004 rule changes

Sebesta acknowledges that, prior to the 2004 rule changes, determinations by a grievance committee whether or not to take disciplinary action did not have any *res judicata* effect.⁶ This is because such preliminary screenings, prior to any evidentiary proceeding,

have been inquisitorial in nature, but they have not been decisions upon the merits of the complaints. The preliminary investigation of an attorney for alleged misconduct has been compared to an inquisition by a grand jury. ... The Committee's prior decisions did not ever rise to the level of a final determination of the merits of the complaints before them, and they are not *res judicata*.⁷

B. 2004 rule changes

Sebesta asserts that the foregoing principle is no longer applicable, due to changes to the disciplinary process in 2004. Sebesta says that after January 1, 2004, (i) there was no longer a local investigatory hearing for attorney discipline actions, (ii) investigations are instead conducted

⁶ *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972); *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 618 (Tex. App.—Fort Worth 2004, pet. denied) (“Although a prior State Bar grievance committee determined that Rodgers did not violate the version of the trade name rule in effect in 1994..., a grievance committee decision not to prosecute has no *res judicata* or collateral estoppel effect.”); *Gonzalez v. State Bar of Texas*, 904 S.W.2d 823, 829 (Tex. App.—San Antonio 1995, writ denied) (“even if the matter had gone before a tribunal, a voluntary dismissal not touching upon a ground going to the merits of the case would not give rise to *res judicata* or to collateral estoppel”). See also *Smith v. Grievance Committee, State Bar of Texas for District 14–A*, 475 S.W.2d 396, 399 (Tex. Civ. App.—Corpus Christi 1972, no writ); (“... the proceeding before the Grievance Committee is not an adversary process. The committee is an investigating body. The aim of its inquiry is to collect and assemble facts and information that will enable the committee to take such future action as it may deem expedient for the public welfare. The Grievance Committee is not designed or equipped by the rules and regulations of the State Bar Act to conduct a trial. The adversary process and petitioner's day in court is commenced by the filing of the formal complaint as provided by the Texas Bar Act.”); *Green v. State*, 589 S.W.2d 160, 164 (Tex. Civ. App.—Tyler 1979, no writ) (a grievance committee does not have statewide jurisdiction, promulgates no rules and does not decide ‘contested cases’); *Galindo v. State*, 535 S.W.2d 923, 927 (Tex. Civ. App.—Corpus Christi 1976, no writ) (“the Grievance Committee's proceedings do not accord finality”); *Minnick v. State Bar of Texas*, 790 S.W.2d 87, 90 (Tex. App.—Austin 1990, writ denied) (“A grievance committee's investigations have been compared to an inquisition by a grand jury.”).

⁷ *State v. Sewell*, *supra*, 487 S.W.2d at 718.

by a team of professional investigators employed by the Office of Chief Disciplinary Counsel, (iii) even upon a determination by the Office of Chief Disciplinary Counsel that no Just Cause exists, the determination must be reviewed before any dismissal can occur, (iv) a Summary Disposition Panel makes an independent determination whether Just Cause exists, and (v) no appeal is available from a dismissal by the Summary Disposition Panel if it determines that no Just Cause exists. Sebesta emphasizes that under pre-2004 procedures, a dismissal was without prejudice to the Complainant's ability to re-file a complaint within 30 days with additional evidence; after 2004, the words "without prejudice" were stricken and the appeal right was removed.

C. Analysis

The 2004 changes to the rules diminished, rather than increased, the investigatory tools available to the screening entity. The dismissal in 2007, which Sebesta says should be given *res judicata* effect, was by a Summary Disposition Panel. We compare its tools and powers with those available to a grievance committee prior to 2004, whose dismissals did not have *res judicata* effect. The Summary Disposition Panel has no subpoena power to compel production of documents or to compel testimony; and it hears no witnesses.⁸ The pre-2004 grievance committees had subpoena power to gather documents and to require testimony; and they had the opportunity to hear and cross-examine witnesses under oath.⁹ The Summary Disposition Panel has fewer tools than the pre-2004 grievance committees to attempt any adjudication of merits, and the Summary Disposition Panel is not charged with any adjudicatory function.

⁸ Tex. Rules Disciplinary P. R. 2.13.

⁹ See *McGregor v. State*, 483 S.W.2d 559, 561 (Tex. Civ. App.—Waco 1972), writ granted and order set aside without reference to the merits due to petitioner's motion for nonsuit below, 487 S.W.2d 693 (Tex. 1972).

The changes in 2004 do not transform the role of the screening entity into an adjudicatory body, whose decisions might have *res judicata* effect. Just as the pre-2004 screening role of grievance committees has frequently been compared to the inquisitorial and non-adjudicatory role of grand juries,¹⁰ the Summary Disposition Panels continue to perform that function but with fewer investigatory tools.

Sebesta's further argument – that pre-2004 dismissals were expressly “without prejudice” to a complainant's right to re-file the same complaint with additional evidence within 30 days – does not persuade a different conclusion. The pre-2004 cases found no *res judicata* following a screening dismissal – without regard to whether a complainant had, or had not, chosen to re-file within 30 days from the dismissal. The limited procedural opportunity before 2004 for a complainant to re-file the same complaint within 30 days was irrelevant to the question whether the Commission on Lawyer Conduct is barred by *res judicata* from initiating a disciplinary proceeding in the future.

It should be no surprise that a dismissal prior to commencement of an evidentiary proceeding can have no *res judicata* effect. Even after commencement of an evidentiary proceeding, and during an evidentiary hearing up until the close of the Commission's case in chief, allegations of an attorney's professional misconduct can be voluntarily non-suited by the Chief Disciplinary Counsel. Such a non-suit is without prejudice and without any subsequent *res judicata* effect.¹¹ There is no jurisprudential or public policy reason why a dismissal at a much

¹⁰ *State v. Sewell*, *supra*, 487 S.W.2d at 718; *Commission for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 137 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Minnick v. State Bar of Texas*, *supra*, 790 S.W.2d at 90; *Greenspan v. State*, 618 S.W.2d 939, 941 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *Wilson v. State*, 582 S.W.2d 484, 487 (Tex. Civ. App.—Beaumont 1979, no writ); *Smith v. Grievance Committee, State Bar of Texas for District 14–A*, *supra*, 475 S.W.2d at 399.

¹¹ Disciplinary evidentiary proceedings are governed by the Texas Rules of Civil Procedure except as expressly modified by the Rules of Disciplinary Procedure. Tex. Rules Disciplinary P. R. 3.08.B. Thus,

earlier date should be given *res judicata* effect – at a time when a screening entity does not have the benefit of the investigatory tools available later in an evidentiary proceeding, such as the capacity to subpoena production of documents and to subpoena testimony, the capacity to receive any sworn testimony in any depositions or evidentiary hearing, and the opportunity for cross-examination.

“*Res judicata*” means “the matter has been adjudicated.” There is no adjudication by a Summary Disposition Panel, but only a screening based upon the investigation by the Office of the Chief Disciplinary Counsel without the formal tools later available in an evidentiary proceeding. The Summary Disposition Panel makes a determination of which matters warrant the commencement of evidentiary proceedings. It does not adjudicate the merits, nor does it yet have the tools to make any evidentiary findings by a preponderance of the evidence. Those findings are made at the conclusion of an evidentiary proceeding – either by an Evidentiary Panel or by a district court. Only then – after an adjudication – should principles of *res judicata* become applicable.

IV. Appellant’s estoppel defense

Alternatively, Sebesta asserts that the 2014 disciplinary proceeding should be barred due to principles of quasi-estoppel. Among non-governmental actors, quasi-estoppel “precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a

the Commission for Lawyer Discipline may file a voluntary notice of non-suit at any time before it has completed its case-in-chief. Tex. R. Civ. P. 162. A voluntary non-suit has no *res judicata* effect. *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011). Indeed, in *State v. Sewell, supra*, the grievance committee had filed a formal disbarment suit in district court and had subsequently chosen to take a non-suit. The Supreme Court held: “The order dismissing the formal complaint to disbar McGregor was without prejudice to the Committee's right to refile the suit. Such an order is not a bar to the institution of the same suit.” 487 S.W.2d at 718.

position inconsistent with one to which he acquiesced, or from which he accepted a benefit.”¹² Quasi-estoppel is not applicable against a party who did not have knowledge of all material facts.¹³

For four reasons we overrule Sebesta’s argument.

First, Sebesta cites no instance when quasi-estoppel is available against a governmental entity or based upon actions of an agent of a governmental entity. Estoppel is ordinarily not available in such circumstances.¹⁴

Second, even when quasi-estoppel may be available, it is a factually intensive determination.¹⁵ The substantial evidence review applicable to fact issues does not support any conclusion that the Evidentiary Panel acted without a reasonable basis.¹⁶

Third, as an equitable defense, quasi-estoppel is not available to parties with unclean hands.¹⁷ The unchallenged findings of fact show (i) Sebesta’s conduct in the underlying prosecution was egregious and (ii) the March 29, 2007 response Sebesta submitted in connection with the 2007 grievance failed to admit, and substantially contradicted, the facts found concerning his conduct in the underlying prosecution.

¹² *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

¹³ *Clark v. Cotton Schmidt, L.L.P.*, 327 S.W.3d 765, 770 (Tex. App.—Fort Worth 2010, no pet.).

¹⁴ *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970).

¹⁵ *See, e.g., Lopez v. Muñoz, Hockema & Reed, L.L.P., supra* (reversing summary judgment); *Clark v. Cotton Schmidt, L.L.P., supra* (reversing summary judgment; “resolving all doubts in Clark’s favor on the quasi-estoppel issue, we hold that Cotten Schmidt did not conclusively establish that it is unconscionable to allow him to maintain a position inconsistent with one to which he previously acquiesced”).

¹⁶ *See Comm’n for Lawyer Discipline v. A Texas Attorney, supra*, at 2.

¹⁷ *Texas Enterprises, Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249 (Tex. App.—San Antonio 2001, no pet.); *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988).

Fourth, it is not unconscionable for a screening entity of a disciplinary authority to reach one conclusion as to Just Cause when presented with information in 2007 (including Sebesta's materially inaccurate March 29, 2007 response) and to reach another conclusion when presented with information in 2014 (including a 2010 affidavit from the special prosecutor stating his determination that there was no credible evidence that Graves had any involvement in the murders).

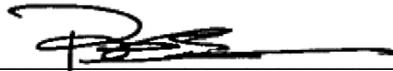
V. Conclusion

The judgment of disbarment is affirmed.

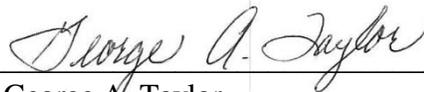
IT IS SO ORDERED.



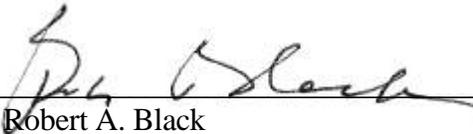
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George A. Taylor



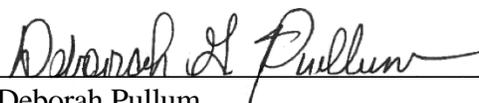
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2016 WL 6903758

Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED
OPINIONS MAY NOT BE CITED AS AUTHORITY.

DO NOT PUBLISH
Court of Criminal Appeals of Texas.

EX PARTE David Mark TEMPLE, Applicant

NO. WR-78,545-02

DELIVERED: November 23, 2016

Synopsis

Background: After defendant was convicted of murder and was sentenced to life in prison, defendant's conviction was affirmed by the Houston Court of Appeals, 342 S.W.3d 572, and the Court of Criminal Appeals, 390 S.W.3d 341. Defendant subsequently filed post-conviction application for writ of habeas corpus. The 178th District Court, Harris County, recommended grant of relief.

[Holding:] The Court Of Criminal Appeals, Richardson, J., held that State's failure to timely disclose police reports to defendant constituted *Brady* violation.

Relief granted.

Yeary, J., filed concurring opinion.

Keller, P.J., and Keasler and Hervey, JJ., dissented.

**ON APPLICATION FOR A WRIT OF HABEAS
CORPUS IN CAUSE NO. 1008763-A FROM THE
178TH DISTRICT COURT OF HARRIS COUNTY**

Opinion

OPINION

Richardson, J., delivered the opinion of the Court in which Meyers, Johnson, and Alcalá, JJ. joined.

*1 Applicant, David Mark Temple, was convicted of the murder of his wife and was sentenced to life in prison. The Fourteenth Court of Appeals affirmed Applicant's conviction,¹ and this Court affirmed the judgment of the court of appeals, holding that the evidence was legally sufficient to support Applicant's conviction.² Applicant filed this post-conviction application for writ of habeas corpus pursuant to [Texas Code of Criminal Procedure Article 11.07](#).³ The trial court judge did not preside over the habeas proceedings. Judge Larry Gist was assigned to preside over the writ hearing. Judge Gist conducted a two-and-a-half-month writ hearing, which involved the lengthy examination of over 30 witnesses and over 200 exhibits. He prepared Findings of Fact and Conclusions of Law addressing each of Applicant's claims for relief. We agree with the habeas judge's recommendation. Relief is granted.

A. Background

Applicant and his wife, Belinda Temple, met in college, married, and bought a home in Katy, Texas, near Applicant's parents' house. Applicant worked as a teacher and coach at Alief Hastings High School, and Belinda worked as a teacher at Katy High School. On the afternoon of January 11, 1999, Belinda, who was seven months' pregnant, was at work when she was informed that their three-year-old son, "E.T.," was running a fever. During lunch, Belinda picked up E.T. from day care and brought him home. Around 12:30 that afternoon, Applicant arrived home to watch E.T. so that Belinda could return to work for an afternoon meeting. Between 3:30 and 3:45 p.m., Belinda arrived at Applicant's parents' house to pick up some soup. She then left for home. Applicant testified at his trial that, after Belinda arrived home, he and E.T. left so Belinda could rest. According to Applicant, he took E.T. to two different parks, then to a store to pick up some drinks and cat food. Applicant and E.T. were seen on the store video surveillance entering the store at 4:32 p.m. and leaving at 4:38 p.m. After Applicant made one more stop, he and E.T. returned home.

Applicant testified that he pulled his car into the garage, left E.T. in the garage, and went into the backyard where he noticed that the back door to the house was open and the door's window was broken. Applicant said that he immediately grabbed E.T., took him across the street to the neighbors' house, and asked them to call 911 because the house had been broken into. Applicant and his neighbor ran back to Applicant's house. The neighbor stopped at the gate when confronted by Applicant's dog,

but Applicant ran into the house. Applicant testified that he went upstairs and found Belinda's body in the closet of the master bathroom. She had been killed by a twelve-gauge shotgun blast to the back of the head. At 5:38 p.m., Applicant called 911. Officers began to arrive on scene. Thereafter, Applicant was questioned by police. He was considered a suspect from the outset, in part because it was discovered that he was having an extramarital affair; however, Applicant was not indicted until 2005. Police had also suspected a neighbor, R.J.S., who was a high-school student living with his parents next door to Applicant and Belinda. However, the police did not pursue their investigation of R.J.S.

*2 Applicant's trial began in October of 2007. In his opening statement, Applicant's defense counsel presented a time-line to the jury that he stated would show that Applicant did not have enough time to commit the murder. The State's theory of the case was that Applicant was motivated to murder Belinda because he was having an affair with another woman. Applicant's defense counsel was aware that the State had questioned R.J.S. about Belinda's murder, but he was told by the prosecution that R.J.S. was not a suspect, and he did not receive the police reports until trial. Applicant's counsel made every attempt at that time to develop an alternate perpetrator defense. Applicant's defense counsel filed a motion for continuance based upon the State's failure to timely disclose exculpatory evidence after the State had rested and he had begun presenting the defense's case. That motion was denied. Applicant was found guilty of murder and sentenced to life in prison.

After Applicant exhausted his direct appeals, he filed a post-conviction application for writ of habeas corpus⁴ seeking relief based on (1) a claim of ineffective assistance of counsel under *Strickland v. Washington*,⁵ (2) a claim that his due process rights were violated under *Brady v. Maryland*,⁶ and (3) a claim of actual innocence under this Court's opinion in *Ex parte Elizondo*.⁷ With regard to the claim of actual innocence, the habeas judge concluded that relief based on actual innocence is not justified.⁸ After reviewing the record, we agree with the habeas judge and deny relief based upon actual innocence.⁹ We will next address Applicant's claim of *Brady* violations.

B. Applicant's *Brady* Claim

Applicant asserts that the State wrongfully failed to disclose certain exculpatory evidence and wrongfully failed to timely disclose other exculpatory evidence. In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to

an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹⁰ The Supreme Court has since held that the duty to disclose such evidence is applicable even though there has been no request by the accused,¹¹ and that the duty encompasses impeachment evidence as well as exculpatory evidence.¹² "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"¹³ There are three essential components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.¹⁴ In order to obtain relief based on a *Brady* violation, Applicant "must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense."¹⁵ Favorable evidence includes exculpatory evidence and impeachment evidence. "Exculpatory evidence is that which may justify, excuse, or clear the defendant from fault, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence."¹⁶

*3 Applicant claims that the State failed to timely produce favorable evidence to the defense. Most of the *Brady* evidence about which Applicant complains was contained within the several hundred pages of police offense reports that were not provided to defense counsel until some time during the trial. There was a clear discrepancy between the defense counsel's recollection of what information he received prior to trial and the prosecutor's recollection of what information she gave to defense counsel prior to trial. The prosecutor maintained that she timely gave the defense all of the *Brady* evidence they were entitled to get. The prosecutor believed, as evidenced by her testimony at the writ hearing, that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, "ridiculous." She claimed that, when it came to what constituted *Brady* evidence, her opinion is what mattered. The prosecutor stated, when asked, that if information does not amount to anything, the defense is not entitled to it. However, although the prosecutor does have the initial responsibility to assess whether evidence may be favorable to the defense, the prosecutor is not the final arbiter of what constitutes *Brady* evidence. A prosecutor who errs on the side of withholding evidence from the defense runs the risk of violating *Brady* if the reviewing court ultimately decides

that it should have been turned over. The habeas judge found, and we agree, that this prosecutor’s misconception regarding her duty under *Brady* was “of enormous significance.”

There were at least five detectives who generated reports of their investigation of the murder, and there were approximately 1400 pages of offense reports in this case. Prior to trial, defense counsel requested copies of these reports, which he believed contained *Brady* evidence—including statements by R.J.S. and his friends, who were “rumored” to have some involvement in the murder, and evidence provided by witnesses that could have supported an alternate suspect theory. However, defense counsel was denied access to them. At the writ hearing, both the prosecutor and the defense counsel testified that there was a Harris County District Attorney’s Office policy that, if a defense counsel asked for an examining trial, the prosecution would “close” its file and not give any information over to the defense.¹⁷ And, according to defense counsel, after the prosecution’s file was closed, he was told by the prosecution that the police investigations were thorough and had not resulted in any alternate suspects. Defense counsel testified, and the prosecutor confirmed, that the police reports that were given to defense counsel (some were not given at all), were not turned over until trial. Defense counsel testified that he “requested copies of all the statements very early in the game, and of course [he] was told [he] wasn’t going to get any statements unless and until somebody testified.”

In *Little v. State*,¹⁸ this Court held that, if late-disclosed “evidence was turned over in time for the defendant to use it in his defense, the defendant’s *Brady* claim would fail.” But, this rule is applicable only if the defendant “received the material in time to use it effectively at trial.”¹⁹ Defense counsel testified at the writ hearing that, had he been given this evidence prior to trial he could have “strongly developed an alternative suspect theory and started it from the very beginning of trial.” He claimed that “there’s no question [he] would have tried the case differently.” Defense counsel stated that “what was disclosed to [him] was disclosed in a fashion that was both untimely and confusing and late,” and he “did not have enough time to utilize the information.” And, although defense counsel filed a motion for continuance, that motion was denied. The habeas judge found that the State’s late disclosure of favorable evidence prevented defense counsel from being able to timely investigate or effectively use such evidence at trial.

After a thorough review of the habeas record, including the findings of the habeas judge and the State’s objections

to such findings, we hold that the State did not properly follow the rule of *Brady* requiring the timely disclosure of favorable evidence.²⁰ It is true that the prosecutor may not have purposely or actively hidden the existence of information uncovered by the police investigation;²¹ however, she was not forthcoming with what could be viewed as *Brady* evidence contained within the police reports. And, although defense counsel was able to raise at trial the defensive theory that there was an alternate perpetrator, that effort was limited and hampered by the State’s failure to turn over to the defense the police offense reports containing favorable evidence that would have allowed a more effective presentation of an alternate suspect.²² We find that the method of “disclosure” utilized by the prosecution did not satisfy the State’s duty under *Brady*. We hold, therefore, that Applicant is entitled to relief under *Brady v. Maryland*.

C. Ineffective Assistance of Counsel

*4 The habeas judge found that Applicant’s ineffective assistance of counsel claim has not been shown to meet the requirements of *Strickland v. Washington*.²³ This conclusion appeared to be based on the findings by the habeas judge that defense counsel received several hundred pages of offense reports to digest during trial, including portions dealing with the investigation of R.J.S. and his friends, and that much of the difficulty defense counsel faced was driven by a constant resistance of the trial prosecutor to reveal necessary information. The habeas judge opined that, while substantial information was disclosed by the prosecutor during the trial, it was “literally impossible” for defense counsel to sufficiently investigate, verify, or dispute the evidence that was disclosed. We agree with this assessment.

One of Applicant’s key assertions forming the basis of his claim of ineffective assistance of counsel concerns what we agree was a critical piece of evidence—Applicant’s father’s (Kenneth Temple’s) testimony as to the time of day that Belinda left their house for her 15 minute drive home. Had Kenneth (a defense witness) testified consistently with his prior statement (of which defense counsel had possession long before trial)—that Belinda left Applicant’s parents’ house at 3:55 p.m. and drove the 15 minutes to her house—this evidence would have supported the defensive theory that Applicant did not have time to commit the murder, clean up afterwards, ditch the murder weapon, and still be on a store surveillance camera with his son at 4:32 p.m. Defense counsel admitted during the habeas hearing that he made a mistake by not refreshing Kenneth’s memory with Kenneth’s written statement before he testified. Defense counsel testified at the writ hearing that he had no

strategic reason for failing to communicate with Kenneth regarding this point, and that his failure to do so harmed Applicant. Nevertheless, even though defense counsel admitted that he erred as to this piece of evidence, we find that the State's failure to timely disclose favorable evidence to the defense handicapped defense counsel's overall performance and caused him to lose focus of the importance of this critical piece of evidence.²⁴ Therefore, to the extent that defense counsel's performance could even be viewed as being deficient, such deficiency was the direct result of the State's *Brady* violations. We therefore decline to grant relief based on Applicant's ineffective assistance claim, particularly since there is no cause to, since we are granting relief based upon Applicant's *Brady* violation claim.²⁵

D. Conclusion

Relief is granted. The trial court's judgment is set aside, and Applicant is remanded to the custody of the Sheriff of Harris County to answer the charges in the indictment. The trial court shall issue any necessary bench warrant within ten days after the issuance of this Court's mandate.

Yeary, J., filed a concurring opinion. Keller, P.J., and Keasler and Hervey, JJ., dissented. Newell, J. did not participate.

Yeary, J., filed a concurring opinion.

This is a post-conviction application for writ of habeas corpus challenging Applicant's conviction for the murder of his wife, brought pursuant to [Article 11.07 of the Texas Code of Criminal Procedure](#). TEX. CODE CRIM. PROC. art. 11.07. The habeas court conducted an extensive evidentiary hearing on the writ application, spanning twenty-four days over the course of two-and-a-half months, and has recommended that we grant Applicant a new trial. We filed and set the application on a number of claims, including: 1) claims predicated on *Brady v. Maryland*, 373 U.S. 83 (1963), upon which the habeas court recommends that we grant relief; 2) claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984); and 3) a claim of actual innocence under this Court's opinion in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). Ultimately, I would not grant relief on the basis of Applicant's *Brady* claims, as the trial court has recommended and the Court does today. Nevertheless, I

would sustain one of Applicant's claims of ineffective assistance of trial counsel. In explaining why, I will recount many of the circumstances giving rise to Applicant's *Brady* claims because they set the backdrop for my conclusion that trial counsel's deficient performance undermines confidence in the outcome of Applicant's trial.

I. PROCEDURAL HISTORY

On the afternoon of January 11, 1999, Belinda Temple was murdered by a single shot to the back of her head with a twelve-gauge shotgun as she knelt in the walk-in closet off of the master bathroom of her home in Katy.¹ She was seven months' pregnant at the time. When investigators with the Harris County Sheriff's Office discovered that her husband, Applicant, was having an extramarital relationship with one of his co-workers at one of the local high schools, he became a major focus of their investigation. In March and April of 1999, prosecutors took the case to a grand jury. They produced a dozen witnesses, but they did not ask the grand jury to return an indictment at that time. And indeed, the evidence against Applicant, while it raised serious suspicions, was not overly compelling. There was some question whether he had been at home at the time of the murder, since he was seen with his and Belinda's three-year-old son, ET (hereinafter, "ET"), on the security videotape of a local supermarket either as, or at least soon after, the murder is most likely to have taken place.² Moreover, the grand jury also heard testimony about the Temples' next-door neighbor, RJS, III (hereinafter, "RJS"), a sixteen-year-old boy who was a student at the high-school where Belinda worked as a tutor and special-needs instructor.³ Belinda had recently reported to RJS's parents that RJS had been habitually skipping classes, among other minor infractions, and RJS admitted to the grand jury that he had been home alone, asleep on the couch, at the time of the murder.

Five years later, in the summer of 2004, the case was called to the attention of a prosecutor in the cold-case division of the Harris County District Attorney's office. By this time, Applicant had married Heather Scott, the object of his 1999 extramarital relationship. Without presenting any new evidence to the grand jury, the prosecutor obtained a murder indictment against Applicant and had him arrested.⁴ When the defense attorney hired by Applicant's family almost immediately requested an examining trial for Applicant, the prosecutor responded by closing the State's file to him, as was the Harris County District Attorney's unofficial office policy

at that time. From that point on, the prosecutor provided defense counsel with nothing more than the limited discovery to which Applicant was minimally entitled under the law.⁵ As for *Brady* material, the tenor of the testimony of both the prosecutor and her second chair at the writ hearing was that they felt duty bound to disclose exculpatory or impeaching information only if they believed it to be true; if they felt confident that the sheriff's investigators had satisfactorily ruled out an alternative suspect, they did not believe they were obligated to disclose information about the investigation of that alternative suspect to the defense under *Brady*.⁶ Thus, while Applicant's family conveyed to defense counsel their belief that RJS was a viable suspect, the State did nothing at any time prior to Applicant's trial to alert defense counsel to the full extent of law enforcement's investigation into RJS's possible involvement in Belinda's murder.

Applicant's trial commenced in October of 2007, lasting approximately five weeks. In his opening statement to the jury before any evidence was presented, defense counsel made no mention of an alternative suspect. Instead, he emphasized that Applicant simply could not have had enough time to perpetrate the murder given the time-line he expected the evidence to reveal. The State's theory of the case was that Applicant was motivated to murder Belinda in order to pave the way to marry Scott; and that he staged a burglary to make it appear as if she had been killed by an intruder while he was out running errands with ET.⁷ Somewhere along the way he successfully disposed of the twelve-gauge shotgun he used to kill Belinda, according to the State's theory, and no weapon was ever found that was definitively shown to be the murder weapon. Although Applicant had owned a shotgun as a teenager, the parties disputed the gauge of that shotgun and, in any event, it was undisputed that Applicant no longer possessed that particular shotgun at the time of the offense. Also critical to the State's case was the inference that any other perpetrator besides Applicant would have caused the Temples' dog, Shaka, an aggressive chow, to raise a ruckus in the back yard (the purported point of entry having been the back door) and alert the whole neighborhood. Applicant rebutted this inference with substantial evidence, including his own testimony, that he had left Shaka in the stand-alone garage while out running errands—not in the back yard, as the State's theory assumed.

Defense counsel began to discover the scope of the State's investigation of RJS early in the course of the trial, as sheriff's investigators testified and defense counsel was permitted to review their offense reports in preparing for cross-examination. He was also allowed to review the

earlier grand jury testimony of those trial witnesses who had testified before the 1999 grand jury. By the seat of his pants, he began to develop a supplemental defensive theory (not inconsistent with his original defensive theory) that—as he ultimately argued to the jury in his final summation at the guilt stage—the evidence that RJS committed the offense, while admittedly sketchy, was nevertheless more substantial than the evidence of Applicant's guilt.

Most importantly, defense counsel was able to show that RJS had access to a Harrington & Richardson (hereinafter, "H & R") break-open twelve-gauge shotgun. This shotgun belonged to RJS's father. When it was recovered, it contained an expended shotgun shell. Before it had been fired, this shell had been "reloaded"—that is to say, it was not as originally manufactured, but had been re-packed by hand. The State's experts had concluded that the shotgun shell used to murder Belinda had been similarly reloaded. RJS's father possessed a number of these reloaded shells after the murder, but those were found to contain wadding that was different than the wadding from the reloaded shell used to kill Belinda (and recovered from the floor of the walk-in closet where her body was found). In short, while it was never demonstrated that the H & R shotgun was the actual murder weapon, defense counsel was able to argue to the jury that RJS had access to the closest thing to the murder weapon that any investigation had yet revealed. Having learned as well during trial that Belinda had reported RJS's truancy to his parents, defense counsel was also able to suggest to the jury that RJS had a substantial, albeit not particularly compelling, motive to kill her.

To a limited extent, defense counsel used the late-disclosed offense reports to impeach the testimony of the sheriff's detectives who claimed ultimately to have been "satisfied" that RJS was not the perpetrator.⁸ Moreover, defense counsel used information gleaned from both the offense reports and RJS's own earlier grand jury testimony to cross-examine RJS when he took the stand as the State's only rebuttal witness at the end of the guilt phase of evidence to deny having killed Belinda. The jury found Applicant guilty after deliberating for more than a full day.⁹ It later assessed him a life sentence.

The major thrust of Applicant's direct appeal was to challenge the sufficiency of the evidence, both legally and factually, to show that he murdered his wife. While his appeal was pending, however, this Court eliminated factual sufficiency from the Texas criminal justice lexicon, to the dismay of two members of the Fourteenth Court of Appeals who were inclined to believe that the evidence against Applicant was factually insufficient. *See*

Temple v. State, 342 S.W.3d 572 (Tex. App.–Houston [14th Dist.] 2010).¹⁰ The court of appeals concluded that the evidence was legally sufficient, over the dissent of one justice on denial of rehearing en banc who believed otherwise.¹¹ On petition for discretionary review, this Court ultimately affirmed the court of appeals’s judgment that the evidence was legally sufficient. *Temple v. State*, 390 S.W.3d 341, 363 (Tex. Crim. App. 2013).¹²

Applicant also complained on direct appeal about the late disclosure of the information with respect to the State’s investigation of the alternative suspect, RJS. He argued that the delayed disclosure violated his right to due process under *Brady*. The court of appeals rejected this point of error for two reasons. First, it held that Applicant had procedurally defaulted this claim. *Temple*, 342 S.W.3d at 591. Because defense counsel did not formally seek a continuance until three weeks after the offense reports began to come to light, well into his presentation of defensive evidence and near the end of the guilt phase of the trial, the court of appeals held that he forfeited his right to complain, under this Court’s precedent in *Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999). *Id.*¹³ Alternatively, the court of appeals held that, because Applicant was able in any event to effectively present the untimely disclosed facts, there was not “a reasonable probability that the outcome of the trial would have been different had the State disclosed these facts earlier.” *Id.* at 592. Applicant did not challenge this holding in his petition for discretionary review, and we had no occasion to address it in our opinion.¹⁴

Applicant raises a number of issues in his post-conviction application for writ of habeas corpus, most prominent of which is his renewed *Brady* claim.¹⁵ Unfortunately, in neither his writ application nor during the extensive habeas evidentiary hearing has Applicant adequately distinguished information that he claims was *belatedly* disclosed during trial (hereinafter, “late-disclosed evidence”) from information that he alleges was not disclosed until *after* trial (hereinafter, “undisclosed evidence”). To a significant extent, he continues to complain of the late disclosure rather than of any non-disclosure. Even though defense counsel reviewed many of the offense reports during trial and put much of it to effective use, Applicant contends that there were other bits of exculpatory or impeaching evidence embedded in them that defense counsel simply missed because of the conditions under which he was compelled to review them.¹⁶ In essence, Applicant argues that, while defense counsel was able to put to some good use the late-disclosed information, he was not able to put it to its optimal use, as he would have had the information been revealed to him prior to trial. Defense counsel was

handicapped, Applicant concludes, by having to investigate even as he was having to litigate.

In its proposed findings of fact and conclusions of law, in which it has recommended that we grant relief on the basis of *Brady*, the habeas court has likewise largely failed to distinguish late-disclosed evidence from undisclosed evidence.¹⁷ The habeas court has nonetheless concluded, albeit “not without some doubt,”¹⁸ that Applicant was “denied a fair trial because of the State’s failure to disclose or timely disclose favorable evidence; and had that evidence been disclosed or disclosed timely, the results of the trial would have been different.” For reasons I will develop at some length, I share the habeas court’s doubt. Ultimately, though, while I agree that we should grant Applicant a new trial, I would not base our ruling on his *Brady* claims. Instead, I would base our holding on one of Applicant’s claims of ineffective assistance of counsel (though that ineffectiveness may very well have been a regrettable by-product of the fact that defense counsel was forced to investigate—even as he was trying to litigate—the case).

II. BRADY

A. The Legal Standard

The United States Supreme Court has expanded upon its 1963 decision in *Brady* to hold that a defendant suffers a due process violation if the State or one of its surrogates, whether willfully or not, 1) fails to disclose evidence that 2) is favorable to the defense (either because it is exculpatory or because it impeaches) and 3) is material in the sense that, had it been timely disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been different. *Strickler v. Greene*, 527 U.S. 263, 280–82 (1999). “Reasonable probability” in this context does not mean “the defendant would more likely than not have received a different verdict with the evidence,” but instead means that, having been deprived of the evidence, the defendant did not receive “a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). It is important to bear in mind that the materiality inquiry “is not a sufficiency of evidence test.” *Id.* “A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* It is enough to establish a reasonable probability of a different result “when the [State’s]

evidentiary suppression ‘undermines confidence in the outcome of the trial.’ ” *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)).¹⁹ As part of this consideration, “the reviewing court may consider directly any adverse effect that the prosecutor’s [nondisclosure] might have had on the preparation or presentation of the defendant’s case.” *Thomas v. State*, 841 S.W.2d 399, 405 (Tex. Crim. App. 1992) (quoting *Bagley*, 473 U.S. at 683 (plurality opinion)). Moreover, materiality is to be assessed “collectively, not item by item.” *Kyles*, 514 U.S. at 436.

We have said that, to constitute a *Brady* violation, the State’s suppression must have resulted in the denial of evidence to the defense that “would have been admissible at trial.” *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). We have noted, however, that “the analysis might not end there” because, as the Fifth Circuit has held, “if inadmissible evidence would give rise to the discovery of other admissible evidence or witnesses, the State does have a duty to disclose that evidence.” *Id.* at 699 n.22 (citing *United States v. Brown*, 650 F.3d 581, 588 (5th Cir. 2011)).

We have also held that, if late-disclosed evidence “was turned over in time for the defendant to use it in his defense, the defendant’s *Brady* claim would fail.” *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). So long as the defendant “received the material in time to use it effectively at trial, his conviction should not be reversed just because it was not disclosed as early as it might have and should have been.” *Id.* (citing *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1999)). *See also United States v. Valas*, 822 F.3d 228, 237 (5th Cir. 2016) (same). On direct appeal in Applicant’s case, in an alternative holding to its conclusion that Applicant procedurally defaulted his *Brady* claim, the court of appeals determined that defense counsel was able to put the late-disclosed materials to effective use at Applicant’s trial. *Temple*, 342 S.W.3d at 591–92. We do not ordinarily entertain claims in a post-conviction application for writ of habeas corpus that were previously resolved against an applicant on direct appeal. *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984); *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

This is not to say that Applicant should now be altogether barred from raising a *Brady* claim in his post-conviction writ application. As is the case with claims of ineffective assistance of trial counsel, a habeas applicant may be able to re-raise a *Brady* claim that was rejected on direct appeal if he can present new evidence of its validity. *Cf. Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004) (“[I]f the appellate court rejects a claim of ineffective assistance of counsel because the record on

direct appeal does not contain sufficient information to adequately address and resolve a particular allegation of counsel’s deficient performance, the defendant may re-urge consideration of that specific act or omission in a later habeas corpus proceeding if he provides additional evidence to prove his claim.”); *Ex parte Bryant*, 448 S.W.3d 29, 34–5 (Tex. Crim. App. 2014) (quoting *Nailor* and applying it to hold that the applicant could re-raise his ineffective assistance of counsel claim in a writ since he brought new evidence to support it); *Brown*, 205 S.W.3d at 547 n.26. (citing *Nailor* in support of the Court’s decision to remand to the convicting court “to give applicant an opportunity to present whatever ‘new’ evidence he had in support of his ‘old’ allegation” of ineffective assistance of counsel).

Thus, Applicant may presently be able to raise *Brady* in either or both of two ways. First, if there is additional exculpatory or impeaching material beyond that which was disclosed for the first time at his trial—in short, undisclosed evidence—then of course Applicant may raise a *Brady* claim in post-conviction habeas proceedings, since this would essentially constitute a new *Brady* claim.²⁰ Second, Applicant may be able to re-raise a previous *Brady* claim. But to the extent that Applicant continues to complain about the late-disclosed exculpatory or impeaching evidence that was rejected on direct appeal on the grounds of immateriality, he must produce additional evidence—beyond what is apparent from the appellate record—in order to establish incremental materiality.²¹ What that means is that Applicant must now show that there was exculpatory or impeaching value to the late-disclosed information beyond that which would have been apparent to the court of appeals from the appellate record. And he must also show that this additional exculpatory or impeaching value would have created a reasonable probability of a different outcome—even taking into account the uses to which defense counsel *was* able to put those late-disclosed materials during the trial. In other words, in my view, Applicant must present a record in these habeas corpus proceedings to establish that defense counsel could have used the late-disclosed materials, had they been *timely* disclosed, to substantially *greater* exculpatory or impeaching effect at trial than he actually *did*. It is doubtful, in my opinion, that Applicant has established sufficient incremental materiality here.

B. Applicant’s Allegations of Undisclosed *Brady* Evidence

Most of what Applicant developed at the extensive writ

hearing was additional evidence pertaining to the materiality of the late-disclosed information contained in the various offense reports. But from my own review of both the trial and writ records, I have also been able to parse out some evidence that appears not to have been disclosed even at trial. None of this undisclosed evidence, however, strikes me as particularly momentous. I shall briefly discuss the most prominent examples that I have gleaned from the voluminous habeas record.²²

The School Witnesses: Another investigating officer, Detective Tracy Shipley, interviewed several witnesses at Belinda’s school with respect to certain matters, including what time Belinda had left the school to return home on the day she was murdered. Defense counsel was given a copy of Shipley’s offense report at trial which summarized these interviews. None of these witnesses could say precisely what time Belinda drove off. The timing of Belinda’s departure was critical. The later Belinda left the school, the later she would have arrived, first at her in-laws’ home to pick up some homemade soup, and then at her own home. This would have narrowed Applicant’s window of opportunity to have staged the burglary, killed Belinda, cleaned himself up afterwards from the inevitable blow-back from the shotgun blast,²³ and then loaded ET into his truck to leave the scene.

These witness interviews were tape-recorded, however, and defense counsel was not made aware of the audio recordings during trial. Telephone records that were admitted at trial showed that Belinda called Applicant at about 3:30 p.m. Applicant claims that the audio recordings reveal that two of the school witnesses could establish that Belinda was still in the parking lot of her school when she spoke to Applicant on her phone. This was exculpatory, Applicant claims, because it demonstrated that she had not yet left the school as late as 3:30, when the phone records showed that this conversation took place.

The record does not support Applicant’s contention. The writ record contains the actual audio recording of one of these two witnesses, Courtney Ferguson, which I have listened to.²⁴ Ferguson does not say at any point in the interview that she ever saw Belinda talking on her phone. The audio recording of her testimony lacks the exculpatory value Applicant attributes to it. The recording of the statement of the other witness, Margaret Christen, is *not* in the writ record, so I cannot presently tell whether she ever said that she saw Belinda on the phone.²⁵ Additionally, Applicant claims that both Ferguson and Christen identified a third witness, Denise Lavior, who was present and who (as the habeas court finds) “would

have helped the defense timeline.” But the record reveals nothing about what Lavior might have had to say about whether Belinda was on the phone with Applicant while still in the school parking lot. It is thus pure speculation to say that she would have been helpful to the defense at trial.

FBI Profiler Report: The habeas court recommends that we find that the State “never produced an FBI report which profiled the possible killer.” In December of 2000, an FBI profiler prepared a report that listed the likely “offender characteristics” of the perpetrator of Belinda’s murder. Applicant now argues that defense counsel could have used this FBI report to bolster his final argument at trial that RJS was at least as likely a suspect as Applicant was because RJS better fit the FBI profile. However, at the writ hearing the State introduced a transcript, gleaned from defense counsel’s own case file, of a telephone conversation between defense counsel and the prosecutor that occurred more than two-and-a-half years before trial. In this phone conversation, the prosecutor alluded to the FBI profile report and offered defense counsel an opportunity to review it. While the writ record does not show whether defense counsel took her up on this offer, the phone conversation belies any claim that the FBI profile report was suppressed. The record does not support the habeas court’s recommended finding.

RJS’s Juvenile Probation Status: During the writ hearing, both defense counsel and one of his associates who sat second chair during Applicant’s trial complained that they were never told before or during trial that RJS was on juvenile probation when Belinda was murdered. Defense counsel maintained that he could have used this information to bolster his argument at trial that RJS had a motive to murder Belinda—to avoid having his probation revoked. A Harris County appellate prosecutor confirmed during his writ-hearing testimony that RJS was on juvenile probation at the time of the offense.²⁶ Even so, Applicant does not now argue, nor did the habeas court recommend that we find, that RJS’s status as a juvenile probationer at the time of the offense constitutes undisclosed *Brady* evidence.

The record does not reveal *why* RJS was on juvenile probation. In 1999, as now, if RJS was on juvenile probation for nothing more than simple truancy, then the fact that Belinda could report him to the juvenile probation authorities for *continuing* to skip school could not possibly result in his being committed to the Texas Youth Commission. See [TEX. FAM. CODE §§ 51.03\(b\)\(2\), 54.05\(g\)](#) (“a disposition based solely on a finding that the child engaged in conduct indicating a need for supervision [which includes truant behavior, as

opposed to a disposition based on a finding that the child engaged in “delinquent conduct”) may not be modified to commit the child to the Texas Youth Commission.”). In short, it is unclear whether RJS’s juvenile probation could actually be revoked, as defense counsel’s complaints at the writ hearing presume. Thus, the present record does not reveal that RJS’s status as a juvenile probationer would have provided him with a particularly compelling motive to commit murder, much less that he subjectively believed otherwise. Under these circumstances, I would not, *sua sponte*, fashion an argument that RJS’s juvenile probationary status constituted favorable—and particularly, *material*—exculpatory or impeaching evidence that the State suppressed.

The Written Statements of the So-Called “Katy Boys”: At trial, defense counsel obtained RJS’s two written statements to the investigators as well as RJS’s grand jury testimony prior to questioning RJS on cross-examination. He was also shown the offense reports of the particular detectives who testified at trial, which documented some, but not all, of the oral statements RJS made over the course of their investigation. Those same offense reports documented oral statements made by many of the so-called “Katy Boys,” a group of teenage contemporaries of RJS who were investigated to some extent, mostly because of their relationship to RJS himself.²⁷ But because none of the Katy Boys testified at trial, none of their written statements or grand jury testimony was turned over to the defense prior to or during trial. Applicant complains of the non-disclosure of two of RJS’s oral statements and all of the written statements and grand jury testimony of the Katy Boys.²⁸ The gist of his argument is that, had the State provided him with all of this information, he would have been significantly better equipped to develop and present his theory at trial that it was RJS, and perhaps two of his cohorts, CT and MG, who committed the offense.

It is unclear to me, however, that the various undisclosed statements and grand jury testimony supplies significant materiality. It is true that there are some inconsistencies among the various statements. But none of the Katy Boys (other than RJS) testified at trial, and so defense counsel would have had no occasion to use the inconsistencies among their statements to impeach them.²⁹ To the extent that the various statements could have aided defense counsel in piecing together and presenting his alternative suspect theory, I am not inclined to believe it would ultimately have made much difference in the eyes of the jury, for reasons I will expand upon next in my discussion of the H & R shotgun.

The Recovery of the H & R Shotgun: A week or so

before Belinda’s murder, several of the Katy Boys burglarized a home belonging to the boyfriend of CG’s mother. I glean the following facts from their various statements. Participating in the burglary were CG, CC, and CE. Several 12-gauge shotguns were taken during this burglary, though none was shown to be the murder weapon. Several days later, they took the shotguns out to shoot them and invited RJS to join them. RJS purloined his father’s H & R shotgun and joined them on their shooting excursion. Afterwards, CE dropped RJS off at a car stereo business where RJS was to meet his father. Because RJS did not want his father to know he had taken the H & R shotgun, he left it with CE, who took it home and apparently hid it under his bed.³⁰

On the day of Belinda’s murder, RJS and CE skipped their last class and left school. They briefly dropped by RJS’s house, and then RJS drove CE home. RJS returned to his own home and called CT and MG, who came over. According to their various accounts, these three then drove down the street to the house of another acquaintance to try to obtain marijuana, then drove back to RJS’s house. From there, they drove to a convenience store for cigarettes, then back once more to RJS’s residence. MG and CT dropped RJS off so that MG could go pick up his mother from work.³¹ RJS claims he then fell asleep on the couch, to be awakened by his father at about 6 p.m., by which time emergency personnel and local constables were on the scene.

Three weeks later, at the end of January, the H & R shotgun was recovered. At trial, the testimony of both Detective Leithner and Detective Mark Schmidt both tended to suggest that it was recovered from RJS’s residence a few weeks after the murder. One of the offense reports that defense counsel reviewed during trial indicated that the H & R shotgun was recovered by a Deputy Ramon Hernandez; but this offense report does not say where, or from whom, Hernandez recovered it. Hernandez’s own supplemental offense report recounting his recovery of the H & R shotgun, if it ever existed at all, seems to have gone missing.³² Hernandez testified at the writ hearing, but by that time he could not remember from whom he recovered the shotgun in the absence of a supplemental offense report documenting its recovery. The mystery was apparently solved in 2012 when (in response to Applicant’s budding actual innocence claim) one of the sheriff’s investigators, Detective Holtke, re-interviewed CE. CE told Holtke that Hernandez had recovered the H & R shotgun from him. In none of CE’s previous statements to investigators had he indicated that he had ever taken possession of the H & R shotgun.

Applicant makes much of the fact that it was never

revealed to him at trial from whom or where Hernandez recovered the H & R shotgun. In its recommended findings of fact, the habeas court concludes that Hernandez’s supplemental offense report was “lost, destroyed, or never prepared,” and observes that the sheriff’s investigators failed to question CE during their initial investigation “about his hiding the H & R shotgun.” I fail to perceive how this non-disclosure of information pertaining to the recovery of the H & R shotgun deprived Applicant of favorable—much less material—evidence. That Applicant’s jury may have gotten the false impression that the H & R shotgun was recovered from RJS’s household seems to me to have militated to Applicant’s benefit at trial, since it would have placed the shotgun within easy reach for RJS to use in murdering Belinda. Instead, Applicant spins an unlikely scenario in which he contends that he could have persuaded the jury, had the truth been timely revealed, that RJS took CE home from school on the day of the murder, retrieved the shotgun from CE at that time, but then later *returned* the shotgun to CE—to put *back* under CE’s bed—after RJS used it to kill Belinda. There is no evidence in either the trial record or the writ record to support this theory.

Most of Applicant’s present arguments for how he could have used the various undisclosed statements of RJS and the Katy Boys ultimately turn on the jury accepting this dubious proposition—that RJS retrieved the H & R shotgun from CE, used it (perhaps with the help of CT and MG) to kill Belinda, and then *returned* it to CE for safekeeping. I doubt that disclosure of either 1) the various statements and testimonies of the Katy Boys, or 2) the location of the H & R shotgun when it was recovered would have significantly enhanced defense counsel’s ability to persuade the jury that RJS rather than Applicant was responsible for Belinda’s murder. With respect to the latter, it might even have detracted.

Joe Sosa’s Information: Three weeks after Belinda was killed, on February 4, 1999, Detective Schmidt returned a telephone call from Joe Sosa, a special education teacher at Katy High School. Sosa told Schmidt, among other things, that CT had told Sosa that CT had been “in [RJS’s] home the night of the homicide along with [MG,]” and that CT had missed school the next day. Sosa also told Schmidt that, at some undisclosed time, MG “had made a comment that if you put a pillow up to a shotgun it will muffle the sound.”³³ This information appears in a supplemental offense report attributed to Schmidt that was randomly attached to the supplemental report of another officer, and, unlike Schmidt’s other supplements, it is not numbered. I am frankly unable to tell whether defense counsel was aware of it during trial. Schmidt testified at the writ hearing that he conducted no

follow-up investigation of this information that he had obtained from Sosa. Had defense counsel known of it before trial, he could have interviewed Sosa to try to put these statements of CT and MG in context. The record does not reveal what more Sosa might have been able to say.

Joe Cadena’s Statement: Defense counsel was never given access to an offense report that documented the statement of an across-the-street neighbor, Joe Cadena, who told investigators on January 25, 1999, that he had heard what he took to be a truck backfiring at about 4:30 p.m. on the day of Belinda’s murder.³⁴ The habeas court mentions this undisclosed information in its recommended findings as well. But the record also reveals that defense counsel was given access to a different offense report during trial that recorded an earlier statement that Cadena had given to canvassing officers on the night of the murder. In that earlier statement, Cadena asserted that, sometime between 4:30 and 5:30 p.m., he actually heard *two* backfires, which he attributed to a particular truck that he observed on the street.³⁵ Although defense counsel’s investigator spoke with Cadena during trial, defense counsel did *not* subpoena Cadena to testify.

C. Incremental Materiality of the Late-Disclosed Evidence

Perhaps marginally more convincing are Applicant’s arguments that disclosure of much of the materials that the State revealed to defense counsel for the first time during trial could have been used to substantially *greater* effect had they been timely disclosed prior to trial. Some of Applicant’s claims in this regard are more compelling than others. I shall highlight the most pertinent examples of this category as well.³⁶

The Katy Boys’ Failed Polygraphs: The Katy Boys were questioned more than once by sheriff’s investigators and gave some oral statements in addition to their undisclosed written statements. As the habeas court notes in its recommended findings, many of them, including CE, CT, and MG, were subjected to multiple polygraph examinations, which they almost uniformly failed. Defense counsel learned of these facts when he reviewed the offense reports during trial. But the trial court refused to allow defense counsel to elicit any evidence with respect to the polygraph testing or results before the jury, and although defense counsel complained bitterly of this limitation at trial, Applicant did not challenge the exclusion of the polygraph evidence as an issue in his

direct appeal. In any event, it is far from clear that the polygraph evidence was admissible under Texas law,³⁷ or that it would have lead to admissible evidence that defense counsel would not otherwise have been alerted to investigate by the offense reports. For this reason, if no other, I cannot say that the State’s late-disclosure of the polygraph evidence constituted a violation of *Brady*.

The Parkers’ Dog: Jim and Cynthia Parker lived in a house that was catty-corner to the Temple’s property, divided from it by a fence. Defense counsel did not learn until he reviewed the offense reports at trial that a police canvass had disclosed that the Parker’s dog had barked excitedly at the dividing fence at approximately 4:30 p.m. on the day of Belinda’s murder—a time that coincides with his defensive theory for when the break-in and murder occurred (Applicant having been at the supermarket at about this time).³⁸ Once defense counsel did learn about this evidence, however, he interviewed the Parkers one evening during the trial and then subpoenaed them, and they testified for the defense at trial. The habeas court recommends that we find defense counsel did not obtain this information until trial had commenced. The record substantiates this finding, but it makes no difference because Applicant cannot show that he suffered any disadvantage from the State’s failure to divulge this information prior to trial.

Shaka’s “Access” to the Garage: The habeas court also finds that defense counsel did not learn about three other potential witnesses until he reviewed the offense reports at trial, all three of whom could have testified that Shaka, the Temple family’s chow, ordinarily “had access to the garage.” Other witnesses did testify to this fact at trial, however.³⁹ And in any event, the fact that Shaka had “access” to the garage does not necessarily establish that he was in the garage at the time that Belinda was killed, and therefore could not have been expected to bark at any intruders. The testimony of these three additional witnesses would have added only quite modestly to any inference favorable to the defense, and not enough to establish any significant incremental materiality.

Applicant’s Emotional Response: The habeas court recommends a finding that the late-disclosed offense reports also revealed two witnesses who could have attested that Applicant reacted emotionally at the scene to Belinda’s death, sobbing with his head in his hands and appearing weak-kneed. Had he learned of the additional witnesses earlier, defense counsel may have had time to interview them and to subpoena them for trial. Other witnesses did testify at trial to Applicant’s apparent emotional response, however, to counteract the testimony of sheriff’s investigators who conveyed to the jury their

impressions that Applicant seemed emotionless at the scene. One of Applicant’s brothers testified at trial that Applicant appeared to be in shock. His mother testified that he had apparently been crying. Later, she maintained, after he was interrogated by sheriff’s investigators and allowed to leave, Applicant was “completely distraught and broken.” But these were family members, whose testimony could have been discounted by the jury as self-serving. Testimony of non-family witnesses with respect to Applicant’s demeanor was favorable to the defense and defense counsel’s failure to recognize their significance adds marginally to the incremental materiality.

RJS’s Girlfriend: Although the habeas court does not mention it in its recommended findings of fact, there is another piece of information that was not revealed to defense counsel until he was allowed to review the offense reports at trial. Niki Biondo was RJS’s girlfriend at the time of Belinda’s murder. She told sheriff’s investigators that sometime between 6:30 and 7:00 p.m. on the evening of the murder, RJS called her in a very emotional state (“crying”) and told her that his next-door neighbor had been “shot”—not killed, but “shot.” It is unclear how RJS could have learned this detail so soon after the fact. The sheriff’s investigators did nothing to follow up on this lead. At the writ hearing, the State speculated that RJS could have heard this detail from bystanders on the street in the hour or so following Belinda’s murder, notwithstanding that the sheriff’s investigators would have taken pains, at least in theory, to conceal the specifics of the crime scene. A jury would not have been constrained to accept the State’s speculation, however, and it would have been important for Applicant to discover Biondo’s statement in time to track her down and interview her, to test the apparent exculpatory value of her story. She may have proven to be an important witness for the defense, and defense counsel’s failure to recognize her potential importance in the limited time he had to review the offense reports also adds to the incremental materiality.

D. Collective Materiality

Because materiality is to be assessed “collectively, not item by item [.]” *Kyles*, 514 U.S. at 436, the question becomes: Is there sufficient undisclosed *Brady* evidence that, when taken together with Applicant’s showing of incremental materiality of the late-disclosed evidence, would undermine our confidence in the result of Applicant’s trial? I have found little that I regard as significant undisclosed *Brady* evidence, and not a great

deal of incremental materiality in Applicant’s claims of late-disclosed *Brady* evidence. In short, the record simply fails to reveal much *Brady* evidence—either undisclosed evidence with significant exculpatory or impeaching value or late-disclosed exculpatory or impeaching evidence that is incrementally material—to measure collectively for materiality.

For this reason, I would not grant relief on the basis of *Brady*, but would instead grant relief on the basis of ineffective assistance of counsel. Though the habeas court recommended that we reject all of Applicant’s claims of ineffective assistance of counsel, it made few specific findings of fact with respect to any of these claims.⁴⁰ In my view, Applicant has established by a preponderance of the evidence that defense counsel was deficient in at least one critical aspect, and in the context of this particular trial, that deficiency could well have proven to be a game-changer.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. The *Strickland* Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court encapsulated the Sixth Amendment standard for measuring the effectiveness of counsel:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction ... has two components. First, the defendant must show that counsel’s performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. A habeas applicant is entitled to relief if he can demonstrate both deficient performance and prejudice by

a preponderance of the evidence. *Ex parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013).

With respect to the deficiency component of the *Strickland* standard, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. Counsel has “a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.* Appellate review of counsel’s performance must be deferential, and “every effort [must] be made to eliminate the distorting effects of hindsight[.]” *Id.* at 689. An applicant for post-conviction habeas relief who claims his attorney performed deficiently must overcome the presumption “that counsel ... rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690.

In order to establish that his attorney’s deficiency was prejudicial, a habeas applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A “reasonable probability” of a different result means more than that the error “had some conceivable effect on the outcome of the proceeding”; but the applicant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. In short, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. To this end, “[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Id.* at 695–96. “Moreover, a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 696.

While a reviewing court “normally looks to the ‘totality of the representation’ and ‘the particular circumstances of each case’ in evaluating the effectiveness of counsel, *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Cr [im]. App. 1983), the Court has also found that under some circumstances a ‘single error of omission by ... counsel [can] constitute[] ineffective assistance.’ *Jackson v. State*, 766 S.W.2d 504 (Tex. Cr[im]. App. 1985), modified on other grounds on remand from the U.S. Supreme Court 766 S.W.2d 518 (Tex. Cr[im]. App. 1988).” *Ex parte Felton*, 815 S.W.2d 733, 735–36 (Tex. Crim. App. 1991). See also, *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (“[I]t is possible that a single egregious error of omission or commission by [applicant]’s counsel constitutes ineffective assistance.”) (internal quotation

marks omitted).⁴¹ The United States Supreme Court has likewise recognized that the Sixth Amendment “may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). One mistake may, in some instances, prove momentous enough to justify the conclusion both that the attorney rendered constitutionally deficient performance and that the impact of that deficiency was such as to undermine appellate confidence in the result of the proceeding. “Although the [appellate] court must look to the level of counsel’s overall performance, clearly negligent treatment of a crucial deficiency in the prosecution’s case or an obvious strength of the defense will outweigh the adequate handling of a series of minor matters.” 3 W. LaFave et al., *CRIMINAL PROCEDURE* § 11.10(c), at 1156–57 (4th ed. 2015).

I believe that is the case here. Although the question of attorney deficiency in this case is a close one in light of defense counsel’s overall performance, his mistake was a serious one. And there is a substantial basis to conclude, given the totality of this record, that the impact of that mistake, however isolated, could well have been profound.

B. Trial Counsel’s Deficiency

The deficiency in this case centers on the trial testimony of Applicant’s father, Charles Kenneth Temple, Jr., who testified as a defense witness at trial.⁴² On the night of Belinda’s murder, Kenneth had given a written statement to the sheriff’s investigators. Asked about the time that Belinda had dropped by his residence to pick up the homemade soup for the ailing ET on her way home, Kenneth maintained that he had gotten home from work at 3:30 p.m., “and Belinda arrived about fifteen minutes later at approximately 3:45 P.M.” She “visited with us for a few minutes” and then, “I guess it was around 3:55 P.M. at the time she left.” Testimony at trial indicated that the drive from Kenneth’s residence to Applicant and Belinda’s house takes about fifteen minutes.⁴³ Thus, according to Kenneth’s original estimate, Belinda could not have arrived home much earlier than 4:10 p.m. This would have left only a very narrow window of time—ten minutes or so—during which Applicant could have forced or coaxed Belinda into the walk-in closet, killed her, potentially changed his clothes,⁴⁴ staged a burglary, hustled ET into his truck, and still arrived at the supermarket by 4:32 p.m.⁴⁵ Defense counsel was aware of the content of Kenneth’s written statement well in advance of trial.

When Kenneth testified before the grand jury in early April of 1999, he gave the same time estimates: Belinda arrived at his house “at 3:45,” and they visited “for a few minutes standing there in the garage.” “She probably was at my house from 3:45 to 3:55. I think she left about five minutes till 4:00.” He confirmed that the drive from his house to Applicant and Belinda’s home was “[a]bout 15 minutes.” Defense counsel was provided with a copy of Kenneth’s grand jury testimony in the middle of the State’s cross-examination. In any event, he would have known at the time of trial from Kenneth’s written statement to the sheriff’s investigators that Kenneth’s pre-trial estimate was quite favorable to his defensive posture, since it supports a time-line that would have made it even more problematic for a jury to conclude that Applicant could have murdered Belinda.

Inexplicably, Kenneth remembered the time-line differently at trial. He claimed once again that he got home at 3:30 p.m. Defense counsel asked him to give his “best estimate or if you looked at a clock, when did Belinda get there?” Kenneth told the jury, “3:32, or close to that.” A short while later, defense counsel asked, “And then when did she leave.” Kenneth answered, “In minutes. 3:45 at least.” Defense counsel then asked Kenneth how long the drive was between the two houses. Kenneth answered:

A. 15 to—15 plus minutes.

Q. Okay. And she left there at 3:45?

A. Yes.

This estimate would have placed Belinda at home much closer to 4:00 o’clock, in conformance with the State’s theory of the case. Though the prosecutor showed Kenneth selected portions of his grand jury testimony while she cross-examined him at trial, she never showed him his earlier testimony with regard to the time-line.

Kenneth testified again during the writ hearing. At this point, he reverted to his original account of the time-line, asserting once again that Belinda did not arrive at his house until 3:45, stayed for about ten minutes, and left “by 3:55.” Kenneth maintained that he had given defense counsel a copy of his written statement to the sheriff’s investigators on more than one occasion prior to trial. Even so, he maintained, defense counsel never advised him to review his written statement before testifying at trial. Kenneth reiterated that his grand jury testimony with respect to his time estimates was consistent with his written statement. When, on cross-examination at the writ hearing, the State’s habeas counsel showed Kenneth a

transcript of his trial testimony to confirm that he had given a different time estimate at trial, Kenneth seemed incredulous:

Q. Do you recall what you testified to during your son's trial back in 2007 as to what time Belinda Temple left her house?

A. I don't remember that specifically, no. I remember my written testimony [sic], not that.

Kenneth insisted that his testimony at trial had been inaccurate. He reiterated that defense counsel had not instructed him before his trial testimony to review his written statement, nor did he review it on his own accord "during the trial."

For his part, defense counsel made no excuses for this lapse when he testified at the writ hearing. He admitted that Kenneth had given him a copy of his written statement "soon after I became involved in the case." Applicant's counsel then asked defense counsel:

Q. Which of these two timelines are more beneficial to the defense, alibi defense for [Applicant]?

A. Well, the one of Ken Temple's timeline. The one that has Belinda arriving at the Temple home, Mr. and Mrs. Temple's home at 3:45 and then leaving at 3:55, because that would put her at [Applicant] and Belinda's home about 15 minutes later, which would make it after 4 o'clock.

Q. Can you think of any reason why you did not use that second timeline?

A. I have no explanation for it. I don't know.

Q. Can you imagine how you made that mistake?

A. No.

Q. Was it intentional?

A. No.

Q. Is there any strategic reason why you would not make at that time your only defense as close to 4:30 as possible?

A. No.

Q. Now, can you imagine any reason why you did not

use [Kenneth's written statement] to refresh the memory of [Kenneth] when [he] said I got home—she got to the house at 3:32?

A. No.

Q. And left at 3:45?

A. No. It was obviously different from his written statement, and I should have gone up and shown him his written statement and say "Does this refresh your recollection," but I did not.

Q. Have you done that before?

A. I have.

Q. On few or many occasions refreshing a witness' memory with a prior written statement?

A. Well, you know, that's second-year law school evidence. You can do that. I've done it a lot of times.

Q... Mr. [defense counsel], is there any reason whatsoever for you, from a strategic perspective, not to use [Kenneth]'s timeline?

A. No.

Q. Did it harm your client not to use his timeline?

A. I now believe it did, yes.

Q. Why?

A. Well, because it gave more time to be explained. That is, more time to do what the State envisioned that [Applicant] did, that is, time to kill Belinda, get rid of the shotgun.

Strictly speaking, of course, defense counsel was mistaken to assume that he could have used Kenneth's written statement to refresh Kenneth's memory on the witness stand—at least not over an objection from the State. Kenneth did not purport to suffer from a lapse of memory while testifying at trial; he seemed to remember well enough. *See Callahan v. State*, 937 S.W.2d 553, 559 (Tex. App.—Texarkana 1996 no pet.) (predicate for using a document to refresh a witness's memory includes a showing that "his memory needed to be refreshed").⁴⁶ He just remembered differently than he had in the past. Nevertheless, a party may impeach his own witness. *See TEX. R. EVID. 607* ("Any party, including the party that called the witness, may attack the witness's credibility).

Defense counsel could have laid the predicate, under [Rule of Evidence 613](#), to use Kenneth’s written statement to elicit the fact that Kenneth had made an inconsistent statement in the past—in the hope that reminding Kenneth of his prior written statement *would* jog Kenneth’s memory and cause him to revise the substance of his trial testimony. [TEX. R. EVID. 613](#). Moreover, once he learned during Kenneth’s cross-examination that Kenneth had testified to the grand jury consistently with his written statement, he could have impeached him with that as well, if necessary.

More to the point, defense counsel should have better prepared this witness for his critical trial testimony; at the very least, he should have asked Kenneth to review his written statement before taking the witness stand, to refresh his memory *before* trial. *See, e.g., Perrero v. State*, 990 S.W.2d 896, 899 (Tex. App.—El Paso 1999, pet. ref’d) (trial counsel provided ineffective assistance of counsel by putting his client on the witness stand without properly preparing him to testify). Perhaps defense counsel was distracted from his ordinary witness-preparation duties because he was busy exploring the many new evidentiary leads while in the process of trying his case—a product of the State’s belated disclosure of so much information that was favorable to the defense.

Notwithstanding defense counsel’s admission at the writ hearing, the State argues that his performance was not constitutionally deficient because failing to challenge Kenneth’s trial testimony was nonetheless objectively reasonable. We have indeed held that trial counsel’s conduct must be measured by an objective standard of reasonableness, and “a decision not motivated by strategy might be objectively reasonable.” *Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016). From this proposition, the State seems to argue that, because defense counsel *might* reasonably have chosen to stand on Kenneth’s trial testimony, not challenge it, we may not find that his performance was constitutionally deficient. I ultimately disagree, for two reasons.

First of all, to the extent the State is suggesting that defense counsel actually *made* a strategic decision to let Kenneth’s trial testimony stand unchallenged, the record presents little evidence to support that conclusion. Defense counsel denied it, insisting that he had simply made a mistake. “Whether a counsel’s action or inaction is based on a strategic choice is a factual question, on which the defendant can offer evidence when the incompetency challenge is presented in a post-conviction proceeding (as often must be the case).” [LaFave, CRIMINAL PROCEDURE § 11.10\(c\), at 1133](#). There is no compelling reason to reject defense counsel’s

testimony in this regard. *See Saenz*, 491 S.W.3d at 828 & n.9 (refusing to indulge the appellate presumption that counsel’s decisions were strategically motivated in the context of a post-conviction habeas corpus proceeding at which “the record ... was developed, and trial counsel was able to adequately respond”).⁴⁷ I have no trouble believing that, presented for the first time in the middle of trial with an abundance of vital new information to support a new defensive theory—an alternative suspect—defense counsel lost his focus when executing his original defensive plan of alibi. As ultimate factfinder in post-conviction habeas corpus proceedings, we are free to accept trial counsel’s assurance that his conduct was *not* based on trial strategy, even if the record presents some basis to believe that some objective strategy *could* have justified it. *See Saenz*, 491 S.W.3d at 829 (“[A]s the ultimate factfinder in habeas proceedings, we decline to adopt the habeas court’s finding that trial counsel might have made a reasonable strategic decision ...”). Accordingly, I decline to automatically adopt the State’s “*post hoc* rationalization of counsel’s conduct” in place of counsel’s own explanation. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003).

Secondly, the State’s asserted justification strikes me as less than objectively reasonable. The State argues that defense counsel was content to let Kenneth’s trial testimony go uncorrected because it was consistent with the account he would later elicit from Applicant himself during Applicant’s own trial testimony. Were I to regard this as a plausible tactical choice, it might present me with a reason to reject, as disingenuous, defense counsel’s concession that his failure was a mistake, and to conclude instead that it was a reasonable tactical decision in keeping with his overall strategy in the case. But, for reasons I develop next, I find the State’s proposed defensive strategy untenable.

In Applicant’s own written statement to sheriff’s investigators, also taken on the night of the murder, he estimated that Belinda “got home around 3:45 P.M.” When he testified at trial, however, he claimed he did not know exactly what time Belinda had gotten home because he had taken his watch off to bathe ET. He guessed, however, that she had gotten home closer to 4:00 p.m. The State argues that defense counsel made a deliberate decision not to impeach Kenneth’s earlier testimony because the estimate Kenneth had given at trial—that Belinda left his house at 3:45 p.m.—was consistent with Applicant’s own (albeit revised) estimate that she had arrived home approximately fifteen minutes later, at 4:00 p.m. The State theorizes that defense counsel deliberately chose to forego corrective measures with respect to Kenneth’s testimony in order to avoid any later

contradiction of Applicant’s own time estimate and to thereby maintain Applicant’s credibility.

I find this theory questionable. Both Kenneth and Applicant were asked at trial to supply their best estimates of the time-line, and the jury was not necessarily expecting perfect precision. Defense counsel had nothing to lose and everything to gain by propounding the most favorable estimate available—regardless of whether it might conflict slightly with his client’s. After all, under Applicant’s own estimate, which placed Belinda home about 4:00, it would have been difficult, but not inconceivable, for him to have committed the offense and still arrived at the supermarket by 4:32 p.m. But under Kenneth’s pre-trial estimate, placing Belinda home much closer to 4:10 p.m., it would have been practically impossible. I do not think that any reasonable defense lawyer would adopt the State’s proposed strategy under these circumstances, and I decline its invitation to find that defense counsel in fact did.⁴⁸

Defense counsel failed to properly prepare Kenneth to testify consistently with his written statement with respect to a particular fact that was vital to the optimal presentation of his original defensive posture in the case. He was also unprepared to impeach Kenneth in the event that he persisted in testifying differently than his written statement. I would hold that these failures constituted an omission that fell below the standard of reasonable professional competence. I would hold that Applicant has satisfied the deficient-performance prong of *Strickland*, and I turn next to the question of prejudice.

C. Prejudice

The question before us on discretionary review in this case was legal sufficiency: whether a rational jury could convict Applicant on the basis of the facts presented. We held that the circumstantial evidence supported a rational jury verdict of guilty beyond a reasonable doubt. *Temple*, 390 S.W.3d at 363. But rational juries can acquit even when the evidence is legally sufficient to convict,⁴⁹ and the question before us in gauging the prejudice prong of *Strickland* is not one of sufficiency of the evidence. *Cf. Kyles v. Whitley*, 514 U.S. at 434 (*Brady*’s materiality standard, which is essentially the same as *Strickland*’s prejudice prong, “is not a sufficiency of evidence test”). Given the evidence that Applicant’s jury heard in this case, a rational jury might just as readily have acquitted him. Even the State’s evidence presented some basis to doubt whether Applicant could possibly have had time to perpetrate the offense, and there is further evidence of a

viable second suspect who was close at hand and who also arguably had a motive to commit Belinda’s murder. In short, the jury’s verdict, though rational, was hardly “one with overwhelming record support.” *Saenz*, 491 S.W.3d at 833 (quoting *Strickland*, 466 U.S. at 696). When that is the case, reviewing courts may more readily conclude that deficient attorney performance results in prejudice. *Id.*

“Applying that principle here,” *id.*, it is not hard to imagine that defense counsel’s mistake, isolated as it was, could have tipped the precarious balance the other way. Add to the existing record the evidence that the jury would have heard but for defense counsel’s failure to properly prepare Kenneth to testify, and there is a reasonable probability that a rational jury would harbor a reasonable doubt that Applicant was the murderer. Had defense counsel been less distracted by late-disclosed evidence and therefore better focused to prepare his witness, there is little reason to doubt that Kenneth would have reverted to his original time estimate. And had the jury heard and credited Kenneth’s original time estimate, it might more readily have concluded that Applicant could not have had time to kill Belinda,⁵⁰ and it may therefore have given more credence to the alternative hypothesis—in some respects, *better* supported by the evidence—that RJS was the perpetrator.

The *Strickland* standard does not require us to conclude that such a scenario is more likely than not before habeas corpus relief is appropriate. 466 U.S. at 693. “The result of a proceeding can be rendered unreliable, and hence the proceedings unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 694.⁵¹ In view of the overall context in which this trial occurred, it is no great stretch to declare that our confidence in the result of Applicant’s trial has been undermined, and that is enough to establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* I conclude that he has established by a preponderance of the evidence both deficient performance and prejudice, and thus he has established that he suffered a deprivation of his Sixth Amendment right to the effective assistance of counsel.

IV. CONCLUSION

Accordingly, I concur in the Court’s judgment to reverse Applicant’s murder conviction and remand him to the custody of the Harris County Sheriff to answer to the indictment against him.

All Citations

Footnotes

- 1 [Temple v. State](#), 342 S.W.3d 572 (Tex. App.–Houston [14th Dist.] 2010).
- 2 [Temple v. State](#), 390 S.W.3d 341 (Tex. Crim. App. 2013).
- 3 [TEX. CODE CRIM. PROC. art. 11.07](#).
- 4 [TEX. CODE CRIM. PROC. art. 11.07](#).
- 5 [466 U.S. 668](#) (1984).
- 6 [373 U.S. 83](#) (1963).
- 7 [947 S.W.2d 202](#) (Tex. Crim. App. 1996).
- 8 *Id.* See also [Ex Parte Harleston](#), 431 S.W.3d 67 (Tex. Crim. App. 2014); [Ex Parte Holloway](#), 413 S.W.3d 95 (Tex. Crim. App. 2013).
- 9 See [Ex parte Brown](#), 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). See also [Ex parte Reyes](#), 474 S.W.3d 677, 681 (Tex. Crim. App. 2015) (noting that, because a declaration of actual innocence might constitute “greater relief than merely granting a new trial,” it is appropriate to address an actual innocence claim even though we may grant habeas relief in the form of a new trial on another ground).
- 10 [373 U.S. at 87](#).
- 11 [United States v. Agurs](#), 427 U.S. 97, 107 (1976).
- 12 [United States v. Bagley](#), 473 U.S. 667, 676 (1985).
- 13 [Strickler v. Greene](#), 527 U.S. 263, 280 (1999) (quoting [Bagley](#), 473 U.S. at 682).
- 14 *Id.* at 281–82.
- 15 *Id.* at 289 (citing [Kyles v. Whitley](#), 514 U.S. 419, 434 (1995)).
- 16 [Ex Parte Miles](#), 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (citing [Harm v. State](#), 183 S.W.3d 403, 408 (Tex. Crim. App. 2006)).
- 17 Although the prosecutor and the defense counsel discussed by telephone on February 23, 2005 (a Wednesday), the existence of certain pieces of evidence in the prosecution’s file, and defense counsel was informed that he could, at that time, come view that evidence, the prosecution’s file was suddenly closed to defense counsel on that following Monday, February 28, 2005, the day defense counsel requested the examining trial.
- 18 [991 S.W.2d 864, 866](#) (Tex. Crim. App. 1999).

19 *Id.* (emphasis added).

20 On January 1, 2014, the Legislature enacted the Michael Morton Act to ensure that defendants, such as Applicant in this case, would receive evidence that the State had in its possession in order to prepare a defense against it. See Michael Morton Act, 83rd Leg., R.S. ch. 49, § 3, 2013 Tex. Sess. Law Serv. 1611 (codified as [TEX. CODE CRIM. PROC. art. 39.14](#)); *Ex parte Pruett*, 458 S.W.3d 537, 542 (Tex. Crim. App. 2015). The Michael Morton Act created a general, ongoing discovery duty of the State to disclose before, during, or after trial any evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive. We believe that the Michael Morton Act was created to avoid problems exactly like those that arose in this case.

21 The prosecutor testified that she was willing to read information to the defense prior to trial from the police reports, but they could not see them. “I would give them all the discovery they were entitled to. Piece-by-piece, day-by-day, very slowly and very miserably they got what they were entitled to have.” She said she was going by “the hard rules, ... where you go through it piece-by-piece, paragraph-by-paragraph.”

22 See *Ex Parte Villegas*, 415 S.W.3d 885 (Tex. Crim. App 2013); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (holding that “the disclosure of all of this information to the jury could have significantly undermined the confidence in the State’s case”).

23 466 U.S. 668 (1984).

24 Defense counsel testified at the writ hearing that he “was learning stuff that was vital that [he] should have known months before trial so [he] could have properly investigated it.” He said that he “did what [he] could at the time and during trial,” but “[t]here was too much to digest, there was too much to investigate in the middle of trial.”

25 See e.g., *Ex parte Saenz*, 491 S.W.3d 819, 833 (Tex. Crim. App. 2016); *Ex parte Allen*, Nos. AP–75580 and AP–75581, 2009 WL 282739, *9 (Tex. Crim. App. 2009) (not designated for publication) (holding that, in light of our disposition of the case granting relief on one of the applicant’s grounds, we did not need to address all of the applicant’s claims).

1 A firearms examiner testified at trial that the diameter of the wadding from the shotgun shell used to murder Belinda was “consistent with a 12–gauge more than any other gauge” of shotgun shell. It has not been seriously disputed at any stage of these proceedings that the murder weapon was a twelve-gauge shotgun.

2 The time-stamp on a security video from the supermarket indicated that Applicant arrived there with ET at 4:32 p.m.

3 Belinda worked at a different high school than Applicant.

4 Applicant knew that Belinda was pregnant, of course. As of 1999, however, the Legislature had not yet provided that the murder of a pregnant woman was a capital offense. See Acts 2003, 78th Leg., ch. 823, § 2.01, p. 2608, eff. Sept. 1, 2003 (amending [Penal Code Section 1.07\(26\)](#)’s definition of “individual” to include “an unborn child at every stage of gestation from fertilization until birth”); *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) (recognizing the 2003 legislative amendment authorizing capital prosecution for the murder of a mother and her fetus).

5 Prior to the passage of the Michael Morton Act in 2013, “Texas law gave a defendant the right to no more discovery than due process requires.” Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 48 TEX. TECH. L. REV. 893, 898 (2016).

6 Asked whether the State should reveal information about an alternative suspect prior to trial, the second chair prosecutor replied, “Not if you run it down and there’s no validity to it, then it is not something that needs to be disclosed.” The first chair prosecutor testified similarly that she was not obligated to turn over information seemingly favorable to the defense if in her estimation it was “ridiculous.” She went so far as to assert that it was her “job” to “stand up for” an alternative suspect like RJS if she believed he was being “wrongfully accused.” She insisted that “[t]here is a line you have to draw in your own mind ethically where you quit accusing a 16–year-old boy of committing a capital murder.”

- 7 Because ET was running a low fever on the day of the offense, Belinda left school early to fetch him from his day care center and take him home. She then called Applicant to come tend to ET while she returned to school for an important meeting. She was murdered after she returned home from that meeting, but not before she stopped at her in-laws' house to pick up a batch of homemade chicken soup for ET. By the time she arrived home, ET was feeling much better. At trial, the parties stipulated that a subsequent psychological examination revealed "no evidence that ET had been a witness to the murder."
- 8 These offense reports revealed that RJS was questioned by various sheriff's investigators as many as seven times, giving a number of oral statements and two written statements. He was subjected to two polygraph tests, both of which showed signs of deception when he was asked about his involvement in Belinda's murder. He eventually refused to submit to a third polygraph. In spite of these circumstances as detailed in his offense report, Detective Charles Leithner pronounced himself "satisfied" at trial that RJS did not kill Belinda. Defense counsel was prevented from introducing evidence of RJS's failed polygraphs, and Applicant did not complain of this ruling on appeal. But defense counsel was permitted to show that RJS was questioned repeatedly by the investigators and that, at one point, Leithner told RJS's parents that RJS could not be ruled out as a suspect until his story could be corroborated.
- 9 The docket sheet reflects that the jury was retired to deliberate at 2:47 p.m. on November 14, 2007, excused for the evening at 4:45 p.m., and then returned its verdict the next day at 4:25 p.m.
- 10 Justice Seymore authored the panel opinion holding the evidence legally sufficient. [Temple](#), 342 S.W.3d at 581–619. But he also authored a separate concurring opinion, decrying the panel's acquiescence to the plurality and concurring opinions of this Court in [Brooks v. State](#), 323 S.W.3d 893 (Tex. Crim. App. 2010), which a few months earlier had abandoned factual sufficiency review.
- 11 Justice McCally, who was not a member of the original panel, authored an impassioned dissent to the denial of rehearing en banc, urging the court of appeals to hold that the evidence was legally insufficient. [Temple](#), 342 S.W.3d at 628–46. Justice Seymore weighed in again, writing a separate dissent to the denial of en banc rehearing. He disagreed with Justice McCally's conclusion that the evidence was legally insufficient, but he opined that, for essentially the same reasons that Justice McCally concluded that the evidence was legally insufficient, he would hold that it was factually insufficient. *Id.* at 646–59. He was joined by Justice Anderson.
- 12 The majority opinion of the court of appeals panel, the separate opinions on the denial of rehearing en banc, and the opinion of this Court on discretionary review, all engaged in lengthy and meticulous recitations of the evidence. Though I have studied both the entire record of the appeal as well as the lengthy hearing on Applicant's writ application, I do not recite the facts in quite the same level of detail in this opinion. For present purposes, I must limit my fact recitation to those details most pertinent to Applicant's particular post-conviction claims. For the full flavor of how painstaking the legal sufficiency analyses were in this case, however, I refer the reader to those various recitations. Our discretionary review was limited to Applicant's sufficiency claims.
- 13 The Court's opinion today does not address this aspect of the court of appeals' holding.
- 14 Applicant also claimed on appeal that the first chair prosecutor engaged in numerous instances of prosecutorial misconduct during the course of the trial. The court of appeals agreed with many though not all of these claims but concluded that, on balance, her misconduct did not operate to deprive Applicant of a fair trial. [Temple](#), 342 S.W.3d at 592–619. These numerous claims were not embraced within the scope of our discretionary review, which was limited to Applicant's sufficiency claims. To a large extent, Applicant's present post-conviction writ application continues to dwell on the prosecutor's conduct and her character. While I do not condone some of the prosecutor's actions in this case, I find Applicant's focus on her conduct and character largely to distract from the genuine issue under *Brady*, namely, whether Applicant was ultimately deprived of favorable evidence that might realistically have made a difference to the outcome of his trial. After all, the bedrock "principle" that undergirds *Brady* "is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused." [Brady](#), 373 U.S. at 87 (citing [Mooney v. Holohan](#), 294 U.S. 103 (1935)).
- 15 To the extent that Applicant is now complaining of late-disclosure of the same information that he complained about on direct appeal, the court of appeals' disposal of that issue, which we had no occasion to examine on discretionary review, has become law of the case. Thus, the court of appeals' holdings that Applicant's *Brady* complaint was procedurally defaulted and that, alternatively, the particular information he claimed on appeal that the State suppressed was not material, those holdings have become binding. See George E. Dix & John M. Schmolesky, 43B TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 59:13, at 822 (3rd ed. 2011) ("The doctrine of the 'law of the case' clearly limits ... efforts to use habeas to relitigate issues already resolved on appeal. The direct appeal and

subsequent application for habeas relief are the same ‘case’ for purposes of this doctrine, and consequently the law of the case doctrine generally bars reconsideration of issues of law resolved in the appeal.”) (footnotes omitted). Neither Applicant nor the Court today attempts to explain why the court of appeals’ holdings with respect to procedural default and materiality should not be final—at least to the extent that Applicant continues to complain of suppression of the same evidence that formed the basis of his appellate complaint.

16 At the writ hearing, defense counsel testified, for example, that he was given about an hour to review the nearly 100 page offense report of Detective Leithner while sitting in the courtroom with one of the prosecutors hovering over him. Defense counsel later introduced Leithner’s offense report as an exhibit in support of his motion for continuance, and the trial court admitted it for record purposes, so it was a part of the appellate record in the court of appeals.

17 The judge who presided over the writ hearing is not the same judge who presided over Applicant’s trial. After we filed and set this cause for submission, the State filed a motion in this Court to supplement the record with an affidavit from the judge who presided over the trial in 2007, expressing his disagreement with the habeas court judge’s recommendation that we grant *Brady* relief in this cause. Applicant, in turn, filed a motion to strike the State’s motion. We denied both motions on May 18, 2016.

18 I take this phrase verbatim from the habeas court’s findings of fact and conclusions of law.

19 As the United States Supreme Court recently emphasized, under this standard, an applicant “can prevail even if ... the undisclosed information may not have affected the jury’s verdict.” *Weary v. Cain*, 136 S.Ct. 1002, 1006 n.6 (2016).

20 Because this would constitute a new *Brady* claim, we would not be bound by law of the case with respect to the *Brady* claim that Applicant raised on direct appeal.

21 Here I am giving Applicant the benefit of the doubt that, if he can present new evidence to show *incremental* materiality, he will not be bound by law of the case, and can make his claims in post-conviction habeas corpus proceedings notwithstanding the court of appeals’ holdings with respect to procedural default and materiality.

22 The discussion that follows is meant to be illustrative, not necessarily exhaustive.

23 The record is unclear whether Applicant was wearing the same clothes when captured on the supermarket video that he had been wearing earlier in the day, before Belinda could have been shot. But there was defensive testimony at trial that the shotgun blast, even with the muzzle touching the back of Belinda’s head, would have caused some blow back and sprayed the shooter with blood. Sheriff’s investigators did not detect blood on the clothes Applicant was wearing after Belinda’s murder.

24 In its recommended findings of fact, the habeas court calls this witness “Stacy” Ferguson, but she is identified in the offense report and in the audio recording as “Courtney” Ferguson. Courtney Ferguson’s recorded interview is contained in Applicant’s Exhibit 180—and then again in Applicant’s Exhibit 178. See note 25, *post*.

25 Applicant has alleged, and the habeas court recommends that we find, that Christen “saw [Belinda] talking to [Applicant] on her cell phone between 3:20 and 3:30 pm on the day of her murder.” From the citations to the writ record, it appears that the recording of Christen’s interview is supposed to be contained in Applicant’s Exhibit 178. But this exhibit does not contain Christen’s interview. Instead, it is a duplicate of the same interviews (including Ferguson’s) contained in Applicant’s Exhibit 180. The Court has taken the trouble to order the original exhibits from the district clerk and I have verified that we still have not been provided with the audio recording of Christen’s interview. None of these witnesses testified at the writ hearing. Thus, there is nothing in the record to substantiate the habeas court’s recommended finding. At trial, Christen simply testified that Belinda’s meeting at the school lasted until “about 3:20 to 3:30[.]” but Christen did not mention Belinda making a call on her cell phone during that time, and she did not see what time Belinda left the campus.

26 During questioning by one of the prosecutors at the writ hearing, the head of the appellate section in the Harris County District Attorney’s Office, who personally handled Applicant’s direct appeal, acknowledged as follows:

Q. Essentially, you wouldn’t disagree that [defense counsel] knew that [RJS] was a juvenile delinquent?

A. Yes.

Q. For heavens sake, he was on juvenile probation, right?

A. Yes.

- 27 “The Katy Boys” was the name the prosecutor gave to RJS’s teenage contemporaries in her testimony at the writ hearing. Defense counsel had another, less polite, term for them.
- 28 Sheriff’s investigators obtained written statements from CT, MG, CE, CC, and JP. I find no written statement from CG in the writ record. CT and MG testified before the grand jury in April of 1999.
- 29 Moreover, it is doubtful that would have elected to call any of the Katy Boys to the stand himself simply in order to impeach them.
- 30 Defense counsel knew about the burglary of the home of the boyfriend of CG’s mother prior to trial, having obtained an offense report of that offense in advance of trial. It was not until reviewing the offense reports pertaining to Belinda’s murder at trial, however, that defense counsel learned that RJS had joined the Katy Boys in their shotgun-shooting excursion days before Belinda’s murder. He questioned RJS about this event during his cross-examination of RJS at trial.
- 31 There is some discrepancy amongst the various statements with respect to the order of these events, but none is inconsistent with RJS’s claim that he was home by about 4:30 p.m. Defense counsel was aware of at least the general outline of this narrative from the offense reports he reviewed at trial.
- 32 Nobody at the writ hearing, including Hernandez himself, could say for sure that he had actually prepared such a supplement, but all agreed that, assuming he did, it has been lost.
- 33 There was no forensic evidence at trial to suggest that a pillow was used to muffle the shot that killed Belinda.
- 34 It was shown at trial that several young boys who lived behind the Temple residence had heard what could have been a gunshot at around 4:30, at a time when Applicant must have been on his way to the supermarket. As the State hypothesized during the writ hearing, it is possible to argue that the boys heard the same backfire that Cadena thought he heard.
- 35 There is no evidence that the shotgun that killed Belinda was fired a second time.
- 36 Again, the discussion that follows is not exhaustive.
- 37 See *Ex parte Bryant*, 448 S.W.3d 29, 40 (Tex. Crim. App. 2014) (“Polygraph evidence is generally excluded from courtrooms because the reliability of such tests remains unproven and jurors could attach undue credibility to a test that purports to sort truth from fiction, a role for which a factfinder is more properly suited.”) (citing *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012) (“[W]e have not once wavered from the proposition that the results of polygraph examinations are inadmissible over proper objection because the tests are unreliable.”)).
- 38 See note 34, *ante*.
- 39 For example, Michael Ruggiero, a neighbor who lived across the street from the Temples, testified that the latch on their back gate was not catching properly, and that the Temples would therefore keep Shaka in the garage so he could not get out. His wife, Peggy, testified that she had observed Belinda arriving home on occasion and pulling into the garage. Belinda would honk the horn once the garage door had opened to signal for Shaka to move out of the way.
- 40 The habeas court simply concluded that Applicant’s “current claim that trial counsel provided ineffective representation has not been shown to meet the *Strickland* requirements and relief is not justified.” Such a perfunctory conclusion has little utility. When “the habeas judge’s findings do not resolve the disputed fact issues, this Court must exercise its role as the ultimate finder of fact.” *Ex parte Flores*, 387 S.W.3d 626, 635 (Tex. Crim. App. 2012). Fortunately, the factual development in the record is more than sufficient to provide a basis to glean the relevant facts ourselves and draw conclusions of law from them.
- 41 *E.g.*, *Ex parte Scott*, 581 S.W.2d 181 (Tex. Crim. App. 1979) (ineffective counsel at the punishment phase for failure to uncover the invalidity of a prior conviction that was used to enhance); *May v. State*, 722 S.W.2d 699 (Tex. Crim. App. 1984) (failure to file a sworn application for probation when the evidence demonstrated eligibility); *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991) (failure to request an accomplice-witness instruction requiring corroboration of the testimony of several accomplices as a matter of law); *Vasquez v. State*, 830 S.W.2d 948 (Tex. Crim. App. 1992)

(failure to request instruction on the defense of necessity when the evidence raised the issue); *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001) (failure to request limiting instruction/reasonable doubt instruction with respect to extraneous offenses that were integral to the State's proof); *Ex parte Harrington*, 310 S.W.3d 452 (Tex. Crim. App. 2010) (failure to investigate the validity of a prior conviction used to enhance punishment); *Villa v. State*, 417 S.W.3d 455 (Tex. Crim. App. 2013) (failure to request instruction on medical care defense when the evidence raised the issue); *Ex parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 2016) (failure to impeach chief witness for the State with his prior inconsistent statements).

42 The reporter's record at trial identified the witness as "Kenneth," not by his first name "Charles," and I conform to that designation in this opinion.

43 At the writ hearing, Detective Leithner confirmed that in his offense report he had indicated that it had taken him approximately sixteen minutes to drive the distance from Kenneth's house to Applicant's.

44 See note 23, *ante*.

45 This was the time that the security video showed Applicant and ET entering the supermarket.

46 In *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979), we explained:

A witness testifies from present recollection what he remembers presently about the facts in the case. *When that present recollection fails*, the witness may refresh his memory by reviewing memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded. (Emphasis supplied). All of this is contingent on a lapse of present recollection.

47 When ineffective counsel is alleged on direct appeal, it is usually the case that the record is silent with respect to whether counsel's action or inaction was the product of strategy or mistake. *Bone v. State*, 77 S.W.3d 828, 833 & n.13 (Tex. Crim. App. 2002). "An ineffectiveness claim raised on direct appeal is limited to what the trial record reveals as to the grounding for counsel's actions, and here the appellate court commonly will assume a strategic motivation if any can possibly be imagined." *LaFave*, *supra*, at 1137. In the post-conviction context, however, where ineffectiveness of counsel has been alleged and the record has been developed with respect to counsel's actions, this appellate assumption no longer controls. *Saenz*, 491 S.W.3d at 828 & n.9. If trial counsel concedes that his challenged act or omission was not the product of strategy, the objective existence of a plausible strategic basis for the act or omission may provide a reason to doubt the genuineness of his concession. That would justify a finding of fact that his choice was, in fact, a strategic one notwithstanding his concession otherwise. But, as the ultimate fact-finder in post-conviction habeas corpus proceedings, we remain free to accept trial counsel's concession. *Id.* at *7. This is unlike in the appellate context, where appellate courts must defer to a trial court's finding with respect to the credibility of counsel's claim that an act or omission was inadvertent rather than strategic. See *Okonkwo v. State*, 398 S.W.3d 689, 694 & n.4 (Tex. Crim. App. 2013) (where trial counsel claimed lack of strategic motive for an omission at trial, appellate court "should have deferred to the trial court's implied finding that counsel's affidavit lacked credibility"). Of course, even in the post-conviction context, we usually defer to the recommended findings of the convicting court when they are supported by the record. *E.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007). Here, however, the habeas court made only one finding of fact relevant to this ineffective counsel claim: "Defense counsel did not use Charles Kenneth Temple's written statement timeline." It made no recommended finding with respect to the credibility of defense counsel's concession that his failure to do so was an oversight, not the product of strategy. The only question that remains with respect to the performance prong of *Strickland* is whether that mistake was one that fell outside the bounds of reasonable professional standards.

48 This is not to say that the record is wholly devoid of any support for the State's argument. For instance, as part of a mock trial in preparation for Applicant's trial, the defense team apparently prepared a "Juror Notebook" containing a time-line which listed the time of Belinda's arrival home as "3:55 p.m." Similarly, during his opening statement to the jury at the beginning of trial, defense counsel told the jurors that the evidence would show that Belinda arrived home "between 3:45 and 4:00 o'clock sometime." This time-frame was consistent with Applicant's statement to sheriff's investigators (3:45), as later revised by his trial testimony (4:00).

But other excerpts from the trial record support defense counsel's assertions at the writ hearing that he simply made a mistake, not a strategic choice that he regrets in hindsight. For example, at one point during Applicant's direct examination at trial, in trying to establish what time Belinda must have arrived home, defense counsel asked Applicant:

Q. So if [Belinda] left [Kenneth's house] at 3:50, 3:55 she would have gotten [home] what time?
The prosecutor astutely objected that defense counsel's question "assumes facts not in evidence." Because Kenneth's trial testimony placed Belinda's departure at 3:45, not "3:50, 3:55," as defense counsel's question posited, the trial court correctly sustained this objection. Nevertheless, more than once defense counsel asked Applicant questions that seemed to assume that Kenneth's earlier trial testimony had been consistent with Kenneth's prior written statement. These exchanges strongly suggest to me that defense counsel simply did not realize that Kenneth had testified differently, and that his failure to try to correct Kenneth was a mistake, not a strategic choice. Defense counsel's second chair attorney confirmed that it had been the defensive strategy at trial "to try to get Belinda home as close to 4:32 as possible" because "the closer [to 4:32] that she arrives to the house, the more favorable it is to the defense." "Courts ... readily find ineffective assistance when counsel's testimony at a post-conviction evidentiary hearing establishes that a failure to act on an important matter was a product of inattention in a setting where the missed option was obvious." *LaFave, supra, at 1161*.

49 See *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) ("Jury verdicts finding guilt beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt[.]").

50 As it is, relying on the estimate that Applicant originally gave to sheriff's investigators that Belinda arrived home as early as 3:45 p.m., the State argued during its final summation at the guilt phase of trial that Applicant enjoyed as much as 47 minutes to perpetrate the offense and get to the supermarket. Defense counsel was unequipped to refute this scenario in his own final argument. Had defense counsel properly prepared Kenneth to testify consistently with his original statement to the police and his grand jury testimony, then defense counsel would have been in a position to argue to the jury that Applicant had no more than ten minutes in which to commit the offense.

51 Indeed, as is the case with the *Bagley* test for materiality, under the *Strickland* test for prejudice, Applicant "can prevail even if" trial counsel's deficiency "may not have affected the jury's verdict." *Weary v. Cain*, 136 S.Ct. at 1006 n.6.

433 S.W.3d 546
 Court of Criminal Appeals of Texas.

Thaxton D. JOHNSON, Appellant
 v.
 The STATE of Texas.

No. PD-0473-13.

June 18, 2014.

OPINION

PRICE, J., delivered the opinion of the Court in which KELLER, P.J., and MEYERS, WOMACK, KEASLER, HERVEY, COCHRAN, and ALCALA, JJ., joined.

The appellant was convicted by a jury of capital murder and sentenced to life imprisonment without the possibility of parole.¹ At trial, the appellant had sought to cross-examine two State’s witnesses for bias by informing the jury of the specific felony charges—and concomitant ranges of punishment—the witness then faced in Harris County. However, the trial court limited his cross-examination to exposing the fact that the witnesses stood accused only of certain unspecified “felonies.” On appeal, the First Court of Appeals rejected the appellant’s claim that the trial court’s ruling violated his right under the Confrontation Clause to effectively cross-examine adverse witnesses and affirmed the conviction.² In his petition for discretionary review, the appellant urges this Court to reverse the court of appeals on the rationale that “[m]erely informing the jury that the State’s witnesses had pending felony indictments is insufficient to accomplish what the Sixth Amendment right of confrontation intends[.]”³ We will affirm.

Synopsis

Background: Defendant was convicted in the District Court, Harris County, of capital murder. He appealed. The Court of Appeals, 2013 WL 1451292, affirmed. Defendant appealed.

Holdings: The Court of Criminal Appeals, Price, J., held that:

^[1] trial court’s refusal to allow defendant to impeach state’s witnesses during cross-examination with evidence of specific pending felony charges against them did not violate defendant’s right to confrontation, and

^[2] trial court’s refusal to allow defendant to impeach the witnesses during cross-examination with evidence of punishment ranges attendant to their pending charges did not violate defendant’s right to confrontation.

Affirmed.

Attorneys and Law Firms

*548 Allen C. Isbell, Attorney at Law, Houston, TX, for Thaxton D. Johnson.

Bridget Holloway, Assistant District Attorney, Houston, Lisa C. McMinn, State’s Attorney, Austin, TX, for The State of Texas.

Opinion

FACTS AND PROCEDURAL POSTURE

A. The Investigation

In the early hours of Valentine’s Day 2010, Susan Griert awoke to the sounds of shattering glass and the voice of her boyfriend, William Thompson, crying out for her. She found Thompson lying on the floor of their bedroom with blood “gushing up out of his mouth,” the result of gunshot wounds to his chest and face. She called 9–1–1 emergency services and was directed to administer CPR until paramedics arrived at the scene. Though first responders arrived in time to administer aid to Thompson, he ultimately succumbed to *549 his wounds and was later pronounced dead.

In the course of the ensuing murder investigation, Houston Police Department detectives discovered that the appellant, a handyman whom Thompson and Griert had often paid to do odd jobs, recently had a falling out with the couple. As they dug deeper into the appellant’s

connection with the victim, detectives came into contact with brothers Joseph and Stefan Kennedy. Stefan, a friend of the appellant, told investigators that the appellant, while walking with Stefan through Thompson's neighborhood on the night of the shooting, stopped in front of Thompson's house and "pulled up his shirt," exposing the wooden handle of a gun. Evidently panicked, Stefan fled the scene. As he did so, he "heard ... a loud noise" that sounded "like a boom," as though "a door was being kicked." Joseph, meanwhile, told investigators that "around that time" he received a phone call from the appellant, who threatened to "kill Brandon [a third Kennedy brother] and Stefan" if they "snitch[ed]" on him. On the basis of these allegations and other evidence tying the appellant to Thompson's murder, the appellant was arrested and charged with capital murder.⁴

B. At Trial

After receiving notice of the State's intent to call Joseph and Stefan as witnesses against him, the appellant discovered that each brother was facing at least one felony charge in Harris County. Specifically, Joseph was under indictment for two counts of first-degree felony theft, while Stefan was indicted for first-degree felony aggravated robbery, state-jail felony theft, and Class-A misdemeanor assault. Accordingly, in a pretrial hearing, counsel for the appellant made the following request:

[F]or the purpose of the Defense, I believe that two of the witnesses—a Mr. Joseph Kennedy, if he's called, and Mr. Stefan Kennedy, if he is called—have pending felony cases. We believe that it would be appropriate on cross-examination to examine in front of the jury whether or not any offers have been made or whether or not they are testifying with the idea that this will be of benefit.

The trial court initially "ha[d] no problem with that," and granted the defense request. Later in the hearing, however, the State asked "orally in a motion in limine" that the appellant's counsel "not be allowed to go into what those pending charges are or anything they might have in a pending case." The appellant's counsel responded:

I think the fact that what the cases are—the degree and the range of punishment that he is facing—are

absolutely material as to the degree to which these might influence him in terms of garnering favor for the State for his testimony.

Certainly, if somebody has pending misdemeanor cases—a great deal different than if someone has a pending first-degree felony. We agree that is part of the equation ... of what goes into the possible fabrication and the possible tipping of the testimony against my client[.]

The trial court, evidently disagreeing, issued a preliminary ruling as to the admissibility of the specific felony offenses and *550 punishment ranges the Kennedy brothers faced: "Those two will not be admitted before the jury [.]” The trial court later clarified that it would permit counsel to “ask whether or not those things that are pending: Are they misdemeanors or are they felonies? That’s it.”

Several times throughout the trial, the appellant asserted his “constitutional right” to “confront the witnesses against [his] client” by “getting into whether or not there was anything out there that may influence his testimony against my client.” Over the State’s objection that “any further questioning” relating to the specific offenses and punishment ranges would be “beyond any [Rule] 609 impeachable conviction,”⁵ the appellant beseeched the trial court to allow him to “provide copies of the indictments in each case” so as to “identify what those cases are.” The appellant sought also to “ask [each witness] to inform the jury that these were first-degree felonies and that the punishment range for a first-degree felony is from five to ninety-nine years or life[.]” Each time this request was made, however, the trial court adhered to its earlier ruling that the extent of the appellant’s cross-examination of the Kennedy brothers’ pending charges would be limited to eliciting their classification as either “misdemeanors” or “felonies.” The appellant was ultimately convicted of capital murder, and, since the State did not seek the death penalty, the appellant’s sentence was automatic: imprisonment for life without the possibility of parole.

C. On Appeal

Before the First Court of Appeals, the appellant argued that “as a result” of the trial court’s limitation on his cross-examination of Joseph and Stefan “he was denied the ability to confront th[ose] witnesses in violation of the Sixth Amendment of the United States Constitution.”⁶ As he had argued before the trial court, the appellant

reasoned that “there was a causal connection ... between the witnesses’ ‘vulnerable status’ and their potential bias to testify in a manner favorable to the State,” and that the strength of that causal connection could not be optimally explored on cross-examination without delving into the nature, degree, and punishment ranges of the offenses underlying the charges pending against each witness.⁷

The court of appeals disagreed, holding that the appellant had not adequately established the requisite “causal or logical connection between the charges pending ... and any bias based on [the witnesses’] expectation of ... favorable treatment by the State[,]” thereby essentially failing to show the relevance of the proffered evidence.⁸ The court of appeals reasoned that “[t]he admission of ... the indictments in the pending cases and testimony about the punishment range ... would not have any further shown Joseph or Stefan’s ‘vulnerable relationship’ with the State” than the testimony actually elicited at trial: that both witnesses were simply facing “felony” charges in Harris County.⁹ And *551 as the appellant was, in its opinion, “otherwise afforded an opportunity for a thorough and effective cross-examination,” the court of appeals ruled that “the trial court did not err in limiting appellant’s request for further cross-examination about the specific felony charges ... and the punishment range of those offenses,” and it accordingly affirmed the judgment of conviction below.¹⁰

THE LAW

[1] The Sixth Amendment to the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”¹¹ While, as its name would suggest, this “Confrontation Clause” generally protects the defendant’s right to physically “confront” his accusers face-to-face,¹² this is hardly the only right protected by the Confrontation Clause.¹³ Rather, “[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination[,]” because that is “the principal means by which the believability of a witness and the truth of his testimony are tested.”¹⁴

[2] To that end, we have held that “it is not within a trial court’s discretion to prohibit a defendant from engaging in ‘otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.’ ”¹⁵ Nor, indeed, may a trial court prevent a defendant from “pursu[ing] his proposed line of cross examination” when it can be said that “[a] reasonable jury

might have received a significantly different impression of [the witness]’s credibility had ... counsel been permitted” to do so.¹⁶ The Fifth Circuit has added, in this context, that until it can be “determine[d] that the cross examination satisfied the Sixth Amendment, the [trial] court’s discretion” simply “does not come into play.”¹⁷ This qualification of a trial court’s discretion to limit cross-examination for bias appropriately accounts for the fact that “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination[,]” and is “always relevant as discrediting the witness and affecting the weight of his testimony.”¹⁸

This is not to say that trial courts do not “retain wide latitude insofar as the *552 Confrontation Clause is concerned to impose reasonable limits on such cross-examination,” so long as those limits do not operate to infringe upon the Confrontation Clause’s guarantee of “an *opportunity* for effective cross-examination.”¹⁹ After all, the accused is not entitled to “cross-examination that is effective in whatever way, and to whatever extent,” he might wish.²⁰ In light of this, in those circumstances in which the defendant seeks to “impeach a witness with evidence of pending criminal actions,” we have said that the trial court *does* have discretion to place limits on those areas of cross-examination in which the defendant fails to “establish some causal connection or logical relationship between the pending charges and the ... ‘vulnerable relationship’ ” alleged.²¹ This is because a defendant who cannot persuasively establish this connection has essentially failed to demonstrate that the evidence he seeks to introduce (*i.e.*, the existence and/or severity of the pending charges) is *relevant* to prove the allegation of bias.²²

[3] [4] Given that our “causal connection” requirement is ultimately rooted in the concept of relevance, however, it must also be borne in mind that “[t]he failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness’ credibility.”²³ This sensibility is aptly expressed in an oft-repeated legal aphorism: “A brick is not a wall.”²⁴ To be considered “relevant,” the proffered evidence need not definitively prove the bias alleged—it need only “make the existence” of bias “more probable or less probable than it would be without the evidence.”²⁵ The question in this case is whether the Confrontation Clause guarantees that the accused be permitted to use every brick at his disposal—no matter how incrementally it may serve to reinforce the wall.

ANALYSIS

A. No Logical Connection?

^[5] The court of appeals determined that the “appellant did not introduce additional *553 facts showing any causal or logical connection between the charges pending against Joseph and Stefan and any bias based on their expectation of a deal ... for more favorable treatment by the State based on their testimony in appellant’s trial.”²⁶ In support of this conclusion, the court of appeals relied upon our opinions in *Carpenter v. State* and *Irby v. State*, two cases in which we held that evidence alleged by the respective defendants to demonstrate an accusatory witness’s “vulnerable relationship” with the State was properly excluded due to each defendant’s failure to establish a “causal” or “logical” connection between the evidence and the bias alleged.²⁷ The appellant, meanwhile, claims that the court of appeals’s reliance on these cases is misplaced, as each of the tentative “connections” between the evidentiary proffers and biases in *Carpenter* and *Irby* is markedly weaker than the connection articulated at trial and on appeal in this case.²⁸

In *Carpenter*, the defendant was “precluded from cross-examining [a] State’s witness” about the “federal conspiracy charges then pending against” that witness.²⁹ While the defendant “posit[ed] that the pending federal charges demonstrated [the witness’s] vulnerable relationship with the State,”³⁰ we were not persuaded:

Appellant does not argue, and the record does not demonstrate, why prosecution by the federal government for theft and conspiracy to possess and distribute controlled substances would tend to show that the witness’ testimony in this unrelated state prosecution ... might be biased. * * * [T]he testimony in support of Appellant’s bill of exception does no more than establish the factual basis of the pending federal charges.³¹

On the basis of the defendant’s failure to show a “logical connection” between the federal charges and the witness’s potential for bias, we concluded that “the Court of Appeals’ determination that there was a danger that allowing such cross-examination would confuse the jury, or tempt it to use the facts developed in an improper way,” was “sound.”³²

In *Irby*, the defendant “wanted to cross-examine [the testifying complainant] about the fact that he was on deferred-adjudication probation for aggravated assault with a deadly weapon.”³³ As in *Carpenter*, the defendant argued to the trial judge that the witness’s “ ‘vulnerable

status’ was relevant to show bias and motive[.]”³⁴ Once again, however, we held that the “appellant *554 failed to make a logical connection between [the complainant’s] testimony ... and his entirely separate probationary status [.]”³⁵ Reasoning that a mere showing of the witness’s “vulnerable relationship” with the State, if evidenced *only* by his probationary status, would not make it any more or less probable that the witness harbored some bias in favor of the State, we concluded that “the trial judge did not abuse his discretion in excluding this impeachment evidence because it was irrelevant.”³⁶

At least with respect to the “nature” of the witnesses’ alleged offenses (*i.e.*, the *type* of felonies), we disagree with the appellant that he has provided any stronger a logical connection between the evidence proffered and the bias alleged than either of the posited connections we found to be inadequate in *Carpenter* and *Irby*. The fact that a witness stands accused of (for example) “felony theft” would not, if presented to the jury, make that witness seem any more prone to testifying favorably for the State than a similarly situated witness who stood accused only of some unspecified “felony.” Both hypothetical witnesses—the one accused of “felony theft” and the other accused of the unspecified “felony”—would stand in the same vulnerable relation to the State; other things being equal, they would be subject to the same risk and extent of punishment. In other words, had the jury been presented with the fact that Joseph’s felony charges were actually “felony theft” charges (and that Stefan’s were actually “felony robbery” charges), it would have had no incrementally greater capacity to evaluate his potential for bias—its perception of the witness’s vulnerable relationship with the State would be essentially the same as before. Thus, as in *Carpenter*, “Appellant’s bill of exception[.]” insofar as it pertains to the nature of the witnesses’ charged offenses, “does no more than establish the factual basis of the pending [State] charges.”³⁷

^[6] On the other hand, unlike the nature of a charged offense, the range of punishment attendant to a charged offense does have an incrementally greater impact on the jury’s ability to assess the witness’s motive to alter or fabricate his testimony. A jury privy to the considerable extent to which the State might seek, were it so inclined, to have the witness punished in the pending matter would *at least* be in a better position to assess a witness’s motive—if not his actual intent—to color his testimony in favor of the State. And from the jury’s perspective (again, other things being equal), a witness accused of a felony carrying the potential of a life sentence would be that much more likely—if only by a “brick”—to seek to mollify the State than a witness merely facing some

undifferentiated “felony” charge.

Further, the punishment-range evidence proffered by the appellant does not merely—as did the proffers in *Carpenter* and *Irby*—state a true but inconsequential fact about each witness. Instead, this evidence would have served to distinguish each witness from other, merely conceivably biased felony-indicted witnesses in such a way as to make the existence of the fact sought to be proved (*i.e.*, that the witnesses’s testimonies may have been influenced by their vulnerable relationships with the State) “more probable or less probable than it would be without the evidence.”³⁸ We therefore agree with the appellant that the *555 logical connection between Joseph and Stefan’s punishment ranges and their respective incentives to curry favor with the State is meaningfully stronger than the connections posited in either *Carpenter* or *Irby*. That evidence was indeed relevant, and at least marginally more probative, to enhance the showing of their potential biases in favor of the State.

B. Abuse of Discretion

[7] [8] [9] The appellant having satisfactorily established the relevancy of the pertinent punishment ranges to proving the bias he attributed to Joseph and Stefan Kennedy, the trial court *would* have abused its discretion to exclude that evidence on the basis of the appellant’s failure to demonstrate a “logical connection” between the two. But a trial court’s discretion does not simply terminate upon a showing that the proffered impeachment evidence and the allegation of bias are logically connected.³⁹ Indeed, it is a basic tenet of the law of evidence that merely establishing the relevancy of proffered evidence does not *necessarily* guarantee its admissibility.⁴⁰ Rather, and specifically “insofar as the Confrontation Clause is concerned[,]”

trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.⁴¹

This latitude is exceeded only when the trial court exercises its discretion to so drastically curtail the defendant’s cross-examination as to leave him “unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.”⁴² This kind of trial-court error is most conspicuous, of course, when the trial court *entirely* forecloses the defense from exposing—“prohibit[s] *all* inquiry into”—a “prototypical

form of bias.”⁴³ But it may also be subtler, such as when the only record-making permitted the defense is so circumscribed that “[a] reasonable jury might have received a *significantly different impression* of [the witness’s] credibility had [the defendant’s] counsel been permitted to pursue his proposed line of cross-examination.”⁴⁴

In support of his argument that the trial court abused its discretion, the appellant cites to our opinion in *Carroll v. State*, wherein we ruled that the “[a]ppellant’s inquiry into [the State’s witness’s] incarceration, his pending charge and possible punishment as a habitual criminal, was appropriate to demonstrate [the witness’s] potential motive, bias or interest to testify *556 for the State.”⁴⁵ On the basis of this excerpted language, the appellant asserts that an accused, having established “that the witness against him is in a vulnerable relationship with the authority who has called him as a witness[,]” is always “entitled to show the extent of that vulnerability.”⁴⁶ In effect, the appellant argues that only a categorical rule foreclosing the trial court’s discretion to exclude evidence of the punishment ranges faced by felony-indicted State’s witnesses will suffice to “accomplish what the Sixth Amendment intends” *vis-à-vis* guaranteeing an opportunity for effective cross-examination.

We disagree. In the first place, *Carroll* cannot reasonably be relied upon for the proposition that a criminal defendant has a right to elicit a felony-indicted State’s witness’s potential punishment range on cross-examination. The defendant in *Carroll* sought only to impeach the witness with evidence that he “was currently incarcerated and awaiting trial on an aggravated robbery charge *and that he had several prior felony convictions.*”⁴⁷ The excerpt of *Carroll* relied upon by the instant appellant is therefore better understood as an affirmation of an accused’s right to prove to the jury that his accuser may be subject to punishment as a habitual criminal (and could, as a result, be all the more biased in favor of the State), rather than his right to *precisely* prove the punishment range of the charged offense.

[10] Second, and more to the point, the appellant’s argument fails to account for the fact that “the Confrontation Clause guarantees [only] an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”⁴⁸ This is not a situation in which the trial court entirely foreclosed even the possibility of cross-examination into a “prototypical form of bias.”⁴⁹ Nor is it a situation about which it can necessarily be said that the jury “might have received a *significantly* different impression of [the witness’s] credibility” had it only been

privity to the *exact* punishment range concomitant to first-degree felony offenses.⁵⁰ To the contrary, in this case the trial court not only allowed the appellant to allege the potential for bias (by asking each witness whether he expected his testimony to be of any benefit to him); it allowed him to substantiate that allegation (by asking each witness whether he had any charges pending in Harris County), and to show that the potential for bias was weightier than it otherwise might have been (by asking each witness whether those charges were for “misdemeanor” or “felony” offenses). It appears, in other words, that in this instance the appellant *was* “permitted ... to make a record from which” to argue, in a manner consistent with the logical connection he posited at trial and on appeal (although perhaps to a lesser extent than he would have preferred), that the witnesses’ vulnerable relationships with the State may have colored their testimonies.⁵¹

*557 ^[11] While the appellant makes a fair point that his inability to explore the exact extent of each witness’s potential for bias ultimately rendered each cross-examination at least marginally less effective than it otherwise might have been, a “less than optimal” opportunity for cross-examination does not, of itself, violate the Sixth Amendment. Only when the trial court’s limitation on cross-examination sweeps so broadly as to render the examination wholly ineffective can it be said that the trial court commits an error of constitutional dimension.⁵² And, on the facts of this case, we are simply unwilling to say that the trial court’s limitation so deprived the appellant of an important untrod avenue of examining the witnesses for bias as to leave his overall opportunity for cross-examination ineffective. The trial court acted within its discretion, once the particular allegation of bias had been “effective[ly]” made before the jury, to prevent the appellant from presenting all the minutiae—incrementally probative though each might individually have been—tending only marginally to enhance his allegation of bias against the witness.⁵³ In

light of this, we agree with the court of appeals that “the trial court did not violate appellant’s right to confront the witnesses against him” by preventing him from eliciting the precise punishment ranges attendant to Joseph and Stefan’s pending felony charges.⁵⁴

III. CONCLUSION

With respect to the “nature” of the State’s witnesses’ pending charges (*i.e.*, *558 that Joseph’s pending first-degree felony charges were based on theft and that Stefan’s pending first-degree felony charge was based on robbery), the appellant has failed to demonstrate the relevancy of the proffered evidence to support the allegation of bias. With respect to the punishment ranges attendant to the witnesses’ pending charges (*i.e.*, that each witness’s felony charge carried a potential sentence of five to ninety-nine years’ incarceration or life imprisonment), while the appellant has satisfactorily demonstrated the incremental probativeness of the proffered evidence, he has failed to show that “[a] reasonable jury might have received a significantly different impression of” either witness’s “credibility had ... counsel been permitted” to elicit that evidence.⁵⁵ The court of appeals rightly concluded as much, and its judgment is affirmed.

JOHNSON, J., concurred in the result.

All Citations

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Footnotes

- 1 See [TEX. PENAL CODE §§ 19.03, 12.31](#).
- 2 [Johnson v. State](#), 2013 WL 1451292, at *8 (Tex.App.-Houston [1st Dist.] Apr. 9, 2013) (mem. op., not designated for publication).
- 3 Appellant’s Petition for Discretionary Review at 3–5.
- 4 One witness testified that the “appellant told her that he had robbed someone to get money and marijuana[.]” [Johnson](#), 2013 WL 1451292, at *3; see also [TEX. PENAL CODE § 19.03\(a\)\(2\)](#) (“A person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and ... the person intentionally commits the murder in the course of committing or attempting to commit ... robbery[.]”).

- 5 See [TEX.R. EVID. 609\(a\)](#) (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted ... but only if the crime was a felony or involved moral turpitude ... and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.”).
- 6 [Johnson](#), 2013 WL 1451292, at *5.
- 7 *Id.*
- 8 *Id.* at *8.
- 9 *Id.*
- 10 *Id.* at *8–9.
- 11 U.S. CONST. amend. VI.
- 12 See, e.g., [Crawford v. Washington](#), 541 U.S. 36, 57, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (“The substance of the constitutional protection is preserved to the prisoner in the advantage ... of seeing the witness face to face[.]”) (quoting [Mattox v. United States](#), 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409 (1895)).
- 13 See, e.g., [Delaware v. Van Arsdall](#), 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (“The right of confrontation ... means more than being allowed to confront the witness physically.”) (quoting [Davis v. Alaska](#), 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)) (internal quotation marks omitted).
- 14 [Davis](#), 415 U.S. at 315–16, 94 S.Ct. 1105 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed.1940)).
- 15 [Hurd v. State](#), 725 S.W.2d 249, 252 (Tex.Crim.App.1987) (quoting [Van Arsdall](#), 475 U.S. at 680, 106 S.Ct. 1431).
- 16 [Van Arsdall](#), 475 U.S. at 680, 106 S.Ct. 1431.
- 17 See [United States v. Landerman](#), 109 F.3d 1053, 1061–62 (5th Cir.1997) (“Although the scope of cross examination is within the discretion of the district court, that discretionary authority comes about only after sufficient cross examination has been granted to satisfy the Sixth Amendment.”).
- 18 [Davis](#), 415 U.S. at 316–17, 94 S.Ct. 1105 (quoting 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev.1970)).
- 19 [Van Arsdall](#), 475 U.S. at 679, 106 S.Ct. 1431 (quoting [Delaware v. Fensterer](#), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)).
- 20 *Id.*
- 21 [Carpenter v. State](#), 979 S.W.2d 633, 634 (Tex.Crim.App.1998).
- 22 *Id.* at 635.
- 23 [Carroll v. State](#), 916 S.W.2d 494, 500 (Tex.Crim.App.1996) (quoting [Spain v. State](#), 585 S.W.2d 705, 710 (Tex.Crim.App.1979)).
- 24 Cf. Steven Goode, Olin Guy Wellborn III, & M. Michael Sharlot, 1 TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 401.3, at 115–16 (3d ed.2002) (“To be relevant, the offered item of evidence need not establish a prima facie case. McCormick explains the distinction between relevancy and sufficiency:
Whether the entire body of one party’s evidence is sufficient to go to the jury is one question. Whether a particular

item of evidence is relevant is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence.... Thus, the objection that the inference for which the fact is offered 'does not necessarily follow' is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall.

This statement of the principle is fully consistent with Texas case law.” (footnotes and citations omitted) (quoting McCormick, EVIDENCE § 185 (5th ed.1999)).

25 See TEX.R. EVID. 401 (“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

26 *Johnson*, 2013 WL 1451292, at *8.

27 See *Carpenter*, 979 S.W.2d at 635; *Irby v. State*, 327 S.W.3d 138, 154 (Tex.Crim.App.2010).

28 In his petition for discretionary review, the appellant asks us to review only the court of appeals’s determination that “the trial court did not abuse its discretion when it restricted defense counsel from eliciting from the state’s witnesses the *types of felony offenses and their ranges of punishment* which were pending against those state’s witnesses.” Appellant’s Petition for Discretionary Review at 2 (emphasis added). We express no opinion, therefore, as to whether the court of appeals erred to hold that “[t]he admission of *copies of the indictments* in the pending cases ... would not have any further shown Joseph or Stefan’s ‘vulnerable relationship’ with the State or any potential motive, bias, or interest.” *Johnson*, 2013 WL 1451292, at *8 (emphasis added).

29 *Carpenter*, 979 S.W.2d at 633–34.

30 *Id.* at 634.

31 *Id.* at 635.

32 *Id.* (internal quotation marks omitted).

33 *Irby*, 327 S.W.3d at 140.

34 *Id.*

35 *Id.* at 154.

36 *Id.*

37 979 S.W.2d at 633–35.

38 TEX.R. EVID. 401.

39 See, e.g., *Davis*, 415 U.S. at 316, 94 S.Ct. 1105 (“Cross-examination is ... [s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation[.]”).

40 See, e.g., TEX.R. EVID. 402 (“All relevant evidence is admissible, *except as otherwise provided* by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority.”) (emphasis added). At trial, the appellant asserted only a Sixth Amendment right to the admission of evidence relating to the witnesses’ pending charges; he made no identifiable argument that state law might also afford him the very same right. He neither asserted any such state-law right on appeal nor elected to do so in his petition for discretionary review.

- 41 [Van Arsdall, 475 U.S. at 679, 106 S.Ct. 1431.](#)
- 42 [Davis, 415 U.S. at 318, 94 S.Ct. 1105.](#)
- 43 [Van Arsdall, 475 U.S. at 680, 106 S.Ct. 1431.](#)
- 44 *Id.* (emphasis added).
- 45 [916 S.W.2d at 500.](#)
- 46 Appellant's Brief at 18–19.
- 47 [Carroll, 916 S.W.2d at 499](#) (emphasis added).
- 48 [Van Arsdall, 475 U.S. at 679, 106 S.Ct. 1431](#) (quoting [Fensterer, 474 U.S. at 20, 106 S.Ct. 292](#)) (internal quotation marks omitted).
- 49 [Van Arsdall, 475 U.S. at 680, 106 S.Ct. 1431.](#)
- 50 *Id.* (emphasis added).
- 51 [Davis, 415 U.S. at 318, 94 S.Ct. 1105.](#)
- 52 *Cf. Crane v. Kentucky, 476 U.S. 683, 690–91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)* (“[A]n essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence.... [E]xclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'”) (quoting [United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 \(1984\)](#)); [Potier v. State, 68 S.W.3d 657, 665–66 \(Tex.Crim.App.2002\)](#) (“[T]he exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense. * * * That the defendant was unable to ... present his case to the extent and in the form he desired is not prejudicial where, as here, he was not prevented from presenting the substance of his defense to the jury.”) (internal quotation marks omitted) (quoting [United States v. Willie, 941 F.2d 1384, 1398–99 \(10th Cir.1991\)](#)); [Hammer v. State, 296 S.W.3d 555, 562–63 \(Tex.Crim.App.2009\)](#) (“[T]he constitution is offended if the [defendant is] prohibit[ed] from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory.”) (citing [Potier, 68 S.W.3d at 663–65](#)).
- 53 None of this is to say that the trial court was under any obligation to prohibit the appellant from eliciting the potential punishment ranges that Joseph and Stefan faced. Had the trial court been content that the additional questioning would not run the risk of wasting time or confusing or prejudicing the jury—or that the proffered evidence would indeed significantly impact the jury's impression of the witness's credibility—it could have permitted the appellant to ask the pertinent question and (at the very least) receive the witness's answer. But neither are we inclined to say, as a categorical matter, that a trial court's ruling preventing a criminal defendant from cross-examining a State's witness as to the precise punishment range attendant to the witness's pending charge constitutes a *per se* violation of the Confrontation Clause. When, as here, the defense is able to adduce evidence that an adverse witness is susceptible to some significant degree of punishment, it simply cannot be said that “counsel was unable to make a record from which to argue why [the witness] might have been biased[.]” *Id.*
- 54 [Johnson, 2013 WL 1451292, at *8.](#)
- 55 [Van Arsdall, 475 U.S. at 680, 106 S.Ct. 1431.](#)

KeyCite Yellow Flag - Negative Treatment
Distinguished by *Cozart v. State*, Tex.App.-Hous. (1 Dist.), September 7, 2017

296 S.W.3d 555
Court of Criminal Appeals of Texas.

Murray HAMMER, Appellant,
v.
The STATE of Texas.

No. PD-0786-08.
|
April 8, 2009.

Synopsis

Background: Defendant was convicted in the 218th Judicial District Court, Wilson County, *Donna S. Rayes*, J., of two counts of indecency with a child. He appealed. The San Antonio Court of Appeals, *256 S.W.3d 391*, affirmed. Defendant filed a petition for discretionary review, which was granted.

Holdings: The Court of Criminal Appeals, *Cochran, J.*, held that:

[1] evidence related to child victim’s anger toward defendant, who was her father, after he took her to a hospital for a sexual-assault examination after she ran away from home was admissible to show victim’s motive to falsely accuse defendant of sexual molestation;

[2] probative value of evidence related to medical records from when child victim was taken by defendant for a sexual-assault examination and to victim’s statements to a witness that her sexual activities when she ran away were consensual and not assaultive as she reported to a nurse was not substantially outweighed by the danger of unfair prejudice;

[3] trial court acted within its discretion in excluding the contents of child victim’s journal;

[4] evidence that child victim told others that she had been sexually molested by her mother’s boyfriends and that she lied to her grandmother about being held at knife point by five men who threatened to rape her was admissible under the doctrine of chances to show victim’s bias against defendant and her possible motive to testify falsely against him; and

[5] trial court acted within its discretion in excluding evidence that child victim was found lying on the ground with her boyfriend.

Reversed and remanded.

West Headnotes (17)

[1] **Criminal Law**
Key-Cross-examination and impeachment

110Criminal Law
110XXTrial
110XX(C)Reception of Evidence
110k662Right of Accused to Confront Witnesses
110k662.7Cross-examination and impeachment

Sixth Amendment right to confront witnesses includes the right to cross examine witnesses to attack their general credibility or to show their possible bias, self-interest, or motives in testifying. *U.S.C.A. Const.Amend. 6.*

58 Cases that cite this headnote

[2] **Criminal Law**
Key-Cross-examination and impeachment

110Criminal Law
110XXTrial
110XX(C)Reception of Evidence
110k662Right of Accused to Confront Witnesses
110k662.7Cross-examination and impeachment

Sixth Amendment right to cross examine witnesses to attack their general credibility or to show their possible bias, self-interest, or motives in testifying is not unqualified; a trial judge has wide discretion in limiting the scope and extent of cross examination. *U.S.C.A. Const.Amend. 6.*

61 Cases that cite this headnote

evidentiary rule would prohibit a defendant from cross examining a witness concerning possible motives, bias, and prejudice to such an extent that the defendant could not present a vital defensive theory. [U.S.C.A. Const.Amend. 6](#).

[23 Cases that cite this headnote](#)

[8]

Witnesses

🔑 Fraud or dishonesty

410Witnesses
 410IVCredibility and Impeachment
 410IV(B)Character and Conduct of Witness
 410k344Particular Acts or Facts
 410k344(5)Fraud or dishonesty

A witness's general character for truthfulness or credibility may not be attacked by cross examining him, or offering extrinsic evidence, concerning specific prior instances of untruthfulness. [Rules of Evid., Rules 404\(a\)\(3\), 608\(b\)](#).

[18 Cases that cite this headnote](#)

[9]

Sex Offenses

🔑 Purposes for Admitting in General

352HSex Offenses
 352HVIDevidence
 352HVI(D)Admissibility of Victim's Sexual History; Rape Shield
 352Hk223Purposes for Admitting in General
 352Hk224In general
 (Formerly 321k40(1) Rape)

In a sexual-assault case, evidence of a victim's prior sexual activity may be admissible under the rape-shield rule when offered to establish the victim's motive or bias against the defendant. [Rules of Evid., Rule 412](#).

[10 Cases that cite this headnote](#)

[10]

Criminal Law

🔑 Cross-examination and impeachment

110Criminal Law
 110XXTrial
 110XX(C)Reception of Evidence
 110k662Right of Accused to Confront Witnesses
 110k662.7Cross-examination and impeachment

When a defendant offers evidence of a victim's prior allegations of rape to show the victim's motive to testify falsely at sexual-assault trial, only if the evidence is barred by all state evidentiary rules must courts turn to the federal constitution to determine whether the evidence is admissible. [U.S.C.A. Const.Amend. 6](#).

[6 Cases that cite this headnote](#)

[11]

Witnesses

🔑 Friendly or Unfriendly Relations with or Feeling Toward Party

410Witnesses
 410IVCredibility and Impeachment
 410IV(C)Interest and Bias of Witness
 410k370Friendly or Unfriendly Relations with or Feeling Toward Party
 410k370(1)In general

Evidence related to child victim's anger toward defendant, who was her father, after he took her to a hospital for a sexual-assault examination after she ran away from home was admissible, at a trial for indecency with a child, to show victim's motive to falsely accuse defendant of sexual molestation. [Rules of Evid., Rules 412, 613\(b\)](#).

[8 Cases that cite this headnote](#)

[12]

Criminal Law

🔑 Evidence calculated to create prejudice against or sympathy for accused

110Criminal Law
 110XVIIIEvidence
 110XVII(D)Facts in Issue and Relevance
 110k338Relevancy in General

dishonest and should not be believed in this case.

This is precisely the prohibited propensity chain of logic—“Once a thief, always a thief,” “Once a liar, always a liar”—that underlies both [Rules 404\(b\) and 608\(b\)](#).²⁴ A sexual assault complainant is not a volunteer for an exercise in character assassination.²⁵ Several federal courts have held ***565** that exclusion of this evidence, offered to attack the victim’s general credibility, does not violate the Confrontation Clause.²⁶

If, however, the cross-examiner offers evidence of a prior false accusation of sexual activity for some purpose other than a propensity attack upon the witness’s general character for truthfulness, it may well be admissible under our state evidentiary rules.

^[9] For example, in *Billodeau v. State*,²⁷ we held that the trial court should have admitted evidence that the child complainant in that aggravated sexual assault prosecution had made threats to falsely accuse two neighbors of sexual molestation. We held that such evidence supported the defensive theory that the complainant’s motive in accusing the defendant of sexual molestation was “rage and anger” when he was thwarted.²⁸ Evidence of threats to accuse others of sexual molestation when he displayed “rage and anger” at being thwarted is some evidence of a common motive for accusing the defendant of sexual molestation. The chain of logic is as follows:

The victim makes false accusations in certain circumstances and for certain reasons;

Those circumstances and reasons are present in this case;

Therefore, the victim made a false accusation in this case.²⁹

One might even call this *modus operandi* evidence admissible under [Rule 404\(b\)](#). Evidence of other acts or wrongs may be admissible under [Rule 404\(b\)](#) to prove such matters as motive, intent, scheme, or any other relevant purpose except conduct in conformity with bad character. Even “the doctrine of chances” has been invoked as a possible basis for admitting evidence of a ***566** victim’s prior false accusation of rape.³⁰ Similarly, evidence of a victim’s prior sexual activity may be admissible under [Rule 412](#), the Texas Rape Shield Law,³¹ when offered to establish the victim’s motive or bias against the defendant.

In sum, several different state evidentiary rules permit the use of prior false accusations when offered to show the witness’s bias or motive or for some other relevant,

noncharacter purpose. The Confrontation Clause mandate of *Davis v. Alaska* is not inconsistent with Texas evidence law. Thus, compliance with a rule of evidence will, in most instances, avoid a constitutional question concerning the admissibility of such evidence. With that general framework, we turn to the present case.

III.

At his trial, appellant offered evidence of P.H.’s prior sexual conduct and her prior allegations of “rape” for three reasons: (1) it was relevant to P.H.’s truthfulness, *i.e.*, her general credibility; (2) it was required to be admitted under the Confrontation Clause; and (3) it was admissible under [Rule 412](#) to show P.H.’s motive to falsely accuse her father because he was too strict. We agree that some of this evidence was admissible to show P.H.’s possible motive in accusing her father of molestation.

^[10] First, we note that appellant over-emphasized his reliance upon the Confrontation Clause, rather than [Rule 412](#) (or other evidentiary rules such as [Rules 613 or 404\(b\)](#)), in the court of appeals.³² Thus, that court focused solely upon his Confrontation Clause argument instead of first determining whether this evidence, though barred by [Rule 608\(b\)](#), was admissible under other evidentiary rules to prove P.H.’s motive.³³ Only if the proffered evidence is barred by all state evidentiary rules must courts turn to the federal constitution.

^[11] In this case, appellant’s defensive theory was that P.H. made up a tale of sexual molestation to get out from under the heavy hand of her father. She said she never liked him because he disciplined her too much and yelled at her while doing so. She was angry with him because he wouldn’t let her do whatever she wanted to, as she could when she lived with her mother. The jury was aware of P.H.’s motive to make a false accusation that would send appellant back to prison. Appellant ***567** was allowed to question P.H. generally about her motive to falsely accuse him.

But what the jury did not know—because the trial judge excluded it—is that P.H. was particularly angry with appellant when he took her to the hospital for a sexual assault examination after she had run away from home and stayed out overnight. She told the nurse, “My dad wants to prove that I had sexual intercourse with one of the guys that I ran away with.” P.H. also told the nurse that Ignacio Talamendez had “sexually assaulted” her. She said that “at first it was kind of a consensual thing but

I told him to stop and he kept going.” Then, P.H. purportedly told Shonna that she had really had sex with Anthony, her boyfriend, that night. She had said that it was Ignacio because her father was really strict about letting her see Anthony. Apparently this event upset P.H. so much that she threatened to commit suicide and was admitted to the state hospital shortly thereafter. The charged offenses were alleged to have happened about a month after she was released from the state hospital.

This evidence is strong support for appellant’s theory that P.H. had a motive to falsely accuse him of sexual molestation. It also demonstrates that P.H. was not above changing her story of a consensual sexual encounter with her boyfriend into a nonconsensual one with someone else to prevent her father from learning the truth and presumably punishing her for running away and having sex with Anthony.

This evidence was admissible—unless excluded under [Rule 403](#)—to prove P.H.’s bias against appellant and to show her purported motive in falsely accusing him.³⁴ The Texas Rules of Evidence do not contain a specific rule allowing the admission of bias or motive evidence (maybe because the right to impeach a witness on these bases is so obvious), but [Rule 613\(b\)](#) presumes the right to admit such evidence because it deals with *how* the witness may be examined concerning bias or interest and *when* extrinsic evidence of that bias or interest may be admitted. Furthermore, appellant properly invoked [Rule 412](#), which contains an explicit “motive or bias” exception to the bar against evidence of an alleged victim’s previous sexual conduct.³⁵ ***568** Finally, the Confrontation Clause might well have required the admission of this evidence showing P.H.’s motive to fabricate if appellant had not been able to show that motive through other means—even if that evidence had been barred under state evidentiary rules.³⁶ In this case, however, appellant’s general defensive theory was presented to the jury through alternate testimony.

^[12] ^[13] The trial court appears to have understood that this evidence was probative to show P.H.’s motive to testify because she excluded it only under [Rule 403](#), not some general rule barring all such evidence of motive and bias. She repeatedly stated that she was excluding this evidence because its “prejudicial effect outweighed its probative value.” Relevant evidence may be excluded under [Rule 403](#) only if its probative value is substantially outweighed by the danger of unfair prejudice.³⁷ Under [Rule 403](#), it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice.³⁸ The rule envisions exclusion of evidence only when there is a “clear disparity between the degree of prejudice of the

offered evidence and its probative value.”³⁹

Because [Rule 403](#) permits the exclusion of admittedly probative evidence, it is a remedy that should be used sparingly,⁴⁰ especially in “he said, she said” sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant.⁴¹ In this ***569** case, the trial judge may have used the correct balancing test, but there is nothing in the record to show that she also took into account the possible constitutional ramifications of an exclusion of all of appellant’s evidence offered to demonstrate P.H.’s motive to testify against appellant. Although there is considerable prejudice in allowing P.H. to be cross-examined about her sexual conduct with her boyfriend, her anger at appellant for requiring her to undergo a sexual assault examination, and her various statements to the nurse, this is not “unfair” prejudice because it serves the important function of explaining precisely why P.H. might be motivated to falsely accuse appellant and to accuse him of the very same conduct that she accused her uncle of doing when she was thirteen.

^[14] We conclude that the trial court abused her discretion in preventing appellant from (1) cross-examining P.H. concerning the contents of the medical records when appellant took her to the hospital to be examined for a possible sexual assault; (2) offering those records into evidence if P.H. denies their accuracy; and (3) offering Shonna’s testimony that P.H. told her that the sexual activities that night were consensual and with her boyfriend, not assaultive with Ignacio Talamendez. This evidence, relating to events occurring shortly before the two alleged sexual encounters at issue in this trial and relevant to P.H.’s animus toward appellant and her desire to get out of his house, is demonstrably more probative than prejudicial in establishing her motive to testify. There is nothing in the record that would support a finding that its prejudicial effect outweighed its probative value, much less why its probative value was *substantially* outweighed by the danger of *unfair* prejudice.

^[15] ^[16] ^[17] The other evidence that the trial judge excluded, as noted by the court of appeals, included:

- (1) The contents of P.H.’s journal.⁴² We agree that, because the journal was not produced and the contents are unknown, appellant failed to show that they have any relevance;
- (2) The fact that P.H. told others that she had been sexually molested by her mother’s boyfriends.⁴³ We agree that there was no showing that these accusations were, in fact, false or that they were

similar to the accusation P.H. made against appellant.⁴⁴ However, it is highly unlikely that she was molested by *all* of her mother’s boyfriends. A rational factfinder might, under Wigmore’s doctrine of chances, reasonably conclude that at least some of these accusations, if not all, were false.⁴⁵

(3) The proffered testimony by P.H.’s grandmother that P.H. and her cousin lied about being held at knife point by five men who threatened to rape them, but admitted when they returned home that they had just run away.⁴⁶ We agree that appellant failed to make a sufficient evidentiary connection or argument to establish the independent probative value of this evidence, but it, along with P.H.’s allegations about her mother’s *570 boyfriends, is one more episode, under the doctrine of chances, that makes all of her allegations of sexual misconduct somewhat less likely;

(4) The evidence that P.H. was found “at the Ag. Barn lying on the ground with her boyfriend” seems to have no probative value except to show the victim’s purported promiscuity, an evidentiary use that is strictly prohibited by Rule 412. No one suggested that the school official’s report of P.H.’s activity was false or that the incident was similar to that involving appellant.⁴⁷

We agree with the court of appeals that the trial judge did

not abuse her discretion or rule “outside the zone of reasonable disagreement” in excluding evidence of the journals or of the “Ag. Barn” incident, but the other evidence was admissible under the doctrine of chances.⁴⁸

In sum, we hold that the trial judge abused her discretion in preventing appellant from cross-examining P.H. about the hospital incident, her allegations that “all of her mother’s boyfriends had sexually molested her,” the incident about being held at knife point by five men, and her statements to Shonna concerning the purported sexual assault by Ignacio Talamendez to demonstrate her bias against appellant and her possible motive to testify falsely against him. Because the parties have not briefed the issue of harm on discretionary review, and the court of appeals has not yet had an opportunity to address this issue under Rule 44.2(b), we reverse the judgment and remand the case to the court of appeals for further proceedings consistent with this opinion.

All Citations

296 S.W.3d 555

Footnotes

- 1 [Hammer v. State, 256 S.W.3d 391 \(Tex.App.-San Antonio 2008\)](#). Appellant’s sole ground for review is as follows:
The court of appeals incorrectly determined an important issue of state and federal law by deciding that the trial court did not abuse its discretion by excluding impeachment evidence of complainant’s previous false allegations of sexual assault and such exclusion violated petitioner’s rights under the Confrontation Clause of the United States Constitution. The court of appeals’ opinion is in direct contradiction with the First Court of Appeals in its decision in [Thomas v. State, 669 S.W.2d 420 \(Tex.App.-Houston \[1st Dist.\] 1984, pet. ref’d\)](#), in that the fourth court finds the allegations which complainant fabricated are dissimilar to the offenses [with] which petitioner is charged.
- 2 Shortly after the sexual-assault exam in July, P.H. was admitted to the state hospital after making suicidal threats. The Prozac and Seroquel were prescribed when she was released back into appellant’s care.
- 3 [TEX.R. EVID. 412 \(Evidence of Previous Sexual Conduct in Criminal Cases\)](#).
- 4 Neither the State, nor appellant, nor the court of appeals have suggested that appellant failed to preserve his claim concerning the excluded evidence. It is possible to interpret the trial judge’s statement that “it’s hard for you to make a bill of exception until you know what I’m going to let in and keep out” as referring to all the witnesses’ testimony that had been proffered on the bill of exceptions. It is much more likely, however, that the trial judge was referring only to appellant’s own testimony, which had not yet occurred. Under these circumstances, especially as neither the State nor the court of appeals mentioned any possible ambiguity, we conclude that appellant’s claims were properly preserved for review.
- 5 [Hammer v. State, 256 S.W.3d 391, 395–96 \(Tex.App.-San Antonio 2008\)](#).
- 6 [Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 \(1974\)](#).

- 16 *Potier v. State*, 68 S.W.3d 657, 663–65 (Tex.Crim.App.2002); *Wiley v. State*, 74 S.W.3d 399, 405 (Tex.Crim.App.2002).
- 17 TEX.R. EVID. 608(a)(1) (“The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness”).
- 18 TEX.R. EVID. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.”).
- 19 TEX.R. EVID. 613(b). The rule reads:
Examining Witness Concerning Bias or Interest. In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party’s witnesses on grounds of bias or interest.
- 20 See <http://www.storyarts.org/library/aesops/stories/boy.html>
- 21 *State v. Boggs*, 63 Ohio St.3d 418, 588 N.E.2d 813, 816–17 (1992) (“The mere fact that an alleged rape victim made prior false allegations does not automatically mean that she is fabricating the present charge. Likewise, prior false allegations of sexual assault do not tend to prove or disprove any of the elements of rape, nor do they relate to issues of consent.”).
- 22 See *Lopez v. State*, 18 S.W.3d 220, 223 (Tex.Crim.App.2000) (collecting out-of-state cases suggesting that the Confrontation Clause requires a special exception admitting evidence of the complainant’s prior false accusations of abuse in sexual offenses).
- 23 *Lopez*, 18 S.W.3d at 225 (“Because we find (1) our precedent does not favor creating a special exception to the Rules of Evidence for sex offenses, and (2) the rationale of the out-of-state cases creating a universal sexual offense exception is unpersuasive, we decline to create a *per se* exception to the Rule 608(b) for sexual offenses.”).
- 24 See *State v. Wyrick*, 62 S.W.3d 751, 772 (Tenn.Crim.App.2001) (defendant’s contention that victim’s prior false accusation of rape is relevant to her credibility is the very type of propensity evidence that Rule 404(b) seeks to exclude); see generally, Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN.L.REV. 763, 861 (1986) (explaining that some courts permit false-allegation evidence not “to impeach the complainant’s general character for truthfulness, but instead ... to show a propensity to charge rape falsely,” thereby ignoring “the fact that admitting evidence under this theory violates the general rule forbidding evidence of character to prove conforming conduct”).
- 25 See generally, Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus*, 7 YALE J.L. & FEM. 243 (1995) (arguing that evidence of prior false allegations should be excluded unless probative of motive in the particular case).
- 26 *Boggs v. Collins*, 226 F.3d 728, 739–40 (6th Cir.2000) (declining to find a Confrontation Clause violation when trial court excluded evidence of prior false accusation of rape because it was offered to impeach the victim’s general credibility, not to demonstrate her bias or motive to testify); *United States v. Bartlett*, 856 F.2d 1071, 1089 (8th Cir.1988) (admission of evidence of an alleged prior false accusation of rape offered solely to attack the victim’s general credibility is not required under *Davis v. Alaska*); *Hughes v. Raines*, 641 F.2d 790, 792–93 (9th Cir.1981); *Adams v. Smith*, 280 F.Supp.2d 704, 714 (E.D.Mich.2003).
- 27 277 S.W.3d 34 (Tex.Crim.App.2009).
- 28 In *Billodeau*, the evidence showed that the defendant had given the child two remote-control cars. The child’s mother

disapproved of the cars and told the defendant to take them back. When the defendant took them from the child, he “went into a rage, threw the cars at [the defendant], hitting him in the back, and swore at him.” 277 S.W.3d at 35–6. The day after this tantrum, the child accused the defendant of sexually molesting him. *Id.* n. 3. The defense theory was that the child falsely accused the defendant of sexual molestation because he was angry at him for taking away the cars. Evidence that, on other occasions (in this case they occurred after the primary offense), the child had, when enraged at someone for thwarting his desires, falsely accused (or threatened to falsely accuse) that person of sexually molesting him shows a common motive to accuse someone of molestation when he is angry at them. Rule 404(b) would allow this type of evidence against the defendant to prove his motive in committing the charged crime, and it is equally available to the defense to prove the victim’s motive in acting as he did.

29 See *Kittelson v. Dretke*, 426 F.3d 306, 322 (5th Cir.2005) (victim’s accusation that some other man had improperly touched her supported defensive theory that victim “had a motive to make up such an accusation in order to gain attention and sympathy, as she had received once before, and to show that once [victim’s] accusation had been reported to the police, she was afraid to recant.”).

30 See Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPIAC L.REV. 609, 643–44 (2006).

31 TEX.R. EVID. 412(b)(2)(C).

32 Appellant did argue that “the evidence proffered by Ms. Makuta in the offer of proof tended to add one more piece to the puzzle as to Defendant’s argument that complainant was an out of control child that did not appreciate her father enforcing rules in that she testified P.H. did not have sex with Mr. Talamendez at all but rather lied about the rape to keep her father from discovering her relationship with Anthony. This was crucial to Defendant’s case, and a major theme of his opening argument. Thus the evidence was not only probative as to P.H.’s credibility but as to her motivation as well. It is important to note that Rule 608 only prohibits the admission of specific instances of conduct to attack the credibility of the witness.” Appellant’s Brief in the Court of Appeals at 6.

33 The court of appeals, in looking at the entire collection of proffered evidence, concluded that it amounted to a “general” attack on P.H.’s credibility. *Hammer*, 256 S.W.3d at 395. The court was correct that, in its entirety, the excluded evidence does attack P.H. as being generally untruthful about sexual matters. It is a mish-mash of “The Boy Who Cried Wolf” evidence. But the trial court and the court of appeals failed to examine the individual offers of evidence to see whether some of that evidence was not merely a general attack upon credibility but a more specific attack upon P.H.’s motive to falsely accuse appellant of molestation.

34 See *United States v. Stamper*, 766 F.Supp. 1396 (W.D.N.C.1991) (defendant’s evidence that rape victim had previously made false accusations of sexual assault against other men was admissible to show her “scheme of fabrication” to manipulate her custodians, avoid therapy, and similar motives). In *Stamper*, the defendant, charged with statutory rape, sought to cross-examine the victim and present extrinsic evidence to prove that in the past, the victim had falsely accused three adult men of sexual abuse in order to move from the home of one biological parent to the other and back again and to achieve other personal goals. *Id.* at 1402. The district court quoted *Davis*, saying that the “‘exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 1400. Noting the lack of physical evidence of rape, the court stated that the victim was a crucial or key witness. *Id.* Thus, in order “to confront the complainant effectively, to elucidate the facts and legal issues here in question fully, and to present a defense in a constitutionally viable trial, Defendant must be allowed to set before the jury the proffered evidence of ulterior motives of the complainant.” *Id.* Distinguishing this case from those in which the defendant sought only to impeach the victim’s general credibility with the prior false accusation, the court held that the defendant “is entitled to offer the evidence necessary to prove his theory of the case by showing that complainant’s charges against him did not evince a single isolated instance of manipulative behavior, but rather were part of an ongoing scheme or, at least, a scheme revealed by the like motives and *modus operandi* of schemes past.” *Id.* at 1402. The court held the evidence admissible under Federal Rule 404(b). *Id.* at 1406.

35 TEX.R. EVID. 412(b)(2)(C).

36 See *Potier v. State*, 68 S.W.3d 657, 663–65 (Tex.Crim.App.2002) (“We hold that the exclusion of a defendant’s evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.”).

37 Rule 403 reads, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” TEX.R. EVID. 403.

38 *McFarland v. State*, 845 S.W.2d 824, 837 (Tex.Crim.App.1992), *overruled on other grounds*, *Bingham v. State*, 915 S.W.2d 9 (Tex.Crim.App.1994); *Green v. State*, 840 S.W.2d 394, 410 (Tex.Crim.App.1992).

39 *Conner v. State*, 67 S.W.3d 192, 202 (Tex.Crim.App.2001); *Joiner v. State*, 825 S.W.2d 701, 708 (Tex.Crim.App.1992).

40 See *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex.Crim.App.1990) (op. on reh’g) (presumption under Rule 403 is that probative value outweighs prejudicial effect “unless in the posture of the particular case the trial court determines otherwise”); see also *Conner v. State*, 67 S.W.3d 192, 202 (Tex.Crim.App.2001) (“Rule 403 requires exclusion of evidence only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value”); *State v. Mechler*, 153 S.W.3d 435, 443–44 (Tex.Crim.App.2005) (Cochran, J., concurring) (all Rule 403 rulings are subject to three general considerations: “1) the trial judge should exercise his power to exclude evidence under Rule 403 sparingly; 2) the trial judge’s discretion under Rule 403 is not an invitation to rule reflexively or without careful reasoning; 3) the trial judge may not exclude evidence merely because he disbelieves the testimony”); see generally, 1 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S EVIDENCE ¶ 403[01], at 403–10 (1998) (“If there is any doubt about the existence of unfair prejudice, confusion of the issues, misleading, undue delay or waste of time, it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonitions in the charge”).

41 See *Lopez v. State*, 18 S.W.3d 220, 227 (Tex.Crim.App.2000) (Keller, J., concurring); see also *People v. Hurlburt*, 166 Cal.App.2d 334, 333 P.2d 82, 83 (1958) (“As is usual in such cases, the prosecution was forced to rely primarily on the testimony of the complaining witness to establish its case, while the defense, by necessity, was forced to rely almost entirely on the denials of the defendant. Thus, the credibility of the complaining witness was one of the basic issues presented to the jury.”); *Miller v. State*, 105 Nev. 497, 779 P.2d 87, 89 (1989).

42 *Hammer*, 256 S.W.3d at 394–95.

43 *Id.*

44 See *Lopez v. State*, 18 S.W.3d 220, 226 (Tex.Crim.App.2000) (“Without proof that the prior allegation was false or that the two accusations were similar, the evidence fails to have any probative value in impeaching [complainant’s] credibility in this case. For these same reasons, the risk that this evidence would unduly prejudice and confuse the jury was high.”).

45 See *De La Paz v. State*, 279 S.W.3d 336, 347–48 (Tex.Crim.App.2009).

46 *Hammer*, 256 S.W.3d at 394.

47 *Id.* at 395.

48 *Id.* at 395–96.

 KeyCite Yellow Flag - Negative Treatment
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332 S.W.3d 470
Court of Criminal Appeals of Texas.

Ex parte Navid Ocheghaz GHAHREMANI,
Applicant.

Nos. AP-76,308, AP-76,309.

|
March 9, 2011.

Synopsis

Background: Following affirmance on direct appeal of his convictions for aggravated assault and sexual assault, [2007 WL 3146723](#), defendant filed applications for writs of habeas corpus. Applications were forwarded from 179th Judicial District Court, Harris County, [Randy Roll, J.](#), which made a recommendation that relief be granted.

Holdings: The Court of Criminal Appeals, [Womack, J.](#), held that:

[1] testimony of child victim's parents regarding victim's behavior after she was sexually assaulted by defendant was false;

[2] evidence supported conclusion that state knew that testimony of child victim's parents regarding victim's behavior after she was sexually assaulted by defendant was false;

[3] there was a reasonable likelihood that state's knowing presentation of false testimony of child victim's parents resulted in a harsher punishment of defendant and, thus, violated defendant's due process rights; and

[4] defendant was entitled to habeas relief without making a showing that the due process violation was not harmless.

Applications granted.

Attorneys and Law Firms

*473 [Randy Schaffer](#), Houston, for Appellant.

Alycia B. Harvey, Asst. D.A., Houston, [Jeffrey L. Van Horn](#), State's Attorney, Austin, for State.

Opinion

[WOMACK, J.](#), delivered the opinion for a unanimous Court.

These are post-conviction applications for writs of habeas corpus under [Article 11.07 of the Code of Criminal Procedure](#). The applicant alleges that the State knowingly used false testimony at his trial, in violation of his Fourteenth Amendment right to due process. We agree with the convicting court's recommendation to grant relief.

I. Background

A. Factual Background and Trial

The applicant, then 22 years old, began an online relationship with L.S., then 13 *473 years old, in January 2004. The applicant professed his love and sexual desire for L.S., who said that, although she was a virgin, she wanted to have sex with the applicant. The applicant and L.S. met in person on January 30. The applicant picked up L.S. and her friend J.R. (a 14-year-old girl) from the middle school they attended. He drove the girls to his apartment, where they all consumed alcohol and took [Xanax](#) pills. Eventually, the applicant led L.S. to his bedroom where she immediately fell asleep on the bed. J.R. fell asleep on the couch in the living room.

At trial, in July 2006, each girl recounted waking up at some point in the night with her pants and underwear removed and the applicant engaged in vaginal intercourse with her. Each girl said that she was heavily intoxicated, went back to sleep almost immediately, and did not remember many details. When she awoke the next morning, L.S. asked the applicant if they had had sex, and he confirmed that they had. He told J.R. that she and he had "messed around."

The applicant took the girls, who were still under the effects of Xanax and alcohol, to their middle school. Witnesses described the girls' behavior and physical condition on that day.

L.S.'s mother, Michelle, testified that L.S. had undergone extensive and continuing psychiatric treatment since the night at the applicant's apartment. Michelle testified that L.S. had been repeatedly committed to intensive treatment facilities because of continuing behavior problems, including a drug overdose. After the State rested, the applicant presented no evidence, and the jury found him guilty of the sexual assault of J.R. and the aggravated sexual assault of L.S.¹

During the punishment phase, L.S.'s father, William, testified that after the assault, L.S. was "crying, sobbing, seemingly numb, seemingly somewhat in shock." He "immediately" noticed changes in L.S.'s behavior; she became withdrawn and ceased being an outgoing person. After "a few months," L.S. left her school because she was being taunted by her classmates. L.S. transferred to a different school, and spent a week in a psychiatric hospital. William testified that L.S.'s therapist suggested that L.S. be sent away for intensive treatment at boarding schools, and, though he first resisted this suggestion, "eventually [he and his wife] found out that the therapist was right." Though William's testimony gave no details of the specific timeline of L.S.'s treatments, he said that L.S. was sent away for "ten to eleven months," first to treatment at a "wilderness school," then to a boarding school, then back to the "wilderness school." William estimated that the treatment had cost around \$140,000, with insurance covering only \$5,500. William suggested that 25 years would be an appropriate sentence for the applicant.

J.R.'s father then testified about the ways that J.R.'s behavior had changed since the applicant's assault. The defense did not present any punishment evidence. The State asked for "something in the thirty to forty-year range when determining the punishment in this case." The jury assessed the maximum punishment, 20 years, for the sexual assault of J.R., and 28 years for the aggravated sexual assault of L.S. The convictions and sentences were affirmed on appeal.²

*474 B. Habeas Proceedings

1. The July Police Report

Through a Public Information Act³ request, the applicant's habeas attorney secured the district attorney's file on these cases. In the file was a folder labeled "Work Product," which contained a police report.

The reporting officer detailed being dispatched to L.S.'s home on July 27, 2005. L.S. and her parents were having an argument because one of L.S.'s coworkers had told William that L.S., then 15 years old, was having a relationship with a 25-year-old man, Davis.⁴ William told the police officer that L.S. had confessed to him that the relationship was sexual. When the officer spoke with L.S. alone, L.S. said that she had met Davis in September 2004, started having sex with him that month, and since then had been having sex with him every one or two weeks. According to the report, L.S. "stated that [Davis] treated her nicely but he did deal a large amount of drugs, sometimes in front of her."

The police report also detailed later attempts to contact L.S. and her family, concluding with a September 2, 2005 entry noting that Michelle had informed the officer that L.S. had been sent away to a wilderness boot camp for rehabilitation. The report concludes: "Case will exceptionally cleared/closed [*sic*] for lack of information of the [complainant]."

Also contained in the "Work Product" folder were emails showing that Jamie Harris, the assistant district attorney then prosecuting the case, knew of the July 27 incident on July 29. The copy of the police report contained in the "Work Product" folder was printed on November 16, 2005.

2. Habeas Hearing

The applicant applied for writs of habeas corpus, arguing that the State unconstitutionally suppressed the July police report⁵ and presented false testimony in violation of the Fourteenth Amendment. The applicant argues that the State gave the jury the misleading impression that all of L.S.'s psychological treatment was the result of the applicant's assault, but that the relationship between L.S. and Davis could have been partly responsible for L.S.'s need for treatment.

The convicting court held a fact-finding hearing on October 1, 2009.⁶ Former children's *475 court advocate Patty Smith testified that in 2005 she spoke with William and Michelle about L.S.'s relationship with Davis. Smith knew then that L.S. was not sent away from home for therapy until sometime after the July 27 incident. Smith had told Harris about Davis and about her suspicions that L.S. was selling drugs and may have been initiated into a gang. Smith stated her belief, based in part on conversations with William and Michelle, that the drugs,

gang initiation, and relationship with Davis were the result of the trauma caused by the applicant’s assault. Smith did not believe that the Davis relationship was a “traumatic” experience for L.S.

Dorian Cotlar, the lead prosecutor during the trial, testified that the July police report was in the “Work Product” folder when he took over the case from Harris. Cotlar read the report and determined that it was irrelevant to the applicant’s case. The only additional investigation he performed into the matter was to run a criminal background search on Davis; Cotlar said he could not remember whether the search turned up anything, but he did not think it did. Cotlar said that he was not aware of Davis being prosecuted for any offense related to L.S. He speculated that the “cleared/closed for lack of information of the [complainant]” notation means that the case was never shown to a prosecutor.

Cotlar cast doubt on whether L.S. had actually had sex with Davis, pointing out that L.S.’s statement came during “a heated argument” with her parents. Cotlar said that after being assaulted by the applicant, L.S. “lied to her parents about a lot of things.” When asked whether he intended to leave the jury with the impression that the applicant was the sole cause of L.S.’s psychological problems, Cotlar responded: “I don’t know. I suppose. I don’t know.”

Cotlar speculated that giving the jury evidence of the Davis relationship would have been harmful to the applicant because he considered the relationship a symptom of the psychological harm caused by the applicant’s assault. Cotlar explained that he did not introduce the evidence at trial because he did not believe he needed it to get the verdict and punishment he wanted, and introducing the evidence would have unnecessarily exposed more of L.S.’s private life.

John Parras, the applicant’s attorney during the trial, testified that at the time of trial he was unaware of L.S.’s relationship with Davis and the allegations of drug use and gang membership. After his testimony, the court ordered the parties to present arguments on this application at a later date, and then recessed.

3. The August Police Reports

While preparing for arguments, Alycia Harvey, the prosecutor handling this writ application, looked up two police report numbers listed as “Related Cases” on the July police report. According to these new-found reports,

written throughout the month of August, 2005, L.S. ran away from home on July 31, 2005—four days after the incident described in the July police report. William and Michelle told police that they believed L.S. was with Davis.

The police were not able to find Davis, but did find his mother. In the presence of the reporting officer, Davis’s mother called Davis, who said that he did not know where L.S. was, and that L.S. had represented herself as being 17 years old. Going to Davis’s supposed address and tracking down his supposed car produced no information regarding L.S.’s location.

*476 L.S. called home in the early afternoon of August 3 and said that she was waiting in a Wal-Mart parking lot and was ready to come home. Michelle called the police, who then met Michelle at the Wal-Mart where L.S. was waiting. The officer “could tell by [L.S.’s] actions and her eyes that she was on some kind of drugs.” L.S. told the officer that she was on “zan-bars [benzodiazepine], ex [‘ecstasy,’ an amphetamine], coke [cocaine], dust [phencyclidine], and possibly other drugs.” L.S. said that she could not recall whether she had had sexual relations with anyone. An ambulance took L.S. to a hospital to have a rape test performed.

Appended to the August police reports is a laboratory report from the Harris County Medical Examiner’s office stating that vaginal swabs performed on L.S. on August 3, 2005 tested positive for blood and semen. The laboratory report is dated July 31, 2006.

The copy of these police reports contained in the record shows that they were printed on October 6, 2009. Harvey turned the August police reports over to the convicting court, which then ordered the State to turn them over to the applicant.

4. The Convicting Court’s Findings of Fact and Conclusions of Law

After the parties presented arguments, the convicting court largely adopted the applicant’s proposed findings of fact and conclusions of law. The convicting court found that the July police report was material to the case, favorable to the applicant, and suppressed by the State in violation of *Brady*. The convicting court found that the State elicited testimony that falsely conveyed the impression that all of L.S.’s psychological treatment was made necessary by the applicant’s assault. The convicting court concluded that

[t]he prosecution’s suppression of this evidence and presentation of testimony creating the misleading impression that applicant was solely to blame for L.S.’s physical, emotional, and psychological problems undermine confidence in the sentences.

The convicting court recommended that we grant the applicant a new punishment hearing. We ordered that the case be filed and set in order to determine whether the State violated *Brady*, and, if so, whether the result of the trial would have been different had the State disclosed the suppressed evidence.

II. Analysis

A. The Applicant’s Ground for Relief

The applicant presents us with a single ground for relief, asserting that the State failed to disclose favorable evidence and “presented [L.S.’s] parents’ misleading testimony creating the false impression that her physical, emotional, and psychological problems resulted solely from her sexual encounter with applicant.”

False-testimony claims and suppressed-evidence claims are legally discrete.⁷ In this case, the suppressed evidence was not inherently exculpatory, nor would it have generally impeached the credibility of any of the State’s witnesses. The July police report would have aided the applicant only by showing that specific testimony from Michelle and William was misleading. The applicant has not argued that the July police report was relevant for any other purpose.

*477 The essence of the applicant’s claim, then, is that the State knowingly presented false testimony; the police report is merely evidence that the testimony was false (and that the State knew it was false). Both the State and the applicant have presented arguments regarding both the *Brady* and false-testimony claims. The convicting court made findings of fact addressing both claims, and its recommendation for relief was based on both claims combined. Because we believe that the false-testimony claim is the underlying issue here, we will address this matter as a false-testimony claim.⁸

B. Use of False Testimony

1. False Testimony

[1] [2] [3] A conviction procured through the use of false testimony is a denial of the due process guaranteed by the Federal Constitution.⁹ The use of false testimony at the punishment phase is also a due-process violation.¹⁰ A due-process violation may arise not only through false testimony specifically elicited by the State, but also by the State’s failure to correct testimony it knows to be false.¹¹ “It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence.”¹²

[4] Though the case law in this area frequently refers to “perjured” testimony, there is no requirement that the offending testimony be criminally perjurious.¹³ “It is sufficient if the witness’s testimony gives the trier of fact a false impression.”¹⁴ These rules are not aimed at preventing *478 the crime of perjury—which is punishable in its own right¹⁵—but are designed to ensure that the defendant is convicted and sentenced on truthful testimony.

2. The State’s Knowledge

[5] [6] To constitute a violation of due process under Federal precedent, the State must knowingly use false testimony.¹⁶ This Court allows applicants to prevail on due-process claims when the State has unknowingly used false testimony.¹⁷ Even under this expanded notion of due process, however, the State’s knowledge is still a relevant factor to determine the standard we use for reviewing an applicant’s habeas claim.

3. Materiality

[7] [8] [9] The knowing use of false testimony violates due process when there is a “reasonable likelihood” that the false testimony affected the outcome.¹⁸ We have characterized this as a requirement that the false testimony must have been material.¹⁹ This standard is more stringent (*i.e.*, more likely to result in a finding of error) than the standard applied to *Brady* claims of suppressed evidence, which requires the defendant to show a “reasonable probability” that the suppression of

evidence affected the outcome.²⁰ The “reasonable likelihood” standard is equivalent to the standard for constitutional error, which “requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”²¹

C. Application to This Case

^[10] ^[11] In an 11.07 writ proceeding, this Court is the ultimate factfinder.²² The convicting court is the original factfinder, and we will generally defer to and accept that court’s findings of fact and conclusions of law when they are supported by the record.²³

1. Was the Testimony False?

^[12] Michelle testified that the “biggest problem” with L.S.’s behavior after the applicant’s assault was that she always felt dirty and took two showers a day.²⁴ Michelle said that L.S. gained weight, required therapy, and “wasn’t the same socially.” The State then asked whether *479 there was “anything else specifically that you’ve noticed different about [L.S.] since January 31st of 2004 that we haven’t talked about.” Michelle said there was not. She mentioned only one intervening event between the applicant’s assault and L.S.’s intensive therapy: a drug overdose, about which she gave no details. William testified that after the applicant’s assault, he and Michelle “eventually ... found out” that L.S.’s original therapy was not helping and that she needed more intensive therapy, such as the wilderness camp and boarding school. He gave no information regarding intervening events.

The habeas record shows that Michelle and William sent L.S. away for intensive therapy nineteen months after the applicant’s assault. In that time, L.S. had a job at a restaurant and (she said) engaged in a long-term, intimate relationship with a 25-year-old drug dealer. Members of the prosecution team also believed that during this time L.S. was selling drugs and was initiated into a gang. Shortly after Michelle and William learned all this, L.S. ran away from home for three days. She came home on drugs and with evidence of sexual assault still inside her vagina, though she did not remember who assaulted her. Only after these events was L.S. sent away for the intensive therapy that Michelle and William described in their testimony.

The State argues that this testimony did not create a misleading impression, because the behavior problems detailed in the July and August police reports were themselves the result of the psychological trauma L.S. suffered from the applicant’s assault. The State cites cases in which mental-health professionals testified that promiscuity and drug use are symptoms of sexual assault,²⁵ and to a fact sheet from the Children’s Assessment Center stating that promiscuity is a symptom displayed by 38% of child sexual assault victims.

The convicting court did not accept this argument, and we shall defer to that determination if there is support for it in the record. The convicting court found that the gap in the evidence presented to the jury was so significant that Michelle and William’s testimony “creat[ed] a misleading impression of the facts.” Based on the gravity of the events that were left out of their testimony, the fact that the testimony glossed over the lengthy period of time between the applicant’s assault and L.S.’s intensive therapy, and the fact that the testimony attributed all of L.S.’s psychological treatment to harm done by the applicant, we believe there is support in the record for the convicting court’s finding.

2. Did the State Know the Testimony was False?

^[13] The convicting court found that the State had knowledge of the July police report, and that the State was aware that L.S. was sent away for intensive therapy only after her parents learned of the Davis relationship. The State does not contest these findings, and they are supported by the record.

There are no findings of fact related to the August police reports, nor is there any testimony from the habeas hearing regarding them. The record could support a finding that the State should have known of the incident detailed in the August police reports,²⁶ but the habeas court did not *480 consider the issue. The habeas court’s recommendation is supported by its findings that the knowledge of the July police report and the timing of L.S.’s intensive therapy was sufficient to alert the State that the testimony from Michelle and William was misleading.

3. Was the False Testimony Material?

^[14] ^[15] The convicting court found that the misleading

testimony “undermine[s] confidence in the sentences,” a materiality standard it derived from *United States v. Bagley*²⁷ and *Kyles v. Whitley*.²⁸ This is the materiality standard for *Brady* claims, which is less likely to find error than the standard applicable to false testimony claims. If the convicting court found that the applicant met the *Brady* standard, then it necessarily found that the applicant met the false-testimony standard.

For the aggravated sexual assault of L.S., cause # 1030953–A, the possible sentence ranged from 5 to 99 years, or life, and the applicant received 28 years. For the sexual assault of J.R., cause # 1030954–A, the possible sentence ranged from 2 to 20 years, and the applicant received 20 years.

The main evidence the State presented at the punishment phase came from the girls’ fathers,²⁹ who described how the girls reacted to the applicant’s assault. The misleading testimony in this case amplified the impact that the applicant’s actions had on L.S. We accept the convicting court’s finding that there is a reasonable likelihood that the false testimony resulted in a harsher punishment in cause 1030953–A.

The false testimony did not directly bear on the sexual assault of J.R., but that does not end our analysis of whether the false testimony affected the applicant’s sentence in her case (cause 1030954–A). First, we note that J.R.’s behavior did not change so markedly as L.S.’s. J.R. began sleeping on the floor at the foot of her parents’ bed, was the victim of taunting at school, and performed uncharacteristically poorly at school. She underwent two years of therapy. In her guilt-phase testimony, J.R. said that she had gone to group-therapy sessions once per week for two years after the applicant’s assault. She also described thinking of suicide in the days after the *481 applicant’s assault. We also note, as the State did in its guilt-phase jury argument, that J.R. played no role in soliciting sex with the applicant and seems to have gone with the applicant to keep L.S. company.

The applicant received the maximum sentence for J.R.’s case, which was still less than the sentence he received for cause L.S.’s case. Had it been otherwise (*e.g.*, had the applicant not received the maximum for J.R.’s case, or had the punishment for J.R.’s case exceeded that for L.S.’s case), then we might accept an argument that the false testimony regarding L.S.’s treatment did not affect the sentence the applicant received for J.R.’s case. In this circumstance, however, we cannot.

In its punishment-phase jury argument, the State made no mention of what the punishment should be in cause

1030954–A. Instead, the State referred to William’s testimony that 25 years was an appropriate punishment for the aggravated sexual assault of L.S. The State then argued that 25 years was insufficient to protect society, and that the jury should “look in the thirty to forty-year range when determining the punishment in this case.” All of these numbers exceeded the maximum possible punishment for cause 1030954–A. At the habeas hearing, the applicant argued that the jury assessed 28 years for cause 1030953–A and used that as a baseline from which to assess 20 years for cause 1030954–A.

There is evidence in the record to support the convicting court’s conclusion that there is a reasonable likelihood that the false testimony that affected the applicant’s sentence in cause 1030953–A also affected the applicant’s sentence in cause 1030954–A.

D. Harmless Error

^[16] To obtain relief on habeas review, in addition to showing that a due-process violation occurred, an applicant may be required to show that the due-process violation was not harmless.³⁰ In two types of situations, this Court has applied a harmless-error standard to habeas claims alleging the use of false testimony.

1. *Ex parte Fierro*

The applicant in *Ex parte Fierro* complained that the State knowingly used false testimony at a pre-trial suppression hearing. Mexican police had held Fierro’s parents in custody while the El Paso police interrogated Fierro. The police officer to whom Fierro confessed testified at a pre-trial suppression hearing that he did not know of the actions taken by the Mexican police. Evidence showing that the officer’s testimony was false was available to Fierro at the suppression hearing, but he seems to have made no use of it until his habeas application.³¹

We determined that the State’s knowing use of false testimony violated due process, but was subject to harmless-error analysis.³² Not only did the applicant have to meet the “reasonable likelihood” materiality standard to show that the false testimony violated due process, he also had “to prove by a preponderance of the evidence that the [violation] contributed to his conviction or punishment.”³³ We limited this holding, however, to

situations where the applicant could have raised the issue on direct appeal. We “express[ed] no opinion” whether the preponderance-of-the-evidence standard would apply if an applicant could “demonstrate that he had no opportunity *482 to raise the issue on direct appeal.”³⁴

2. *Ex parte Chabot*

The applicant in *Ex parte Chabot* complained that the State had unknowingly used false testimony at his trial.³⁵ An accomplice witness, Pabst, testified that Chabot raped and killed a woman while he, Pabst, was in a different room. Pabst specifically denied sexually assaulting the victim. Twenty years after the trial, new tests revealed Pabst’s DNA on samples taken from the victim’s vagina, proving that Pabst’s testimony was false. Neither the State nor the applicant knew at the time of Chabot’s direct appeal that Pabst’s testimony was false.

We determined that the State’s unknowing use of false testimony was subject to the same preponderance-of-the-evidence standard we applied in *Fierro*.³⁶ *Chabot* did not address the question left open in *Fierro*, of whether the preponderance-of-the-evidence standard should apply to the State’s knowing use of false testimony when the applicant could not have raised the issue on direct appeal.³⁷

3. State’s Knowing Use of False Testimony Unknown to the Applicant

Here we are faced with a situation left unaddressed by *Fierro* and *Chabot*. The State used Michelle’s and William’s testimony, which created the false impression that L.S.’s psychological treatment was solely attributable to the applicant’s assault. Yet the State was aware of evidence that intervening events may have caused Michelle and William to seek treatment for L.S. The applicant did not have access to this information at trial, and learned of the July police report only when his habeas attorney gained access to it through a Public Information

Act request.

When the State knowingly uses false testimony, the determinative factor in whether the defendant can raise the issue on direct appeal is, frequently, how well the State hides its information. In *Fierro*, for example, the State turned over to the applicant, at the pre-trial suppression hearing, a police report showing that testimony at the suppression hearing was false. *Fierro* failed to raise this matter at trial, in a motion for new trial, or on direct appeal. When the claim came to us on habeas review, *Fierro* had already had the opportunity to present the claim in circumstances where it would not have been subject to the preponderance-of-the-evidence standard, but only to the reasonable-likelihood standard of materiality.

In contrast, the applicant in this case had no opportunity to present his claim on direct appeal, in large part because the State concealed information suggesting that the testimony was misleading. Under the Harris County District Attorney’s open-file policy applicable at the time of the applicant’s trial, defense counsel was free to examine most documents in the prosecutor’s file, but not documents in “Work Product” folders. The lead prosecutor knew of the July police report, knew that it was in a “Work Product” folder, and intended that the applicant not have access to it because the prosecutor did not consider it relevant to the case.

*483 ^[17] When a habeas applicant has shown that the State knowingly used false, material testimony, and the applicant was unable to raise this claim at trial or on appeal, we will grant relief from the judgment that was obtained by that use.

We grant relief from the judgments as to the punishments in these cases. The convicting court may hold a new punishment hearing in both causes.

All Citations

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Footnotes

- 1 At the time of the offense, J.R. had recently turned 14, but L.S. was a few weeks shy of her 14th birthday. (See [PENAL CODE § 22.021\(a\)\(2\)\(B\)](#) (victim under age 14 as one element of aggravated sexual assault)).
- 2 *Ghahremani v. State*, 14–06–00729–CR *et seq.*, 2007 WL 3146723 (Tex.App.-Houston [14th Dist.] Oct. 30, 2007, *pets. ref’d*) (mem. op. not designated for publication).

- 3 See generally GOV'T CODE Ch. 552.
- 4 According to the report, it was L.S. who called the police. L.S. told the officer that “her parents had struck her” on the face. The officer observed no marks on her face. Michelle and William told the officer that there had been no violence, but that “the trio were in each others face [*sic*] arguing about a highly emotional topic, and arms and hands were waving on both sides.” The officer contacted a prosecutor regarding the alleged assault, and the prosecutor “declined any charges due to normal parental discipline under the specific situation.”
- 5 See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (due process is violated when the State refuses to disclose requested evidence that is favorable to the defendant regarding either punishment or guilt); *United States v. Bagley*, 473 U.S. 667, 681–82, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (due process requires reversal if the State, regardless of whether the defense made a request, failed to disclose relevant, mitigating evidence to the defendant).
- 6 The docket sheet contained in the record seems to state that this hearing occurred on August 13, 2009. At a later hearing, an attorney refers to this hearing having occurred on September 30, 2009. We will use the date on the reporter’s record of the hearing, which is October 1, 2009.
- 7 See, e.g., *Ex parte Chabot*, 300 S.W.3d 768 (Tex.Cr.App.2009) (due process was violated when the State unknowingly presented perjured testimony); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (due process was violated when the State withheld favorable evidence; no testimony conflicted with the withheld evidence).
- 8 See also 42 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 22.51 (2d ed. 2002) (“If a defendant is able to establish both that the State knowingly used perjured testimony and that it failed to disclose evidence showing the falsity of that testimony, the defendant is entitled to relief if he or she can show the testimony used is material under the perjured testimony line of decisions and its more relaxed materiality standard.”).
- 9 *Mooney v. Holohan*, 294 U.S. 103, 112–13, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
- 10 See *Estrada v. State*, 313 S.W.3d 274, 287–88 (Tex.Cr.App.2010) (ordering new punishment hearing because of false punishment-phase testimony).
- 11 *Id.* at 288 (citing *Napue*, 360 U.S. at 269, 79 S.Ct. 1173).
- 12 *Duggan v. State*, 778 S.W.2d 465, 468–69 (Tex.Cr.App.1989).
- 13 See, e.g., *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir.1995) (Posner, J.) (“The wrong of knowing use by prosecutors of perjured testimony does not require a determination that the witness could have been successfully prosecuted [for perjury]. Successful prosecution would require proof beyond a reasonable doubt not only that the witness’s testimony had been false but also that it had been knowingly false (and hence perjury). The wrong of knowing use by prosecutors of perjured testimony is different, and misnamed—it is knowing use of *false* testimony. It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false. ... [This] is implicit in the frequent use of ‘false’ as a synonym for ‘perjured’ in cases in which prosecutors are claimed to have knowingly used perjured testimony. E.g., *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)”).
- 14 Dix & Dawson, *supra* n.8, at § 22.53; see *Alcorta v. Texas*, 355 U.S. 28, 31, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) (due process was violated where witness gave the jury a “false impression” by testifying that he did not “love” the victim and had not been on any “dates” with the victim, but omitted the fact that he had had sexual intercourse with the victim on several recent occasions); *Burkhalter v. State*, 493 S.W.2d 214, 218 (Tex.Cr.App.1973) (due process was violated where witness’s statement was not technically false, but “conveyed an impression to the jury which the State knew to be false”; the State had agreed with witness’s lawyer not to prosecute witness if witness testified, but witness did not know of this agreement and thus was not committing perjury when he testified he had no agreement with the State).
- 15 See PENAL CODE §§ 37.02–.03.
- 16 See *Napue*, 360 U.S. at 269, 79 S.Ct. 1173; *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d

481 (1985) (plurality op.); *United States v. Webster*, 392 F.3d 787, 801 (5th Cir.2004).

17 *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex.Cr.App.2009).

18 *Agurs*, 427 U.S. at 103, 96 S.Ct. 2392.

19 *Dix & Dawson*, *supra* n. 8, at § 22.55; see, e.g., *Ex parte Fierro*, 934 S.W.2d 370, 373 (Tex.Cr.App.1996) (referring to materiality test).

20 *Fierro*, 934 S.W.2d at 373;

21 *Bagley*, 473 U.S. at 680, n. 9, 105 S.Ct. 3375.

22 *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex.Cr.App.2008).

23 *Id.*; *Chabot*, 300 S.W.3d at 772.

24 On cross-examination, the applicant showed Michelle an internet-messaging transcript from January 12, 2004, in which L.S. stated that she showered twice daily “like a ritual.”

25 See *De La Paz v. State*, 273 S.W.3d 671, 678 (Tex.Cr.App.2008); *West v. State*, 121 S.W.3d 95 (Tex.App.-Fort Worth 2003, pet. ref’d).

26 The July police report dealt with a series of unprosecuted sexual assaults of a victim in this sexual assault case, and the physical copy of the July police report contained in the “Work Product” folder listed the August police reports as “Related Cases.” Additionally, Cotlar and Smith both testified that they had contact with Michelle and William after L.S. was sent away, and Cotlar said that he had continuing contact with the family through the trial. William testified that he had discussed L.S.’s delicate psychological condition with Cotlar in an effort to persuade Cotlar not to take this case to trial.

27 473 U.S. at 678, 105 S.Ct. 3375.

28 514 U.S. at 434, 115 S.Ct. 1555.

29 The only other punishment-phase witness was Dr. Lawrence Thompson, a psychologist who was the director of therapy at the Children’s Assessment Center. Prosecutor Cotlar repeatedly attempted to get Dr. Thompson to give his opinion as to whether sex offenders could be rehabilitated. Each time Defense Counsel Parras objected, and the trial court sustained the objection. At one point, Dr. Thompson stated that one researcher believed that sex offenders could not be rehabilitated, and the trial court instructed the jury to disregard the statement. At the applicant’s habeas hearing, Parras testified that he made a motion for mistrial at one of the several off-the-record discussions that occurred while Dr. Thompson was on the stand, and that the motion was denied. Ultimately, the only admitted testimony from Dr. Thompson was that there was some scientific literature discussing whether sex offenders could be rehabilitated (though Dr. Thompson did not state the conclusions reached in the literature), and that Dr. Thompson did not believe that any of the ten sex offenders he had personally supervised had been rehabilitated.

30 *Fierro*, 934 S.W.2d at 373–74.

31 *Id.*, at 371–4.

32 *Id.*, at 374–75.

33 *Id.*

34 *Id.*, at 374, n. 10.

35 *Chabot*, 300 S.W.3d at 769–70.

36 *Id.*, at 770–71.

37 *Ex parte Napper*, 322 S.W.3d 202, 242, 244 (Tex.Cr.App.2010) (noting that *Chabot* did not address that question, and explicitly “leav[ing] open that question”).

Benchbook for U.S. District Court Judges 5th ed.

Section 5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material)

This is a final draft by the *Benchbook* committee. The material is not in the *Benchbook* format and should not be cited; pagination will change.

5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material)

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Introduction

Federal criminal discovery is governed by Rule 16 of the Federal Rules of Criminal Procedure and for certain specified matters by portions of Rules 12, 12.1, 12.2, and 12.3.¹ The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 govern the disclosure of witness statements at trial, and the Classified Information Procedures Act, 18 U.S.C. App. 3, governs discovery and disclosure when classified information related to national security is implicated. Prosecutors and defense lawyers should be familiar with these authorities, and judges typically know where to find the relevant law in deciding most discovery issues.

However, it sometimes is more challenging to understand the full scope of a prosecutor's obligations with respect to a defendant's constitutional right to exculpatory

1. See also Rule 15, governing depositions for those limited circumstances in which depositions are permitted in criminal cases, and Rule 17, governing subpoenas.

information under *Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972), and to deal effectively with related disclosure disputes. Applying *Brady* and *Giglio* in particular cases can be difficult; it requires familiarity with Supreme Court precedent, circuit law, and relevant local rules and practices.

This section of the *Benchbook* is intended to give judges general guidance on the requirements of *Brady* and *Giglio* by providing a basic summary of the case law interpreting and applying these decisions. For further reference, the Appendix provides three other sources of information: a link to the Federal Judicial Center’s recent report summarizing a national survey of Rule 16 and disclosure practices in the district courts; a link to the “Policy Regarding Disclosure of Exculpatory and Impeachment Information” in the *United States Attorneys’ Manual* of the Department of Justice; and a list of examples of exculpatory or impeachment information, disclosure of which may be required under *Brady* or *Giglio*.

Because every *Brady* or *Giglio* inquiry is fact-specific, the depth of such an inquiry can vary considerably from case to case. Judges are encouraged, as part of efficient case management, to be mindful of the particular disclosure requirements in each case and to resolve disclosure disputes quickly to avoid unnecessary delay and expense later. The material provided in this section are for informational purposes only; they are not meant to recommend a particular course of action when disclosure issues arise.

Although *Brady* exculpatory material and *Giglio* impeachment material are sometimes distinguished, courts often refer to them together as “*Brady* material” or “exculpatory material,” and this section generally follows that practice.

A. Duty to Disclose Exculpatory Information

1. In General

In *Brady*, the Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. The Court later held that the prosecution has an obligation to disclose such information even in the absence of a defense request. *See Banks v. Dretke*, 540 U.S. 668, 695–96 (2004); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *United States v. Agurs*, 427 U.S. 97, 107, 110–11 (1976).

In *Giglio*, the Supreme Court extended the prosecution’s obligations to include the disclosure of information affecting the credibility of a government witness. *See* 405 U.S. at 154–55. As the Court later explained, “[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule” because it is “evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quotations omitted).

2. Information from Law Enforcement Agencies

Under *Brady*, the prosecutor is required to find and disclose favorable evidence initially known only to law enforcement officers and not to the prosecutor. The individual prosecutor in a specific case has an affirmative “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. at 437. See also *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam) (“*Brady* suppression occurs when the government fails to turn over even evidence that is ‘known only to police investigators and not to the prosecutor’”) (quoting *Kyles v. Whitley*, 514 U.S. at 438).

3. Ongoing Duty

A prosecutor’s disclosure obligations under *Brady* are ongoing: they begin as soon as the case is brought and continue throughout the pretrial and trial phases of the case.² See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress”).³ If *Brady* information is known to persons on the prosecution team, including law enforcement officers, it should be disclosed to the defendant as soon as reasonably possible after its existence is recognized.

4. Disclosure Favored

When it is uncertain whether information is favorable or useful to a defendant, “the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.” *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009). See also *Kyles v. Whitley*, 514 U.S. at 439–40; *Agurs*, 427 U.S. at 108.⁴

2. The Supreme Court has declined to extend *Brady* disclosure obligations to evidence that the government did not possess during the trial but only became available “after the defendant was convicted and the case was closed.” See *District Attorney’s Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68–69 (2009) (“*Brady* is the wrong framework” for prisoner’s post-conviction attempt to retest DNA evidence using a newer test that was not available when he was tried). “[A] post-conviction claim for DNA testing is properly pursued in a [42 U.S.C.] § 1983 action.” *Skinner v. Switzer*, 131 S. Ct. 1289, 1293, 1300 (2011) (also noting that “*Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983”). Cf. *Whitlock v. Brueggemann*, 682 F.3d 567, 587–88 (7th Cir. 2012) (distinguishing *Osbourne*: “*Brady* continues to apply [in a post-trial action] to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial”).

3. See also *Steidl v. Fermon*, 494 F.3d 623, 630 (7th Cir. 2007) (“For evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings.”); *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (“*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward”); *Smith v. Roberts*, 115 F.3d 818, 819–20 (10th Cir. 1997) (same, applying *Brady* to impeachment evidence that prosecutor did not learn of until “[a]fter trial and sentencing but while the conviction was on direct appeal. . . . [T]he duty to disclose is ongoing and extends to all stages of the judicial process.”).

4. Cf. *United States v. Moore*, 651 F.3d 30, 99–100 (D.C. Cir. 2011) (“This is particularly true where the defendant brings the existence of what he believes to be exculpatory or impeaching evidence or information

B. Elements of a Violation

There are three elements of a *Brady* violation: (1) the information must be favorable to the accused; (2) the information must be suppressed—that is, not disclosed—by the government, either willfully or inadvertently; and (3) the information must be “material” to guilt or to punishment. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

1. Favorable to the Accused

Information is “favorable to the accused either because it is exculpatory, or because it is impeaching.” *Strickler*, 527 U.S. at 281–82. Most circuits have held that information may be favorable even if it is not admissible as evidence itself, as long as it reasonably could lead to admissible evidence. *See, e.g., United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162–63 (2d Cir. 2008) (*Brady* information “need not be admissible if it ‘could lead to admissible evidence’ or ‘would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise’”) (quoting *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)).⁵

2. Suppression, Willful or Inadvertent

Whether exculpatory information has been suppressed by the government is a matter for inquiry first by defense counsel making a request of the prosecutor. If defense counsel remains unsatisfied, the trial court may make its own inquiry and, if appropriate, require the government to produce the undisclosed information for *in camera* inspection by the court. *See also* discussion in *infra* section D, Disputed Disclosure.

to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material.”), *cert. denied*, 132 S. Ct. 2772 (2012).

5. *See also United States v. Wilson*, 605 F.3d 985, 1005 (D.C. Cir. 2010) (no *Brady* violation because undisclosed information was not admissible nor would it have led to admissible evidence or effective impeachment), *cert. denied*, 131 S. Ct. 841 (2010); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (“we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it”); *Spence v. Johnson*, 80 F.3d 989, 1005 at n.14 (5th Cir.) (“inadmissible evidence may be material under *Brady*”), *cert. denied*, 519 U.S. 1012 (1996); *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994) (“A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence.”), *cert. denied*, 513 U.S. 1115 (1995); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) (“information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes”), *cert. denied*, 504 U.S. 930 (1992). *Cf. Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam) (where it was “mere speculation” that inadmissible materials might lead to the discovery of admissible exculpatory evidence, those materials are not subject to disclosure under *Brady*); *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007) (if defendant “is able to make a showing that further investigation under the court’s subpoena power very likely would lead to the discovery of [admissible material] evidence,” defendant may “request leave to conduct discovery”); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir.) (citing *Wood*, there was no *Brady* violation where undisclosed information was not admissible and could not be used to impeach; court did not address whether it could lead to admissible evidence), *cert. denied*, 525 U.S. 908 (1998). *But cf. Hoke*, 92 F.3d 1350, 1356 at n.3 (4th Cir.) (reading *Wood* to hold that inadmissible evidence is, “as a matter of law, ‘immaterial’ for *Brady* purposes”), *cert. denied*, 519 U.S. 1048 (1996).

It does not matter whether a failure to disclose is intentional or inadvertent, since “under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.” *Strickler*, 527 U.S. at 288; *Agurs*, 427 U.S. at 110 (“Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”). See also *Porter v. White*, 483 F.3d 1294, 1305 (11th Cir.) (“The *Brady* rule thus imposes a no-fault standard of care on the prosecutor. If favorable, material evidence exclusively in the hands of the prosecution team fails to reach the defense—for whatever reason—and the defendant is subsequently convicted, the prosecution is charged with a *Brady* violation, and the defendant is entitled to a new trial.”), *cert. denied*, 552 U.S. 1185 (2007); *Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) (“*Brady* has no good faith or inadvertence defense”).

Information will not be considered “suppressed” for *Brady* purposes if the defendant already knew about it⁶ or could have obtained it with reasonable effort.⁷ However, suppression still may be found in this situation if a defendant did not investigate further because the prosecution represented that it had turned over all disclosable information or that there was no disclosable material. In *Strickler*, the prosecutor had an “open file” policy, but exculpatory information had been kept out of the files. The Supreme Court held that the “petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution’s open file policy as fulfilling the prosecution’s duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner’s reliance on the open file policy by asserting during state habeas proceedings that petitioner had

6. See, e.g., *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) (“there is no suppression if the defendant knew of the information or had equal access to obtaining it”), *cert. denied*, 130 S. Ct. 1073 (2010); *United States v. Zichittello*, 208 F.3d 72, 103 (2d Cir. 2000) (“Even if evidence is material and exculpatory, it ‘is not ‘suppressed’” by the government within the meaning of *Brady* ‘if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.’”) (citations omitted), *cert. denied*, *Lysaght v. United States*, 531 U.S. 1143 (2001); *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997) (same), *cert. denied*, 522 U.S. 1120 (1998); *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (“No *Brady* violation exists where a defendant ‘knew or should have known the essential facts permitting him to take advantage of any exculpatory information,’ . . . or where the evidence is available to defendant from another source.”) (citations omitted), *cert. denied*, 502 U.S. 846 (1991). Cf. *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) (“a defendant’s independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution’s disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.”), *cert. denied*, 529 U.S. 1029 (2000).

7. *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998) (“government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender”), *cert. denied*, 526 U.S. 1152 (1999); *United States v. Dimas*, 3 F.3d 1015, 1019 (7th Cir. 1993) (when “the defendants might have obtained the evidence themselves with reasonable diligence . . . , then the evidence was not ‘suppressed’ under *Brady* and they would have no claim”); *Hoke v. Netherland*, 92 F.3d at 1355 (“The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant.”).

already received ‘everything known to the government.’” 527 U.S. at 283–89.⁸ The Court reached the same conclusion in a later case in which the prosecution withheld disclosable information after having “asserted, on the eve of trial, that it would disclose all *Brady* material.”⁹

Suppression may also be found when disclosure is so late that the defense is unable to make effective use of the information at trial. See discussion in *infra* section C, Timing of Disclosure.

3. Materiality

a. Definition

The most problematic aspect of *Brady* for prosecutors and trial judges is the third element: the requirement that the favorable information suppressed by the government be “material.” Under *Brady*, information is considered “material” “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (quotations omitted). “A reasonable probability does not mean that the defendant ‘would more likely than not have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’” *Id.* (quoting *Kyles v. Whitley*, 514 U.S. at 434) (alteration in original).¹⁰

8. The Court cautioned, however, that “[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them.” *Id.* at 288, n.33. See also *Carr v. Schofield*, 364 F.3d 1246, 1255 (11th Cir.) (citing and quoting *Strickland* for proposition that “if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*”), *cert. denied*, 543 U.S. 1037 (2004).

9. *Banks v. Dretke*, 540 U.S. 668, 693–96 (2004) (“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no ‘procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.’ 527 U.S. at 286–287”). See also *Gantt v. Roe*, 389 F.3d at 912–13 (“While the defense could have been more diligent, . . . this does not absolve the prosecution of its *Brady* responsibilities. . . . Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution’s representation that it was sharing the fruits of the police investigation.”). Cf. *Bell v. Bell*, 512 F.3d 223, 236 (6th Cir.) (distinguishing *Banks* from instant case, in which the facts known to defendant “strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record”), *cert. denied*, 555 U.S. 822 (2008).

10. See also *Banks v. Dretke*, 540 U.S. at 698–99 (“[o]ur touchstone on materiality is *Kyles v. Whitley*”); *Kyles v. Whitley*, 514 U.S. at 434 (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”); *Bagley*, 473 U.S. at 682 (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”).

This definition of “materiality” necessarily is retrospective. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial. While *Brady* requires that materiality be considered even before or during trial, obviously it may not always be apparent in advance whether the suppression of a particular piece of information ultimately might “undermine [] confidence in the outcome of the trial.”¹¹ For this reason, as noted earlier, the Supreme Court explicitly has recommended erring on the side of disclosure when there is uncertainty before or during trial about an item’s materiality: “[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.”¹² At the same time, the Court reiterated the “critical point” that “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.”¹³

11. *Smith v. Cain*, 132 S. Ct. at 630. See also *United States v. Jordan*, 316 F.3d 1215, 1252 n.79 (11th Cir.) (“In the case at hand, . . . the defendants’ *Brady* claims involve material that was produced both before and during the defendants’ trial. In such a scenario, because the trial has just begun, the determination of prejudice is inherently problematical.”), *cert. denied*, 540 U.S. 821 (2003).

12. *Agurs*, 427 U.S. at 108. See also *Cone v. Bell*, 556 U.S. at 470 n.15 (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (“it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government’s case”). Cf. *Jordan*, 316 F.3d at 1251 (“under *Brady*, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings. Not infrequently, what constitutes *Brady* material is fairly debatable. In such cases, the prosecutor should mark the material as a court exhibit and submit it to the court for in camera inspection.”); *United States v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984) (“Any doubt concerning the applicability of *Brady* to any specific document . . . should have been submitted to the court for an in camera review.”).

Some district courts have enacted local rules that eliminate the *Brady* materiality requirement for pretrial disclosure of exculpatory information. See discussion at pp. 16–17 in LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES (2011). See also *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009) (“[f]or the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis” of two district courts that held that “the ‘materiality’ standard usually associated with *Brady* . . . should not be applied to pretrial discovery of exculpatory materials”).

13. *Agurs*, 427 U.S. at 109–10 (also cautioning that “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense”). See also *United States v. Lemmerer*, 277 F.3d 579, 588 (1st Cir.) (“The same standard applies when the claim is one of delayed disclosure rather than complete suppression. However, in delayed disclosure cases, we need not reach the question whether the evidence at issue was ‘material’ under *Brady* unless the defendant first can show that defense counsel was ‘prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant’s case.’”), *cert. denied*, 537 U.S. 901 (2002); *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) (“Although the government’s obligations under *Brady* may be thought of as a constitutional duty arising

b. Cumulative Effect of Suppressed Evidence

Although each instance of nondisclosure is examined separately, the “suppressed evidence [is] considered collectively, not item by item” in determining materiality. *Kyles v. Whitley*, 514 U.S. at 436–37 & n.10 (“showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached”).¹⁴ The undisclosed evidence “must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.” *Agurs*, 427 U.S. at 112.¹⁵

C. Timing of Disclosure

1. In Time for Effective Use at Trial

As noted earlier, information may be considered “suppressed” for *Brady* purposes if disclosure is delayed to the extent that the defense is not able to make effective use of the information in the preparation and presentation of its case at trial. How much preparation a defendant needs in order to use *Brady* material effectively— which determines how early disclosure must be made by the prosecution—depends upon the circumstances of each case. Disclosure before trial (and often well before trial) is always preferable and

before or during the trial of a defendant, the scope of the government’s constitutional duty—and, concomitantly, the scope of a defendant’s constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial. . . . The government therefore has a so-called ‘*Brady* obligation’ only where non-disclosure of a particular piece of evidence would deprive a defendant of a fair trial.”); *Starusko*, 729 F.2d at 261 (there is “no violation of *Brady* unless the government’s nondisclosure infringes the defendant’s fair trial right”).

14. See also *Jackson v. Brown*, 513 F.3d 1057, 1071–72 (9th Cir. 2008) (“The materiality of suppressed evidence is ‘considered collectively, not item by item.’ . . . [E]ach additional . . . *Brady* violation further undermines our confidence in the decision-making process”) (quoting *Kyles*); *Maharaj v. Sec’y for Dept. of Corrections*, 432 F.3d 1292, 1310 (11th Cir. 2005) (“the district court followed the appropriate methodology, considering each *Brady* item individually, and only then making a determination about the cumulative impact”), *cert. denied*, 549 U.S. 1072 (2006); *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004) (“Even if none of the nondisclosures standing alone could have affected the outcome, when viewed cumulatively in the context of the full array of facts, we cannot disagree with the conclusion of the district judge that the government’s nondisclosures undermined confidence in the jury’s verdict.”).

15. See also *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999) (court must “evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record”); *Porretto v. Stalder*, 834 F.2d 461, 464 (5th Cir. 1987) (“Omitted evidence is deemed material when, viewed in the context of the entire record, it creates a reasonable doubt as to the defendant’s guilt that did not otherwise exist.”).

may be required if the material is significant, complex, or voluminous, or may lead to other exculpatory material after further investigation.¹⁶ In some circumstances, however, disclosure right before, or even during, trial has been found to be sufficient.¹⁷ “It is not feasible or desirable to specify the extent or timing of disclosure *Brady* and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made. Thus disclosure prior to trial is not [always] mandated. . . . At the same time, however, the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.” *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001).¹⁸

16. See *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006) (“The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an ‘opportunity for use.’”); *Leka*, 257 F.3d at 101 (“When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case. . . . Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray.”). See also *United States v. Garner*, 507 F.3d 399, 405–07 (6th Cir. 2007) (defendant “did not receive a fair trial” where cell phone records that would have allowed impeachment of critical prosecution witness were not disclosed until the morning of trial and the defense was not given sufficient time to investigate records: “The importance of the denial of an opportunity to impeach this witness cannot be overstated.”); *United States v. Fisher*, 106 F.3d 622, 634–35 (5th Cir. 1997) (new trial warranted where government did not disclose until last day of trial an FBI report containing impeachment evidence that directly contradicted testimony of key witness and defense was not able to make meaningful use of evidence), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753, 758–59 (2000).

17. A majority of the circuits that have addressed this point have held that disclosure may be deemed timely, at least in some circumstances, when the defendant is able to effectively use the information at trial, even if disclosure occurs after the trial has begun. See, e.g., *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011) (“there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value”), *cert. denied*, 132 S. Ct. 1727 (2012); *United States v. Celis*, 608 F.3d 818, 836 (D.C. Cir.) (“the critical point is that disclosure must occur in sufficient time for defense counsel to be able to make effective use of the disclosed evidence”), *cert. denied*, 131 S. Ct. 620 (2010); *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008) (“a defendant is not prejudiced [by untimely disclosure] if the evidence is received in time for its effective use at trial”), *cert. denied*, 129 S. Ct. 1617 (2009); *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (“the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously,” that is, “in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial”); *Blake v. Kemp*, 758 F.2d 523, 532 n.10 (11th Cir.) (“In some instances [disclosure of potential *Brady* material the day before trial] may be sufficient. . . . However, . . . some material must be disclosed earlier. . . . This is because of the importance of some information to adequate trial preparation.”) (citations omitted), *cert. denied*, 474 U.S. 998 (1985).

18. See also *Gantt v. Roe*, 389 F.3d at 912 (“That [relevant] pieces of information were found (or their relevance discovered) only in time for the last day of testimony underscores that disclosure should have been *immediate*: Disclosure must be made ‘at a time when [it] would be of value to the accused.’”) (citation omitted); *United States v. McKinney*, 758 F.2d 1036, 1049–50 (5th Cir. 1985) (“If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been.”); *United States v. Pollack*, 534 F.2d 964, 973–74 (D.C. Cir.) (“Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if

In light of these considerations, and because the effect of suppression usually cannot be evaluated fully until after trial, potential *Brady* material ordinarily should be disclosed as soon as reasonably possible after its existence is known by the government, and disclosures on the eve of or during trial should be avoided unless there is no other reasonable alternative.

2. Prior to a Guilty Plea?

The Supreme Court has held that disclosure of impeachment information is not required before a guilty plea is negotiated or accepted. See *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) (“impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*,” and due process does not require disclosure of such impeachment information before a plea) (emphasis in original). The holding in *Ruiz* was limited to impeachment material because “the proposed plea agreement at issue . . . specific[ed] that] the Government [would] provide ‘any information establishing the factual innocence of the defendant,’” *Id.* at 631. The Court “has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context.” *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (emphasis in original).¹⁹

satisfaction of this criterion requires pre-trial disclosure. . . . The trial judge must be given a wide measure of discretion to ensure satisfaction of this standard. . . . Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions.”), *cert. denied*, 429 U.S. 924 (1976); *Grant v. Alldredge*, 498 F.2d 376, 382 (2d Cir. 1976) (“Although it well may be that marginal *Brady* material need not always be disclosed upon request prior to trial,” evidence indicating that another suspect may have committed the crime “was without question ‘specific, concrete evidence’ of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense” that “would have had a ‘material bearing on defense preparation’ . . . and therefore should have been revealed well before the commencement of the trial.”) (citations omitted).

19. Compare *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting defendant’s argument that the limitation on the Supreme Court’s discussion in *Ruiz* “to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea”), *cert. denied*, 130 S. Ct. 1502 (2010), with *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) (“*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea”). See also *United States v. Mathur*, 624 F.3d 498, 504–07 (1st Cir. 2010) (rejecting defendant’s claim that “potentially exculpatory” information and impeachment information should have been disclosed before his plea, court held that the information was not material and added that: “Although we recognize that plea negotiations are important, that fact provides no support for an unprecedented expansion of *Brady*.”); *Jones v. Cooper*, 311 F.3d 306, 315 n.5 (4th Cir. 2002) (in a death penalty case, “[t]o the extent that appellant contends that he would not have pled guilty had he been provided the [potentially mitigating] information held by the jailor, this claim is foreclosed by” *Ruiz*), *cert. denied*, 539 U.S. 946 (2003). Cf. *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) (prosecution’s “blatant misconduct” and “affirmative misrepresentations” in withholding material exculpatory information—which it was obligated to disclose not only under *Brady v. Maryland* but also under local court rules and a court order—rendered defendant’s guilty plea involuntary under *Brady v. United States*, 397 U.S. 742 (1970)); *United States v. Wright*, 43 F.3d 491, 496

3. Remedies for Untimely Disclosure

Untimely disclosure that effectively suppresses *Brady* information may result in sanctions. The decision whether to impose sanctions is within the sound discretion of the trial judge: “Where the district court concludes that the government was dilatory in its compliance with *Brady*, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial. The choice of remedy also is within the sound discretion of the district court. Fed. R. Crim. P. 16(d)(2) authorizes the district court in cases of non-compliance with discovery obligations to ‘permit the discovery or inspection,’ ‘grant a continuance,’ ‘prohibit the party from introducing the evidence not disclosed,’ or ‘enter any other order that is just under the circumstances.’”²⁰

In most cases, “[t]he customary remedy for a *Brady* violation that surfaces mid-trial is a continuance and a concomitant opportunity to analyze the new information and, if necessary, recall witnesses.”²¹ In fact, failure to request a continuance, or an “outright rejection of a proffered continuance,” is taken as an indication that the defendant is able to use the information effectively despite the delay.²²

In an extreme case, dismissal may be warranted: “*Brady* violations are just like other constitutional violations. Although the appropriate remedy will usually be a new trial, . . .

(10th Cir. 1994) (“under certain limited circumstances, the prosecution’s violation of *Brady* can render a defendant’s plea involuntary”).

20. *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir.), *cert. denied*, 130 S. Ct. 565 (2009). *See also United States v. Johnston*, 127 F.3d 380, 391 (5th Cir. 1997) (district court has “real latitude” to fashion appropriate remedy for alleged *Brady* errors, including delayed disclosure), *cert. denied*, 522 U.S. 1152 (1998); *United States v. Joselyn*, 99 F.3d 1182, 1196 (1st Cir. 1996) (“The district court has broad discretion to redress discovery violations in light of their seriousness and any prejudice occasioned the defendant,” and court properly refused to dismiss indictment for delay in disclosing *Brady* material), *cert. denied*, *Billmyer v. United States*, 519 U.S. 1116 (1997).

21. *Mathur*, 624 F.3d at 506. *See also United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (continuance is preferable to motion to dismiss as remedy for late disclosure); *United States v. Kelly*, 14 F.3d 1169, 1176 (7th Cir. 1994) (when “a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate, if the nature or quantity of the disclosed *Brady* material makes an investigation necessary”).

22. *Mathur*, 624 F.3d at 506. *See also Lawrence v. Lensing*, 42 F.3d 255, 258 (5th Cir. 1994) (petitioner “cannot convert his tactical decision not to seek a recess or continuance into a *Brady* claim in this habeas petition”); *United States v. Adams*, 834 F.2d 632, 635 (7th Cir. 1987) (holding that delayed disclosure did not prejudice defendant partly based on fact that defendant did not request continuance or recess), *cert. denied*, 484 U.S. 1046 (1988); *United States v. Holloway*, 740 F.2d 1373, 1381 (6th Cir.) (where defense counsel made no request for a continuance after delayed disclosure, “we conclude that the timing of the disclosure did not prejudice” the defendant), *cert. denied*, 469 U.S. 1021 (1984).

a district court may dismiss the indictment when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct."²³

4. Jencks Act

There is no consensus among the circuits as to whether the government's constitutional obligation to produce *Brady* information in a timely manner supersedes the timing requirements of the Jencks Act, 18 U.S.C. § 3500.²⁴ Some courts have attempted to harmonize the two rules, usually by finding that the timing of disclosure was sufficient under either standard to allow the defendant to make effective use of the information.²⁵

There may be instances in which the nature of impeaching information warrants a delay in disclosure by the government. Even if the information might be helpful to a defendant in impeaching a witness's testimony, the government might not determine whether it actually will call the witness until shortly before, or even during, the trial. There is also the chance that a witness will choose not to cooperate or could be put in jeopardy by early disclosure.²⁶

23. *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008) ("Because the district court did not clearly err in finding that the government recklessly violated its discovery obligations and made flagrant misrepresentations to the court, we hold that the dismissal was not an abuse of discretion."). *Accord Government of Virgin Islands v. Fahie*, 419 F.3d 249, 255 (3d Cir. 2005) ("While retrial is normally the most severe sanction available for a *Brady* violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.").

24. Compare, e.g., *United States v. Rittweger*, 524 F.3d 171, 181 n.4 (2d Cir. 2008) ("Complying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory material under *Brady*—a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500."), *cert. denied*, 129 S. Ct. 1391 (2009) with *United States v. Presser*, 844 F.2d 1275, 1283–84 (6th Cir. 1988) ("If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence. The clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial. . . . Accordingly, neither *Giglio* nor *Bagley* alter the statutory mandate")

25. See, e.g., *Presser*, 844 F.2d at 1283–84 ("so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated. Any prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it."); *United States v. Kopituk*, 690 F.2d 1289, 1339 n.47 (11th Cir. 1982) ("It has been held that 'when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act.'") (citations omitted), *cert. denied*, *Williams v. United States*, 461 U.S. 928 (1983).

26 See, e.g., *Rodriguez*, 496 F.3d at 228 at n.6 ("We recognize that in many instances the Government will have good reason to defer disclosure until the time of the witness's testimony, particularly of material whose only value to the defense is as impeachment of the witness by reference to prior false statements. In some instances, earlier disclosure could put the witness's life in jeopardy, or risk the destruction of evidence. Also at times, the Government does not know until the time of trial whether a potential cooperator will plead guilty and testify for the Government or go to trial as a defendant."); *Pollack*, 534 F.2d at 973–74 (noting that there can be "situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive discovery in criminal cases, e. g., potential for

Brady and the Jencks Act serve different purposes, and although their disclosure obligations often overlap, they are not always coextensive, and there may or may not be a conflict between their respective timing requirements. “All Jencks Act statements are not necessarily *Brady* material. The Jencks Act requires that any statement in the possession of the government—exculpatory or not—that is made by a government witness must be produced by the government during trial at the time specified by the statute. *Brady* material is not limited to *statements* of witnesses but is defined as exculpatory *material*; the precise time within which the government must produce such material is not limited by specific statutory language but is governed by existing case law. Definitions of the two types of investigatory reports differ, the timing of production differs, and compliance with the statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*.” *Starusko*, 729 F.2d at 263 (emphasis in original).²⁷

5. Supervisory Authority of District Court

“[I]t must be remembered that *Brady* is a constitutional mandate. It exacts the *minimum* that the prosecutor, state or federal, must do” to avoid violating a defendant’s due process rights. *U.S. v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) (emphasis added), *cert. denied*, 440 U.S. 947 (1979). As it is not otherwise specified by rule or case law, district courts have the discretionary authority “to dictate by court order when *Brady* material must be disclosed.” *Starusko*, 729 F.2d at 261 (“the district court has general discretionary authority to order the pretrial disclosure of *Brady* material ‘to ensure the effective administration of the criminal justice system.’”) (citation omitted).²⁸ Some

manufacture of defense evidence or bribing of witnesses. Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions.”). *Cf. United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (“We recognize that, generally, it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government’s case.”).

27. *See also Rodriguez*, 496 F.3d at 224–26 (oral statements by witness that were never written down or recorded did not fall under Jencks Act but could be disclosable under *Brady* or *Giglio*: “The Jencks Act requires the Government to produce to the defendant any ‘statement’ by the witness that ‘relates to the subject matter as to which the witness has testified.’ 18 U.S.C. § 3500(b); *see id.* § 3500(e) (defining ‘statement’). The term ‘statement,’ however, is defined to include only statements that have been memorialized in some concrete form, whether in a written document or electrical recording. . . . The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form.”); *United States v. Phibbs*, 999 F.2d 1053, 1088 (6th Cir. 1993) (“Unlike the Jencks Act, the force of *Brady* and its progeny is not limited to the statements and reports of witnesses.”), *cert. denied*, 510 U.S. 1119 (1994). *Cf. Coppa*, 267 F.3d at 146 (“a District Court’s power to order pretrial disclosure is constrained by the Jencks Act,” and the district court exceeded its authority in ordering disclosure “of not only those witness statements that fall within the ambit of *Brady/Giglio*, and thus may be required to be produced in advance of trial despite the Jencks Act, but also those witness statements that, although they might indeed contain impeachment evidence, do not rise to the level of materiality prescribed by *Agurs* and *Bagley* for mandated production”).

28. *See generally United States v. Hasting*, 461 U.S. 499, 505 (1983) (“[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to

districts have done this through local rules, setting pretrial deadlines for disclosure of *Brady* and *Giglio* material.²⁹ Otherwise, “[h]ow the trial court proceeds to enforce disclosure requirements is largely a matter of discretion to be exercised in light of the facts of each case.” *United States v. Valera*, 845 F.2d 923, 927 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).³⁰

D. Disputed Disclosure

If a defendant requests disclosure of materials that the government contends are not discoverable under *Brady*, the trial court may conduct an in camera review of the disputed materials.³¹ “To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. . . . This showing cannot consist of mere speculation. . . . Rather, the defendant should be able to articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material.”³²

implement a remedy for violation of recognized rights . . . ; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ; and finally, as a remedy designed to deter illegal conduct.”) (citations omitted); *United States v. W.R. Grace*, 526 F.3d 499, 508–09 (9th Cir. 2008) (en banc) (“We begin with the principle that the district court is charged with effectuating the speedy and orderly administration of justice. There is universal acceptance in the federal courts that, in carrying out this mandate, a district court has the authority to enter pretrial case management and discovery orders designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly”). See also Fed. R. Crim. P. 57(b) (“Procedure when there is no controlling law. A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.”).

29. See discussion of local rules in LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 11–18 (2011).

30. See also *United States v. Caro-Muniz*, 406 F.3d 22, 29 (1st Cir. 2005) (“methods of enforcing disclosure requirements in criminal trials are generally left to the discretion of the trial court”); *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir.) (same), *cert. denied*, 537 U.S. 888 (2002); *United States v. Campagnuolo*, 592 F.2d 852, 857 n.2 (5th Cir. 1979) (“The government argues that it was not required to follow certain provisions of . . . the standing discovery order because those provisions were broader in scope than the requirements adopted by the Supreme Court in *Brady*. This argument is without merit. It is within the sound discretion of the district judge to make any discovery order that is not barred by higher authority.”).

31. See, e.g. *United States v. Prochilo*, 629 F.3d 264, 268 (1st Cir. 2011).

32. *Id.* at 268–69 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 at n.15 (1987)). See also *Riley v. Taylor*, 277 F.3d 261, 301 (3d Cir. 2001) (“A defendant seeking an in camera inspection to determine whether files contain *Brady* material must at least make a ‘plausible showing’ that the inspection will reveal material evidence. . . . Mere speculation is not enough.”); *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998) (same); *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995) (same); *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir.) (“Mere speculation that a government file may contain *Brady* material is not

E. Protective Orders

For good cause, such as considerations of witness safety or national security, a trial judge may fashion an appropriate protective order to the extent necessary in a particular case, consistent with the defendant’s constitutional rights. *See, e.g., United States v. Williams Companies, Inc.*, 562 F.3d 387, 396 (D.C. Cir. 2009) (discussing balancing of “the prosecution’s affirmative duty to disclose material evidence ‘favorable to an accused,’” Rule 16(d) (1)’s provision that, “‘for good cause,’ the district court may ‘deny, restrict, or defer discovery or inspection or grant other appropriate relief,’” and defendant’s right to fair trial). *See also* the Classified Information Procedures Act, 18 U.S.C. App. 3, for procedures regarding protective orders for classified information.

F. Summary

The preceding sections are meant as a general guide to the *Brady* line of case law. Every case is different, however, and presents its own particular facts and circumstances that will affect the types of *Brady/Giglio* disclosure issues (if any) that may arise and how such issues may be handled most appropriately. Ideally, both prosecutors and defense attorneys will know and fulfill their respective responsibilities without significant judicial intervention. However, even if things appear to be going smoothly, a judge may want to monitor the situation, perhaps using status conferences to ask if information is being fully and timely exchanged. A district’s particular legal culture is important. In districts where there is a history of poor cooperation between prosecutors and the defense bar, judges may need to take a more active role in ensuring *Brady* compliance than they might in districts where there is an “open file” discovery policy and a history of trust. A district’s local rules or standing orders also may provide specific rules for handling disclosure.

sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.”), *cert. denied, Mugercia v. United States*, 469 U.S. 1020 (1984).

APPENDIX

A. FJC Survey

The Federal Judicial Center recently conducted a comprehensive review of *Brady* practices in federal courts, surveying “all federal district and magistrate judges, U.S. Attorneys’ Offices, and federal defenders, and a sample of defense attorneys in criminal cases that terminated during calendar year 2009. The surveys collected empirical data on whether to amend Rule 16 and collected views regarding issues, concerns, or problems surrounding pretrial discovery and disclosure in the federal district courts.” LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 7 (2011).

In addition to the survey results, the *Summary* contains an analysis of district court rules and standing orders that cover disclosure requirements under *Brady* and *Giglio*. A separate appendix reprints the rules and orders from thirty-eight districts. The rules range from basic reiterations of *Brady* and *Giglio* to very detailed instructions and deadlines. The *Summary* and the *Appendices* can be accessed at <http://cwn.fjc.dcn/fjconline/home.nsf/pages/1356>.

B. Justice Department Policies and Guidance

Two documents set forth the current criminal discovery policies of the Department of Justice. The first is Section 9-5.001 of the *United States Attorney’s Manual*, titled “Policy Regarding Disclosure of Exculpatory and Impeachment Information” (as updated June 10, 2010), which largely follows established case law in outlining a prosecutor’s responsibilities to disclose exculpatory information, though in some instances it goes beyond what is required. It can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.

The second document is a memorandum issued by Deputy Attorney General David Ogden on January 4, 2010, which provides “Guidance for Prosecutors Regarding Criminal Discovery.” It goes beyond *Brady* and *Giglio* and also outlines a prosecutor’s obligations under Rules 16 and 26.2, as well as the Jencks Act, 18 U.S.C. § 3500. Usually called “The Ogden Memorandum,” it is “intended to assist Department prosecutors to understand their obligations and to manage the discovery process,” and can be found at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

Note that these documents are internal policy guidelines. They do not, as the “Policy” states, “provide defendants with any additional rights or remedies,” and they are “not intended to have the force of law or to create or confer any rights, privileges, or benefits.” While it may be useful to know what information prosecutors are gathering and should be disclosing, these guidelines are not legal obligations to be enforced by a court. Unlike a violation of *Brady* or *Giglio*, a failure to follow Justice Department policies is not by itself a basis for a trial judge to impose sanctions, exclude evidence, or declare a mistrial, or for an appellate court to reverse a conviction.

C. Potential *Brady* or *Giglio* Information

Following is a list of the types of material that may be discoverable under *Brady* or *Giglio*. The examples are culled from case law, district court local rules, and the Department of Justice guidelines for prosecutors. The list is not exhaustive, and whether the disclosure of any item is or is not required must be determined in light of the specific facts and circumstances of each case.

[Ed. Note: We will have case cites for the following item where available. Those are still being collected and are not included here.]

1. Exculpatory Information Under *Brady*

- a. information that is inconsistent with any element of any crime charged in the indictment or that tends to negate the defendant's guilt of any of the crimes charged
- b. failure of any persons who participated in an identification procedure to make a positive identification of the defendant, whether or not the government anticipates calling the person as a witness at trial
- c. any information that links someone other than the defendant to the crime (*e.g.*, a positive identification of someone other than the defendant)
- d. information that casts doubt on the accuracy of any evidence—including but not limited to witness testimony—that the prosecutor intends to rely on to prove an element of any of the crimes charged in the indictment, or that might have a significant bearing on the admissibility of that evidence in the case-in-chief
- e. any classified or otherwise sensitive national security material disclosed to defense counsel or made available to the court *in camera* that tends directly to negate the defendant's guilt

2. Impeachment Information under *Giglio*

- a. all statements made orally or in writing by any witness the prosecution intends to call in its case-in-chief that are inconsistent with other statements made by that same witness
- b. all plea agreements entered into by the government in this or related cases with any witness the government intends to call
- c. any favorable dispositions of criminal charges pending against witnesses the prosecutor intends to call
- d. offers or promises made or other benefits provided, directly or indirectly, to any witness in exchange for cooperation or testimony, including:
 - (1) dismissed or reduced charges;
 - (2) immunity or offers of immunity;
 - (3) expectations of downward departures or motions for reduction of sentence;
 - (4) assistance in other criminal proceedings, federal, state or local;

- (5) considerations regarding forfeiture of assets, forbearance in seeking revocation of professional licenses or public benefits, waiver of tax liability, or promises not to suspend or debar a government contractor;
 - (6) stays of deportation or other immigration benefits;
 - (7) monetary benefits, paid or promised;
 - (8) non-prosecution agreements;
 - (9) letters to other law enforcement officials setting forth the extent of a witness's assistance or making recommendations on the witness's behalf;
 - (10) relocation assistance or more favorable conditions of confinement;
 - (11) consideration or benefits to culpable or at-risk third parties;
- e. prior convictions of witnesses the prosecutor intends to call
- f. pending criminal charges against any witness known to the government
- g. prior specific instances of conduct by any witness known to the government that could be used to impeach the witness under Rule 608 of the Federal Rules of Evidence, including any finding of misconduct that reflects upon truthfulness
- h. substance abuse, mental health issues, physical or other impairments known to the government that could affect any witness's ability to perceive and recall events
- i. information known to the government that could affect any witness's bias such as:
- (1) animosity toward the defendant;
 - (2) animosity toward a group of which the defendant is a member or with which the defendant is affiliated; or
 - (3) relationship with the victim.

Treatment of *Brady v. Maryland* Material
in United States District and State Courts'
Rules, Orders, and Policies

Report to the Advisory Committee on
Criminal Rules of the Judicial Conference
of the United States

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Federal Judicial Center
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This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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I. Introduction

In July 2004, the Judicial Conference Advisory Committee on Criminal Rules asked the Federal Judicial Center to study the local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in *Brady v. Maryland*.¹ *Brady* requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. Subsequent Supreme Court decisions have elaborated the *Brady* obligations to include the duty to disclose (1) impeachment evidence,² (2) favorable evidence in the absence of a request by the accused,³ and (3) evidence in the possession of persons or organizations (e.g., the police).⁴ This report presents the findings of that research.

The committee's interest is in learning whether federal district courts and state courts have adopted any formal rules or standards that provide prosecutors with specific guidance on discharging their *Brady* obligations. Specifically, the committee wanted to know whether the U.S. district and state courts' relevant authorities (1) codify the *Brady* rule; (2) set any specific time when *Brady* material must be disclosed; or (3) require *Brady* material to be disclosed automatically or only on request. In addition, the Center sought information regarding policies in two areas: (1) due diligence obligations of the government to locate and disclose *Brady* material favorable to the defendant, and (2) sanctions for the government's failure to comply specifically with *Brady* disclosure obligations.

This report has three sections. Section I presents a general introduction to the report, along with a summary of our findings. Section II describes the federal district court local rules, orders, and policies that address *Brady* material, and Section III discusses the treatment of *Brady* material in the state courts' statutes, rules, and policies.

A. Background: *Brady*, Rule 16, and Rule 11

1. *Brady v. Maryland*

In *Brady v. Maryland*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”⁵ Subsequent Supreme Court decisions have held that the government has a constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process

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

2. *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

3. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

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

5. 373 U.S. at 87.

Clauses.⁶ The Court cited as justification for the disclosure obligation of prosecutors “the special role played by the American prosecutor in the search for truth in criminal trials.”⁷ The prosecutor serves as “the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”⁸

The *Brady* decision did not define what types of evidence are considered “material” to guilt or punishment, but other decisions have attempted to do so. For example, the standard of “materiality” for undisclosed evidence that would constitute a *Brady* violation has evolved over time from “if the omitted evidence creates a reasonable doubt that did not otherwise exist,”⁹ to “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,”¹⁰ to “whether in [the undisclosed evidence’s] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence,”¹¹ to the current standard, “when prejudice to the accused ensues . . . [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”¹²

2. *Federal Rule of Criminal Procedure 16*

Federal Rule of Criminal Procedure 16 governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly said that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” the committee had “decided not to codify the *Brady* Rule.”¹³ However, the committee explained, “the requirement that the government disclose documents and tangible objects ‘material to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.”¹⁴

Rule 16 entitles the defendant to receive, upon request, the following information:

- statements made by the defendant;
- the defendant’s prior criminal record;

6. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”).

7. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

8. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

9. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

10. *Bagley*, 473 U.S. at 682.

11. *Kyles*, 514 U.S. at 434.

12. *Strickler*, 527 U.S. at 281–82.

13. Fed. R. Crim. P. 16 advisory committee’s note (italics added).

14. *Id.*

- documents and tangible objects within the government’s possession that “are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant”;
- reports of examinations and tests that are material to the preparation of the defense; and
- written summaries of expert testimony that the government intends to use during its case in chief at trial.¹⁵

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or during the trial.¹⁶ Finally, Rule 16 grants the court discretion to issue sanctions or other orders “as are just” in the event the government fails to comply with a discovery request made under the rule.¹⁷

3. Federal Rule of Criminal Procedure 11

Federal Rule of Criminal Procedure 11 governs prosecutor and defendant practices during plea negotiations. The Supreme Court has not said whether disclosure of exculpatory evidence is required in the context of plea negotiations; however, in *United States v. Ruiz*, the Court held that the government is not constitutionally required to disclose *impeachment* evidence to a defendant prior to entering a plea agreement.¹⁸ The Court noted that “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* (‘knowing,’ ‘intelligent,’ and ‘sufficiently aware’).”¹⁹ The Court stated that “[t]he degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case—a matter that the Constitution does not require prosecutors to disclose.”²⁰ Finally, the Court stated that “a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”²¹

4. American College of Trial Lawyers’ proposal

In October 2003, the American College of Trial Lawyers (ACTL) proposed amending Federal Rules of Criminal Procedure 11 and 16 in order to “codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and

15. Fed. R. Crim. P. 16(a)(1)(A)–(E).

16. Fed. R. Crim. P. 16(c).

17. Fed. R. Crim. P. 16(d)(2).

18. 536 U.S. 622, 633 (2002).

19. *Id.* at 629 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

20. *Id.* at 630.

21. *Id.* at 631.

scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.”²²

5. Department of Justice’s response to the ACTL’s proposal

The Department of Justice (DOJ) opposes the ACTL’s proposal to amend Federal Rules of Criminal Procedure 11 and 16. DOJ contends that the government’s *Brady* obligations are “clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule,” and therefore no codification of the *Brady* rule is warranted.²³

B. Summary of Findings

1. Relevant authorities identified in the U.S. district courts

- Thirty of the ninety-four districts reported having a relevant local rule, order, or procedure governing disclosure of *Brady* material. References to *Brady* material are usually in the courts’ local rules but are sometimes in standard or standing orders and joint discovery statements.
- Eighteen of the thirty districts that explicitly reference *Brady* material use the term “favorable to the defendant” in describing evidence subject to the disclosure obligation. Nine other districts refer to *Brady* material as evidence that is exculpatory in nature. One additional district uses neither term, and two other additional districts use both terms in defining *Brady* material.
- Twenty-one of the thirty districts mandate automatic disclosure; five dictate that the government provide such material only upon request of the defendant. One district requires parties to address *Brady* material in a pretrial conference statement, and three are silent on disclosure.
- The thirty districts that reference *Brady* material vary significantly in their timetables for disclosure of the material. The most common time frame is “within 14 days of the arraignment,” followed by “within five days of the arraignment.” Some districts have no specified time requirements for disclosure, using terms such as “as soon as reasonably possible” or “before the trial.”
- In twenty-two of the thirty districts with *Brady*-related provisions, the disclosure obligation is a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and provided with the new evidence.

22. Memorandum from American College of Trial Lawyers to the Judicial Conference Advisory Committee on Federal Rules of Criminal Procedure (October 2003), at 2.

23. Memorandum from U.S. Department of Justice (Criminal Division) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcommittee on Rules 11 and 16 (April 26, 2004), at 2.

- Of the thirty districts with policies governing *Brady* material, five have specific due diligence requirements for prosecutors. One district has a certificate of compliance requirement only. The remaining twenty-four districts do not appear to have due diligence requirements.
- None of the districts specify sanctions for nondisclosure by prosecutors, leaving any sanction determination to the discretion of the court.
- Three of the thirty districts that reference *Brady* have declination procedures for disclosure of specific types of information.

2. *Relevant authorities identified in the state courts*

- All fifty states and the District of Columbia have a rule or other type of authority, including statutes, concerning the prosecutor's obligation to disclose information favorable to the defendant.
- Many of the states have enacted rules similar to Federal Rule of Criminal Procedure 16; however, some of these rules and statutes vary in their details. Some states go beyond the scope of Rule 16 and the *Brady* constitutional obligations by explicitly setting time limits on disclosure; other states have adopted Rule 16 almost verbatim, using language like "evidence material to the preparation of the defense" and "evidence favorable to the defendant."
- Most states' rules impose a continuing disclosure obligation, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be promptly notified and shown such new evidence.
- A few states have a specific due diligence obligation that requires prosecutors to submit a "certificate of compliance" indicating that they have exercised due diligence in locating favorable evidence and that, to the best of their knowledge and belief, all such information has been disclosed to the defense.
- All of the states authorize sanctions for prosecutors' failure to comply with discovery obligations and other state-court-mandated disclosure requirements. A few states permit a trial court to dismiss charges entirely as a sanction for prosecutorial misconduct, while other states have held dismissal to be too severe a sanction.

II. U.S. District Court Policies for the Treatment of *Brady* Material

In this section, we describe federal local court rules, orders, and procedures in the thirty responding districts that codify the *Brady* rule, define *Brady* material and/or set the timing and conditions for disclosure of *Brady* material. In addition, we discuss due diligence obligations of the government and specific sanctions for the government's failure to comply with disclosure procedures.

A. Research Methods

Because of the short time we had to complete our research, we were unable to survey each district court about compliance with its *Brady* practices, that is, the degree to which the court's rules and other policies describe what actually occurs in the district. To obtain a comprehensive picture of such practices, we would need to survey U.S. attorneys, federal public defenders, and selected retained or appointed defense counsel in each of the ninety-four districts. Such a survey would be considerably more time-consuming than the research conducted for this report.

We searched the Westlaw RULES-ALL and ORDERS-ALL databases using the following search terms:

- “Brady v. Maryland” & ci(usdct!);
- “exculpatory” & ci(usdct!);
- “exculpatory evidence” & ci(usdct!); and
- “evidence favorable to the defendant” & ci(usdct!).

In addition, we reviewed paper copies of each district court's local rules. For twenty-two districts, these database and paper-copy searches yielded specific local rules and orders that relate to the *Brady* decision or that set forth guidance to the government regarding disclosure of *Brady* material. For the seventy-two (94 minus 22) districts for which our searches did not yield a relevant local rule or order, we contacted the clerks of court to request their assistance in locating any local rules, orders, or procedures relating to the application of the *Brady* decision. Through this effort, we identified eight additional districts (for a total of thirty) that clearly refer to *Brady* material in their local rules, orders, or procedures.

We also received responses from another eight districts that do not clearly refer to *Brady* material, but that provided summary information about their disclosure policies.²⁴ Some districts responded with statements such as “We have not promulgated any local rule and/or general order referencing *Brady* material.” Others stated, “We have not adopted any formal standards or rules that provide guidance to prosecutors on discharging *Brady* obligations.” And a few districts

24. These districts were M.D. La., N.D. Miss., E.D. Mo., W.D.N.Y., N.D. Ohio, M.D. Pa., D.S.C., and D.V.I.

reported, “We follow Federal Rule of Criminal Procedure 16.” In most instances, these districts did not provide any other information regarding how *Brady* material disclosures operated in their districts.

The thirty districts that have local rules, orders, and procedures specifically addressing *Brady* material served as the basis for the federal courts section of our analysis. We reviewed and analyzed each of the thirty districts’ rules, orders, and published procedures to determine

- the types of information defined as *Brady* material;
- whether the material is disclosed automatically or only upon request;
- the timing of disclosure;
- whether the parties had a continuing duty to disclose;
- whether the parties had a due diligence requirement; and
- whether there are specific provisions authorizing sanctions for failure to disclose *Brady* material.

We also noted whether the districts had declination procedures.

B. Governing Rules, Orders, and Procedures

We found references to *Brady* material in various documents, including local rules, orders (including standing orders and standard discovery, arraignment, scheduling, and pretrial orders), and supplementary materials such as joint statements of discovery and checklists (including disclosure agreement checklists).

Provisions for obligations to disclose *Brady* material are contained in the documents listed in Table 1.²⁵ We were unable to find information on each of the variables discussed here for all districts. Consequently, this is not a comprehensive description of each of the thirty districts’ procedures.

C. Definition of *Brady* Material

Most disclosure rules, orders, and procedures in the thirty districts that address the *Brady* decision define *Brady* material in one of two ways: as evidence favorable to the defendant (18 districts),²⁶ or as exculpatory evidence (9 districts).²⁷ One

25. Two of the thirty districts (W.D. Okla., D. Vt.) address *Brady*-material disclosure in more than one document.

26. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1); N.D. Cal. Crim. L.R. 17.1-1(b)(3); D. Conn. L. Crim. R. App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26.3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; M.D. Ga. Standard Pretrial Order; S.D. Ga. L. Crim. R. 16.1(f); D. Idaho Crim. Proc. Order §§ I(5) & (I)5(a); W.D. Mo. Scheduling and Trial Order § VI.A.; D. Nev. Joint Discovery Statement § II; W.D. Okla. App. 5, § 5; W.D. Pa. L. Crim. R. 16.1(F); E.D. Tenn. Discovery and Scheduling Order (sample); M.D. Tenn. L.R. 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); W.D. Wash. Crim. R. 16(a)(1)(K); and S.D. W. Va. Arraignment Order and Standard Discovery Requests § (3)(1)(H)).

27. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116.02(A); D.N.H. L. Crim. R.

district (Western District of Kentucky) refers to the material by case name (“*Brady* material”) but does not define it further—for example, the terms “evidence favorable to the defendant” or “exculpatory evidence” do not appear in the order.²⁸ Finally, two districts (Northern District of Georgia²⁹ and Northern District of New York³⁰) use both terms, “evidence favorable to the defendant” and “exculpatory evidence,” to define *Brady* material.

Table 1. District Court Documents That Reference *Brady* Material

Documents	Number of Districts	Districts
Local rules	16	S.D. Ala., N.D. Cal., N.D. Fla., S.D. Fla., S.D. Ga., D. Mass., D.N.H., D.N.M., N.D.N.Y., E.D.N.C., W.D. Okla., W.D. Pa., D.R.I., M.D. Tenn., W.D. Wash., E.D. Wis.
Standard orders	3	M.D. Ga., S.D. Ind., D. Vt.
Standing orders	2	M.D. Ala., D. Conn.
Procedural orders	1	D. Idaho
Arraignment orders & standard discovery requests	1	S.D. W.Va.
Arraignment orders & reciprocal orders of discovery	1	W.D. Ky.
Joint discovery statements	2	D. Nev., W.D. Okla.
Discovery & scheduling orders	1	E.D. Tenn.
Scheduling orders	1	W.D. Mo.
Magistrate judges’ pretrial orders	1	N.D. Ga.
Criminal pretrial orders	1	D. Vt.
Criminal progression orders	1	D. Neb.
Model checklists	1	W.D. Tex.

16.1(c); D.N.M. L.R.-Crim. R. 16.1; E.D.N.C. L. Crim. R. 16.1(b)(6); D.R.I. R. 12(e); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R. 16.1(b) & (c).

28. W.D. Ky. Arraignment Order & Reciprocal Order of Discovery § (4)(V).

29. N.D. Ga. Magistrate Judge’s Pretrial Order § IV(B).

30. N.D.N.Y. L.R. Crim. P. 14.1(b)(2) (“favorable to the defendant”), and N.D.N.Y. L.R. Crim. P. 17.1.1(c) (“exculpatory and other evidence”).

1. Evidence favorable to the defendant

The most common definition of “evidence favorable to the defendant,” found in ten of the eighteen districts that use the term, defines *Brady* material as any material or information that may be favorable to the defendant on the issues of guilt or punishment and that is within the scope (or meaning) of *Brady*.³¹ Three of the ten districts add the qualifier “without regard to materiality.”³²

2. Exculpatory evidence or material

Nine districts refer to *Brady* material as exculpatory in nature.³³ Seven of these use the terms “exculpatory evidence” or “exculpatory material.”³⁴ An eighth district, Rhode Island, refers to “material or information, which tends to negate the guilt of the accused or to reduce his punishment for the offense charged.”³⁵ Finally, the ninth district, New Mexico, specifically provides for an assessment of the material where there is disagreement among the parties: “if a question exists of the exculpatory nature of material sought under *Brady*, it will be made available for in camera inspection at the earliest possible time.”³⁶

Of these nine districts, Massachusetts has the most detailed and expansive rule dealing with *Brady* material and exculpatory evidence. It defines exculpatory evidence as follows:

- Information that would tend directly to negate the defendant’s guilt concerning any count in the indictment or information.
- Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. § 3731.

31. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1)); D. Conn. L. Crim. R. App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26.3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; W.D. Mo. Scheduling and Trial Order § VI.A.; E.D. Tenn. Discovery and Scheduling Order (sample); M.D. Tenn. Rule 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); and W.D. Wash. Crim. R. 16(a)(1)(K).

32. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1)); and N.D. Fla. L.R. 26.3(D)(1).

33. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116.02(A); D.N.H. L. Crim. R. 16.1(c); D.N.M. L.R.-Crim. R. 16.1; E.D.N.C. L. Crim. R. 16.1(b)(6); D.R.I. R. 12(e); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R. 16.1(b) & (c).

34. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116.02(A); D.N.H. L. Crim. R. 16.1(c); E.D.N.C. L. Crim. R. 16.1(b)(6); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R. 16.1(b) & (c).

35. D.R.I. R. 12(e).

36. D.N.M. Crim. R. 16.1.

- A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.
- A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.
- A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.
- A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.
- Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.
- Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
- Any statement, or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
- Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.
- A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.
- A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.
- Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.
- Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.
- A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.³⁷

37. D. Mass. L.R. 116.2(B).

D. Disclosure Requirements

Twenty-one districts mandate automatic disclosure of *Brady* material.³⁸ One, the Middle District of Georgia, has a caveat—the government need not furnish the defendant with *Brady* information that the defendant has obtained, or with reasonable diligence, could obtain himself or herself.³⁹ New Mexico mandates “discussion” of disclosure, and says that in camera inspection may be needed.⁴⁰

Five districts dictate that the government provide *Brady* material only upon request of the defendant.⁴¹ The Northern District of California adds qualifying language that requires that the parties address the issue “if pertinent to the case,” and in their pretrial conference statement “if a conference is held.”⁴² Three districts⁴³ do not mention this issue in their local rules or orders.

Only one district specifically addresses the disposition of the information or evidence once the case has been resolved. The Middle District of Tennessee requires that the information or evidence be returned to the “government or destroyed following the completion of the trial, sentencing of the defendant, or completion of the direct appellate process, whichever occurs last.”⁴⁴ A party who destroys materials must certify the destruction by letter to the government.

38. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1); D. Conn. L. Crim. R. App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26.3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; M.D. Ga. Standard Pretrial Order; S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Pleas, Trial Date, Discovery Order and Other Matters § VII(a)(1)(H); D. Mass. Crim. R. 116.2(B); W.D. Mo. Scheduling and Trial Order § VI(A); D. Nev. Joint Discovery Statement § II; D.N.M. L.R.-Crim. R. 16.1; D.N.H. L. Crim. R. 16.1(c); N.D.N.Y. L.R. Crim. P. 14.1(b); W.D. Okla. L. Crim. R. 16.1(b) & App. V. Joint Statement of Discovery Conference § 5; W.D. Pa. L. Crim. R. 16.1(F); D.R.I. Rule 12(e)(A)(5); E.D. Tenn. Discovery & Scheduling Order; M.D. Tenn. L.R. 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R. 16.1(b).

39. M.D. Ga. Standard Pretrial Order, citing *United States v. Slocum*, 708 F.2d 587, 599 (11th Cir. 1983).

40. D.N.M. L.R.-Crim. R. 16.1.

41. N.D. Ga. Standard Magistrate Judge’s Pretrial Order; S.D. Ga. L. Crim. R. 16.1(f); E.D.N.C. L. Crim. R. 16.1(b)(6); W.D. Wash. Crim. R. 16(a)(1)(K); and S.D. W. Va. Arraignment Order and Standard Discovery Request § III(1)(H).

42. N.D. Cal. Crim. L.R. 17.1-1(b).

43. D. Idaho, W.D. Ky., and W.D. Tex.

44. M.D. Tenn. R. 12(k).

1. Time requirements for disclosure⁴⁵

The thirty districts vary significantly in their disclosure timetables. Some districts specify a time by which the prosecution must disclose *Brady* material, while other districts rely upon nonspecific terms such as “timely disclosure” or “as soon as practicable.”

a. Specific time requirement

Twenty-five districts have mandated time limits (or specific events, such as hearings or pretrial conferences) for prosecutorial disclosure of *Brady* material (see Table 2).

Table 2. Districts with Time Requirements for Prosecutorial Disclosure of *Brady* Material

Time Requirement	Districts
At arraignment	M.D. Ala., ⁴⁶ S.D. Ala.
Within 5 days of arraignment	N.D. Fla., S.D. Ga., W.D. Pa., E.D. Wis.
Within 7 days of arraignment	D. Idaho, N.D. W. Va.
Within 10 days of arraignment	D. Conn., D.R.I., S.D. W. Va.
Within 14 days of arraignment	S.D. Fla., N.D.N.Y., M.D. Tenn., W.D. Tenn., W.D. Tex., D. Vt., W.D. Wash.
Within 28 days of arraignment	D. Mass.
At the discovery conference	W.D. Okla.
Within 10 days of the scheduling order	W.D. Mo.
Prior to the pretrial conference	N.D. Ga.
At the pretrial conference (PTC) (or address in the PTC statement or order)	N.D. Cal., E.D.N.C.
At least 20 days before trial	D.N.H.

45. It is well settled that the district court may order when *Brady* material is to be disclosed, *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984). Some decisions have held that the Jencks Act controls and that *Brady* material relating to a certain witness need not be disclosed until that witness has testified on direct examination at trial, *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994); *United States v. Jones*, 612 F.2d 453 (9th Cir. 1979); *United States v. Scott*, 524 F.2d 465 (5th Cir. 1975). Others have held that *Brady* material might be disclosed prior to trial, in order to afford the defendant the opportunity to make effective use of it during trial, *United States v. Perez*, 870 F.2d 1222 (7th Cir. 1989); *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979); *United States v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976).

46. “or on a date otherwise set by the Court for good cause shown.” M.D. Ala. Standing Order on Criminal Discovery § 1.

b. No specific time requirement

Four districts have nonspecific time requirements for disclosure, set out in local rules or in various court orders, or determined by case law.⁴⁷ The terms used for these time requirements include the following descriptions:

- “as soon as reasonably possible”;⁴⁸
- “before the trial”;⁴⁹
- “after defense counsel has entered an appearance”;⁵⁰ and
- “[t]iming of disclosure should be *described* in the District’s standard Arraignment Order/Reciprocal Order of Discovery.”⁵¹

Time requirements for disclosure for one district were not given.⁵²

2. Duration of disclosure requirements

Twenty-two of the thirty districts make the prosecutor’s disclosure obligation a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and shown the new evidence.⁵³ A few districts use adjectives or modifiers to more clearly define how soon after discovery of new material the government must disclose it.⁵⁴ One dis-

47. In the Eastern District of Tennessee, timing of disclosure is governed by *U.S. v. Presser*, 844 F.2d 1275 (6th Cir. 1988), which addressed material that was arguably exempt from pretrial disclosure by the Jencks Act, yet also arguably exculpatory under the *Brady* rule. There, the material needed only to be disclosed to defendants “in time for use at trial.”

48. M.D. Ga. Standard Pretrial Order.

49. D. Nev. Joint Discovery Statement § II.

50. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(a)(1)(H).

51. W.D. Ky. Arraignment Order and Reciprocal Order of Discovery § V (emphasis added).

52. D.N.M.

53. M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(c); D. Conn. L. Crim. R. App. Standing Order on Discovery § D; N.D. Fla. Crim. L.R. 26.3(G); S.D. Fla. L.R. Gen. R. 88.10; S.D. Ga. L. Crim. R. 16.1; D. Idaho Procedural Order § I(5); S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(c); W.D. Mo. Scheduling and Trial Order § II; D.N.H. L. Crim. R. 16.2; D.N.M. L.R.-Crim. R. 16.1; N.D.N.Y. L.R. Crim. P. 14.1(f); E.D.N.C. L. Crim. R. 16.1(e); W.D. Okla. App. 5; E.D. Tenn. Discovery and Scheduling Order; M.D. Tenn. R. 10(a)(2); W.D. Tex. C.R. 16(b)(4); D. Vt. L. Crim. R. 16.1(e); W.D. Wash. Crim. R. 16(d); N.D. W. Va. L.R. Crim. P. 16.05; S.D. W. Va. Arraignment Order and Standard Discovery Request § III(4); and E.D. Wis. Crim. L.R. 16(b).

54. *E.g.*, “immediately” (D. Conn. L. Crim. R. App. Standing Order on Discovery § D; S.D. Fla. L.R. Gen. R. 88.10; N.D.N.Y. L.R. Crim. P. 14.1(f); M.D. Tenn. R. 10(a)(2); and N.D. W. Va. L.R. Crim. P. 16.05); “as soon as it is received” (S.D. W. Va. Arraignment Order and Standard Discovery Request § III(4)); “promptly” (S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(c); W.D. Tex. C.R. 16(b)(4)); “expeditiously” (M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(c); N.D.N.Y. L.R. Crim. P. 14.1(f)); and “by the speediest means available” (N.D. Fla. Crim. L.R. 26.3(G)).

trict’s local rule explicitly states that motions to enforce the continuing duty “should not be necessary.”⁵⁵

E. Due Diligence Requirements

Five districts have specific “due diligence” requirements for prosecutors.⁵⁶ Two of these five districts⁵⁷ plus one additional district⁵⁸ require the government to sign and file a “certificate of compliance” (with *Brady* obligations) with discovery. In one of the five districts, failure to file the certificate of compliance along with a discovery or inspection motion “may result in summary denial of the motion or other sanctions within the discretion of the court.”⁵⁹

While other districts do not use the term “due diligence” in their local rules, orders, or procedures, some make it clear that the government has the responsibility to identify and produce discoverable evidence and information. For example, the Western District of Missouri’s rule regarding the government’s responsibility for reviewing the case file for *Brady* (and *Giglio*) material says:

The government is advised that if any portion of the government’s investigative file or that of any investigating agency is not made available to the defense for inspection, the Court will expect that trial counsel for the government or an attorney under trial counsel’s immediate supervision who is familiar with the *Brady/Giglio* doctrine will have reviewed the applicable files for the purpose of ascertaining whether evidence favorable to the defense is contained in the file.⁶⁰

In addition, the Middle and Southern Districts of Alabama include a restriction on the delegation of the responsibility:

The identification and production of all discoverable information and evidence is the personal responsibility of the Assistant U.S. Attorney assigned to the action and may not be delegated without the express permission of the Court.⁶¹

F. Sanctions for Noncompliance with *Brady* Obligations

None of the thirty districts specify remedies for prosecutorial nondisclosure. All leave the determination of any sanctions to the discretion of the court.

One district, however, provides some guidance for judges dealing with the failure of the government to comply with *Brady/Giglio* obligations. The Uniform Procedural Order in the District of Idaho says:

55. D.N.M. Crim. R. 16.1.

56. D. Conn. L. Crim. R. App. Standing Order on Discovery § A; W.D. Mo. Scheduling and Trial Order § II; D. Nev. Joint Discovery Statement § II; D.N.H. L. Crim. R. 16.2; and W.D. Wash. Crim. R. 16(a).

57. W.D. Mo. and W.D. Wash.

58. D.N.M. *See* D.N.M. L.R.-Crim. R. 16.1. This rule does not use the term “due diligence.”

59. W.D. Wash. Crim. R. 16(i).

60. W.D. Mo. Scheduling and Trial Order Note following §§ VI(A) & (B).

61. M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(b)(2)(C).

If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.⁶²

Most courts allow sanctions (generally based on Rule 16's authority) for both parties for general discovery abuses. These sanctions include exclusion of evidence at trial, a finding of contempt, granting of a continuance, and even dismissal of the indictment with prejudice. For example, the Northern District of Georgia's standard Magistrate Judge's Pretrial Order says:

Where reciprocal discovery is requested by the government, the attorney for the defendant shall personally advise the defendant of the request, the defendant's obligations thereto, and the possibility of sanctions, including exclusion of any such evidence from trial, for failure to comply with the Rule. *See* Fed. R. Crim. P. 16(b) and (d) (as amended December 1, 2002); L.Cr.R. 16.1 (N.D. Ga.).⁶³

The Southern District of Florida's Discovery Practices Handbook states that "[i]f a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the gravity it deserves; willful violation of a Court order is always serious and is treated as contempt."⁶⁴ The Northern District of West Virginia's local rule is even more sweeping:

If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with L.R. Crim. P. 16 [the general discovery rule], the Court may order such party to permit the discovery or inspection, grant a continuance or prohibit the party from introducing evidence not disclosed, or the Court may enter such order as it deems just under the circumstances up to and including the dismissal of the indictment with prejudice.⁶⁵

G. Declination Procedures

Three of the thirty districts specifically refer to declination procedures in their local rules or orders.⁶⁶ For example, the Southern District of Georgia's local rule says:

In the event the U.S. Attorney declines to furnish any such information described in this rule, he shall file such declination in writing specifying the types of disclosure

62. D. Idaho Uniform Procedural Order § I(5).

63. N.D. Ga. standard Magistrate Judge's Pretrial Order.

64. S.D. Fla. L.R. App. A. Discovery Practices Handbook § I.D(4) Sanctions. Note that the practices set forth in the handbook do not have the force of law, but are for the guidance of practitioners. The *Discovery Practices Handbook* was prepared by the Federal Courts Committee of the Dade County Bar Association and adopted as a published appendix to the Local General Rules.

65. N.D. W. Va. L.R. Crim. P. 16.11.

66. S.D. Ga. L. Crim. R. 16.1(g); D. Mass. L.R. 116.6(A); and W.D. Wash. Crim. R. 16(e).

that are declined and the ground therefor. If defendant's attorney objects to such refusal, he shall move the Court for a hearing therein.⁶⁷

The District of Massachusetts has an even more detailed rule governing the declination of disclosure and protective orders, providing for challenges, sealed filings, and ex parte motions:

(A) Declination. If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these Local Rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the opposing party seeks to challenge the declination, that party shall file a motion to compel that states the reasons why disclosure is sought. Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may file its submissions in support of declination under seal pursuant to L.R. 7.2 for the Court's in camera consideration. Unless otherwise ordered by the Court, a redacted version of each such submission shall be served on the moving party, which may reply.

(B) Ex Parte Motions for Protective Orders. This Local Rule does not preclude any party from moving under L.R. 7.2 and ex parte (i.e., without serving the opposing party) for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this Local Rule limit the Court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.⁶⁸

Other districts have procedures for motions to deny, modify, restrict, or defer discovery or inspection.⁶⁹ The moving party has the burden to show cause why discovery should be limited.

67. S.D. Ga. L. Crim. R. 16.1(g). *See also* S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters (standard order in criminal cases) § VII(d).

68. D. Mass. Crim. R. 116.6. The Western District of Washington has a similar but less detailed and expansive rule. W.D. Wash. Crim. R. 16(e).

69. *See, e.g.*, D. Conn. Standing Order on Discovery § F. The Middle District of Tennessee's standing order language is similar to Connecticut's; however, the Middle District of Tennessee's includes the following cautionary message: "It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Rule." M.D. Tenn. R. 10(a)(2)(n).

III. State Court Policies for the Treatment of *Brady* Material

This section describes state court statutes, rules, orders, and procedures that codify the *Brady* rule or incorporate specific aspects of it, define *Brady* material and/or set the timing and conditions for its disclosure, impose any due diligence obligations on the government, and specify sanctions for the government's failure to comply with such disclosure procedures.

A. Research Methods

We identified within all fifty states and the District of Columbia the relevant statewide legal authority governing prosecutorial disclosure of information favorable to the defendant. We searched relevant databases in Westlaw and LEXIS, including state statutes, criminal procedure rules, state court rules governing criminal discovery, state constitutions, state court opinions, and state rules on professional conduct. For most states, we were able to locate a relevant state rule, order, or other legal authority when we used the following search terms in various combinations:

- “exculpatory evidence”;
- “favorable evidence”;
- “*Brady* material”;
- “prosecution disclosure”; and
- “suppression of evidence.”

If we were unable to locate a rule for a state, we reviewed state court opinions to determine if case law addressed or clarified the legal obligation regarding prosecutorial disclosure of information favorable to the defendant.

Our analyses and conclusions are based on our interpretation of the relevant authorities that we identified. We looked for relevant legal authority that contained clear and unequivocal language regarding the duty of the prosecutor to disclose information to the defense. Where we could not identify authority with clear language regarding the prosecution's disclosure obligation, we erred on the side of caution and noted the absence of a clear authority regarding the duty to disclose.

B. Governing Rules, Orders, and Procedures

All fifty states and the District of Columbia address the prosecutor's obligation to disclose information favorable to the defendant. Table 3 shows the sources of the relevant authority.

Table 3. Sources of Authority for Prosecutor’s Obligation to Disclose Evidence Favorable to the Defendant

Authorities ⁷⁰	Number of States	States
Rules of Criminal Procedure or general court rules	35	Ala., Alaska, Ariz., Ark., Colo., Del., D.C., Fla., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Minn., Miss., Mo., N.H., N.J., N.M., N.D., Ohio, Pa., R.I., S.C., Tenn., Utah, Vt., Va., Wash., W. Va., Wyo.
General statutes	14	Conn., Ga., Kan., La., Mont., Neb., Nev., N.Y., N.C., Okla., Or., S.D., Tex., Wis.
Penal code	2	Cal., Haw.

Some state supreme courts have found prosecutors’ suppression of exculpatory evidence to violate the due process clauses of their constitutions. For example, in *State v. Hatfield*, the West Virginia Supreme Court held that “[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.”⁷¹ Another state, Nevada, explicitly notes in its criminal discovery procedure statute that “[t]he provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the constitution of this state . . . to disclose exculpatory evidence to the defendant.”⁷²

C. Definition of *Brady* Material

In thirty-three of the fifty-one jurisdictions, we found rules or procedures that codify the *Brady* rule. There are differences in the *Brady*-related definitions of materials covered.

1. Evidence favorable to the defendant

Although there is some variation in the specific language used to define *Brady* material,⁷³ twenty-three states⁷⁴ have adopted language generally resembling the

70. We identified several states that address the favorable evidence disclosure obligation in more than one source, e.g., in a statute as well as in a rule. We charted only the highest authority.

71. 286 S.E.2d 402, 411 (W. Va. 1982).

72. Nev. Rev. Stat. § 174.235(3) (2004).

73. See, e.g., Me. R. Crim. P. 16(a)(1)(C) (“any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant’s guilt as to the offense charged.”).

following: “any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused’s punishment therefor.”⁷⁵

2. *Exculpatory evidence or material*

Ten other states⁷⁶ expressly list exculpatory material as items of information that prosecutors are required to disclose. These states describe exculpatory material in two ways: as “exculpatory evidence”⁷⁷ or as “exculpatory material.”⁷⁸

The remaining states do not appear to have any express language regarding *Brady* material, but case law in several of those states discusses the *Brady* obligation. For example, in *Potts v. State*, the Georgia Supreme Court held that the “[d]efendant . . . has the burden of showing that the evidence withheld from him so impaired his defense that he was denied a fair trial within the meaning of the *Brady* Rule.”⁷⁹ The Supreme Court of Wyoming noted that although “[t]here is no general constitutional right to discovery in a criminal case. . . . [s]uppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt.”⁸⁰ Other state courts have similarly invoked the *Brady* rule in their decisions.⁸¹

No state procedure expressly refers to impeaching evidence as material subject to disclosure requirements, but three states specify that prosecutors must turn over any information required to be produced under the Due Process Clause of the U.S. Constitution.⁸² Two states require disclosure pursuant to the *Brady* decision.⁸³ Despite this lack of express language, however, it appears that any state court

74. Ala., Ariz., Ark., Colo., Fla., Haw., Idaho, Ill., Ky., La., Me., Md., Minn., Mo., Mont., N.J., N.M., Ohio, Okla., Pa., Tex., Utah, and Wash.

75. Idaho Crim. R. 16(a).

76. Cal., Conn., Mass., Mich., Miss., Nev., N.H., Tenn., Vt., Wis.

77. *See, e.g.*, Nev. Rev. Stat. § 174.235(3).

78. *See, e.g.*, Cal. Penal Code § 1054.1(e).

79. 243 S.E.2d 510, 517 (Ga. 1978) (citation omitted).

80. *Dodge v. State*, 562 P.2d 303, 307 (Wyo. 1977) (citations omitted).

81. *Bui v. State*, 717 So. 2d 6, 27 (Ala. Crim. App. 1997) (“In order to prove a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to his defense, and (3) that the evidence was material.” (citation omitted)); *O’Neil v. State*, 691 A.2d 50, 54 (Del. 1997) (“[T]he [prosecution’s] obligation to disclose exculpatory information is triggered by the defendant’s request pursuant to Super. Ct. Crim. Rule 16 and is not limited to trial proceedings.”); *Lomax v. Commonwealth*, 319 S.E.2d 763, 766 (Va. 1984) (“[T]he Commonwealth has a duty to disclose the [*Brady*] materials in sufficient time to afford an accused an opportunity to assess and develop the evidence for trial.”).

82. *See, e.g.*, Nev. Rev. Stat. § 174.235(3); N.M. Dist. Ct. R. Cr. P. 5-501(A)(6); N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(h).

83. *See, e.g.*, N.H. Super. Ct. R. 98(A)(2)(iv); Tenn. Crim. P. R. 16 (Advisory Commission Comments).

opinion that cites the *Brady* rule would include impeachment evidence as material that state prosecutors are constitutionally obliged to produce for defendants.⁸⁴

D. Disclosure Requirements

Five states⁸⁵ use the term “favorable” in describing evidence subject to the state disclosure obligation. However, these states limit the clause “evidence favorable to the accused” with a condition that such evidence be “material and relevant to the issue of guilt or punishment.”⁸⁶

Although *Brady* used “favorable” in describing the evidence required for prosecutorial disclosure,⁸⁷ Rule 16 does not expressly refer to “favorable evidence.” The rule permits a defendant in federal criminal cases to receive, upon request, documents and tangible objects within the possession of the government that “*are material to the preparation of the defendant’s defense* or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.”⁸⁸ In describing some of the items of evidence subject to the criminal discovery right, twenty-six states use language identical or substantially similar to the italicized language above.⁸⁹

1. Types of information required to be disclosed

All of the states,⁹⁰ require, at a minimum, disclosure of the types of evidence that Rule 16 permits to be disclosed before trial:

- written or recorded statements, admissions, or confessions made by the defendant;
- books, papers, documents, or tangible objects obtained from the defendant;

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

85. La., N.M., Ohio, Okla., Pa.

86. See, e.g., Pa. R. Crim. P. 573 (B)(1)(a) (“The Commonwealth shall . . . permit the defendant’s attorney to inspect and copy or photograph . . . any evidence favorable to the accused that is material either to guilt or to punishment.”); La. Code Crim. P. Ann. art. 718 (“[O]n motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine . . . [evidence] favorable to the defendant and which [is] material and relevant to the issue of guilt or punishment.”).

87. 373 U.S. at 87 (“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.”).

88. Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

89. Ala., Conn., Del., D.C., Haw., Idaho, Ind., Iowa, Kan., Ky., Miss., Mo., Neb., N.D., Ohio, Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wyo.

90. Indiana is unique in that it does not contain a separate rule for criminal discovery and relies on civil trial procedural rules to govern criminal trials. See Ind. Crim. R. 21 (“The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings.”) Therefore, Indiana does not provide a specific list of evidence subject to criminal discovery. Presumably, however, a criminal defendant in Indiana state court would be entitled to the basic items of evidence listed here.

- reports of experts in connection with results of any physical or mental examinations made of the defendant, and scientific tests or experiments made;
- records of the defendant’s prior criminal convictions; and
- written lists of the names and addresses of persons having knowledge of relevant facts who may be called by the state as witnesses at trial.⁹¹

Some states, however, go beyond this basic list of information and specify other material for disclosure:

- any electronic surveillance of any conversations to which the defendant was a party;⁹²
- whether an investigative subpoena has been executed in the case;⁹³
- whether the case has involved an informant;⁹⁴
- whether a search warrant has been executed in connection with the case;⁹⁵
- transcripts of grand jury testimony relating to the case given by the defendant, or by a codefendant to be tried jointly;⁹⁶
- police, arrest, and crime or offense reports;⁹⁷
- felony convictions of any material witness whose credibility is likely to be critical to the outcome of the trial;⁹⁸
- all promises, rewards, or inducements made to witnesses the state intends to present at trial;⁹⁹
- DNA laboratory reports revealing a match to the defendant’s DNA;¹⁰⁰
- expert witnesses whom the prosecution will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecution;¹⁰¹
- any information that indicates entrapment of the defendant;¹⁰² and
- “any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.”¹⁰³

91. *See, e.g.*, Conn. Gen. Stat. § 54-86(a) (2003); Idaho Crim. Rule 16(a).

92. Mont. Code Ann. § 415-15-322 (2)(a).

93. Mont. Code Ann. § 415-15-322 (2)(b).

94. Mont. Code Ann. § 415-15-322 (2)(c).

95. Ariz. St. RCRP R. 15.1(b)(10).

96. N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(b).

97. Colo. Crim. P. Rule 16 (a)(I).

98. Cal. Penal Code § 1054.1(d).

99. Mass. Crim. P. R. 14(1)(A)(ix) (as amended, effective Sept. 7, 2004).

100. N.C. Gen. Stat. § 15A-903(g).

101. Wash. Super. Ct. Crim. R. 4.7(a)(2)(ii).

102. Wash. Super. Ct. Crim. R. 4.7(a)(2)(iii).

103. Pa. R. Crim. P. 573(B)(2)(a)(iv).

Most states provide that this “favorable” evidence *may* be disclosed to the defendant upon request or at the discretion of the court. Other states require that evidence beyond the scope of *Brady* material *must* be disclosed even without a request or court order.

2. *Mandatory disclosure without request*

Thirteen states¹⁰⁴ require mandatory disclosure of information “favorable” to the defense, regardless of whether the defendant made a specific discovery request for the material. We determined that this disclosure is mandatory because of the use of the phrase “prosecutor *shall* disclose,” and the lack of any conditional clause such as “upon defendant’s request,” or “at the court’s discretion.” For example, Massachusetts describes as being “mandatory discovery for the defendant” the following items of evidence:

- (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
- (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
- (iii) Any facts of an exculpatory nature.
- (iv) The names, addresses, and dates of birth of the Commonwealth’s prospective witnesses other than law enforcement witnesses
- (v) The names and business addresses of prospective law enforcement witnesses.
- (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant’s criminal responsibility
- (vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.
- (viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
- (ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.¹⁰⁵

In contrast, Hawaii requires disclosure of evidence favorable to the defendant only if the defendant is charged with a felony.¹⁰⁶ In cases other than felonies, Hawaii permits a state court, at its discretion, to require disclosure of favorable evidence “[u]pon a showing of materiality and if the request is reasonable.”¹⁰⁷

Of the thirteen states that require disclosure of favorable evidence, three distinguish between information that is subject to mandatory disclosure and other

104. Alaska, Ariz., Cal., Colo., Fla., Haw., Me., Md., Mass., N.H., N.M., Or., Wash.

105. Mass. Crim. P. Rule 14 (as amended, effective Sept. 7, 2004).

106. Haw. R. Penal P. 16(a) (“[D]iscovery under this rule may be obtained in and is limited to cases in which the defendant is charged with a felony.”)

107. Haw. R. Penal P. 16(d).

evidence that must be specifically requested by the defendant or ordered by the court. Maine requires prosecutors to disclose the following items:

1. Statements obtained as a result of a search and seizure, statements resulting from any confession or admission made by the defendant, statements relating to a lineup or voice identification of the defendant.
2. Any written or recorded statements made by the defendant.
3. Any statement that tends to create a reasonable doubt of the defendant's guilt as to the offense charged.¹⁰⁸

Maine requires the defendant to make a written request to compel the disclosure of books, papers, documents, tangible objects, reports of experts made in connection with the case, and names and addresses of the witnesses whom the state intends to call in any proceeding.¹⁰⁹

The other two states that distinguish between items of evidence that are subject to mandatory disclosure are Maryland¹¹⁰ and Washington.¹¹¹

3. Disclosure upon request of defendant

Thirty-eight states¹¹² require a defendant to request favorable information, sometimes in writing, before the prosecution's obligation to disclose is triggered.

Ten states¹¹³ place an additional condition on the defense:

- the defendant must make “a showing [to the court] that the items sought may be material to the preparation of his defense and that the request is reasonable,”¹¹⁴ or
- the defendant must show “good cause” for discovery of such information.¹¹⁵

It appears that these ten states permit disclosure of certain favorable evidence only at the discretion of the trial court, and only if the court finds that the defendant has met the burden of proof in making the discovery request.

4. Time requirements for disclosure

States vary considerably in their time requirements for disclosure of *Brady* material. Some specify a time by which the prosecution must disclose favorable information, while others rely upon undefined terms such as “timely disclosure” or “as

108. Me. R. Crim. P. 16(a)(1)(A)–(C).

109. Me. R. Crim. P. 16(b).

110. Md. Rule 4-263.

111. Wash. Super. Ct. Crim. R. 4.7.

112. Ala., Ark., Conn., Del., D.C., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.J., N.Y., N.C., N.D., Ohio, Okla., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., W. Va., Wis., Wyo.

113. Conn., Idaho, Ind., Minn., Mo., Neb., Pa., Tex., Va., Wash.

114. Conn. Gen. Stat. § 54-86(a).

115. Tex. Code Crim. Proc. art. 39.14 (2004).

soon as practicable.” Ten states¹¹⁶ have established two separate time limits—one for the period within which the defendant must file a discovery request for favorable information and another for the period within which the prosecution must disclose the information.¹¹⁷

For a small number of states,¹¹⁸ we were unable to determine a specific timetable for disclosure of *Brady* material. Nonetheless, it is probable that these states impose a “timely” disclosure requirement that would not prejudice the defendant’s right to a fair trial.

a. Specific time requirement

Twenty-eight states¹¹⁹ have mandated specific time limits for prosecutorial disclosure of evidence favorable to the defendant. Table 4 summarizes these time requirements.

Table 4. States with Specific Time Limits for Prosecutorial Disclosure of Evidence Favorable to the Defendant

State	Authority	Time Requirement
Alabama	Ala. R. Cr. P. 16.1	Within 14 days after the request has been filed in court
Arizona	Ariz. St. R. Cr. P. 15.6(c)	Not later than 7 days prior to trial
California	Cal. Penal Code § 1054.7	Not later than 30 days prior to trial
Colorado	Colo. Cr. P. R. 16(b)	Not later than 20 days after filing of charges
Connecticut	Conn. Gen. Stat. § 54-86(c)	Not later than 30 days after defendant pleads not guilty
Delaware	Del. Super. Ct. Crim. R. 16(d)(3)(B)	Within 20 days after service of discovery request
Florida	Fla. R. Cr. P. 3.220(b)(1)	Within 15 days after service of discovery request
Georgia	Ga. Code Ann. § 17-16-4(a)(1)	Not later than 10 days prior to trial
Hawaii	Haw. R. Penal P. 16(e)(1)	Within 10 calendar days after arraignment and plea of the defendant

116. D.C., Idaho, Mo., Nev., N.Y., Ohio, Okla., R.I., Va., W. Va.

117. *See, e.g.*, Nev. Rev. Stat. § 174.285 (2004) (“A request . . . may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. . . . A party shall comply with a request made . . . not less than 30 days before trial or at such reasonable later time as the court may permit.”).

118. D.C., Iowa, Pa., S.D., Tenn., Tex., and Wyo.

119. Ala., Ariz., Cal., Colo., Conn., Del., Fla., Ga., Haw., Idaho, Ind., Kan., Me., Md., Mass., Mich., Minn., Mo., Nev., N.H., N.J., N.M., N.Y., Ohio, Okla., R.I., S.C., Wash.

State	Authority	Time Requirement
Idaho	Idaho Cr. R. 16 (e)(1)	Within 14 days after service of discovery request
Indiana	Ind. R. Trial P. 34(B)	Within 30 days after service of discovery request
Kansas	Kan. Stat. Ann. § 22-3212(f)	Within 20 days after arraignment
Maine	Me. R. Crim. P. 16(a)(3)	Within 10 days after arraignment
Maryland	Md. R. 4-263(e)	Within 25 days after appearance of counsel or first appearance of defendant before the court, whichever is earlier
Massachusetts	Mass. Crim. P. Rule 14(1)(A)	At or prior to the pretrial conference
Michigan	Mich. Ct. R. 6.201(F)	Within 7 days after service of discovery request
Minnesota	Minn. R. Crim. P. 9.03; Minn. Bd. of Judicial Stand. R. 9(e)	Within 60 days after service of discovery request; by the time of the omnibus hearing
Missouri	Mo. Sup. Ct. R. 25.02	Within 10 days after service of discovery request
Nevada	Nev. Rev. Stat. § 174.285	Not later than 30 days prior to trial
New Hampshire	N.H. Sup. Ct. R. 98(A)(2)	Within 30 days after defendant pleads not guilty
New Jersey	N.J. Ct. R. 3:13-3(b)	Not later than 28 days after the indictment
New Mexico	N.M. R. Crim. P. 5-501(A)	Within 10 days after arraignment
New York	N.Y. Consol. Law Serv. Crim. P. Law § 240.80(3)	Within 15 days after service of discovery request
Ohio	Ohio R. Crim. P. 16(F)	Within 21 days after arraignment or 7 days prior to trial, whichever is earlier
Oklahoma	Okla. Stat. § 2002(D)	Not later than 10 days prior to trial
Rhode Island	R.I. Super. R. Crim. P. 16(g)(1)	Within 15 days after service of discovery request
South Carolina	S.C. R. Crim. P. 5(a)(3)	Not later than 30 days after service of discovery request
Washington	Wash. Super. Ct. Crim. R. 4.7(a)(1)	No later than the omnibus hearing

b. Nonspecific, descriptive time frame

Eighteen states¹²⁰ provide nonspecific, descriptive time requirements for disclosure of *Brady* material. The terms used for these general time frames include the following:

- “timely disclosure”;¹²¹
- “as soon as practicable”;¹²²
- “a reasonable time in advance of trial date”;¹²³
- “within a reasonable time”;¹²⁴
- “in time for the defendants to make effective use of the evidence”;¹²⁵
- “as soon as possible”;¹²⁶
- “as soon as reasonably possible”;¹²⁷ and
- “within a reasonable time before trial.”¹²⁸

State case law may provide guidance on whether a particular disclosure has satisfied the “timely” disclosure requirement. In general, however, the state courts have interpreted “timely” or “as soon as possible” to mean that the prosecution must disclose information favorable to the defendant “within a sufficient time for its effective use” by the defendant in preparation for his or her defense.¹²⁹ State courts that have ruled on the issue of timing of disclosures have emphasized that any disclosure must not constitute “unfair surprise” to the defendant and must not prejudice the defendant’s right to a fair trial.¹³⁰

120. Alaska, Ark., Ill., Ky., La., Me., Miss., Mont., Neb., N.C., N.D., Ohio, Or., Utah, Vt., Va., W. Va., Wis.

121. *See, e.g.*, Alaska R. Prof. Conduct 3.8(d); La. R. Prof. Conduct 3.8(d).

122. *See, e.g.*, Ark. R. Crim. P. 17.2(a); Ill. Sup. Ct. R. 412(d).

123. *See, e.g.*, Ky. R. Crim. P. 7.24(4).

124. *See, e.g.*, Me. R. Crim. P. 16(a).

125. *See, e.g.*, *State v. Taylor*, 472 S.E.2d 596, 607 (N.C. 1996) (“[D]ue process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence.” (citations omitted))

126. *See, e.g.*, Vt. R. Crim. P. 16(b).

127. *See, e.g.*, *State v. Hager*, 342 S.E.2d 281, 284 (W. Va. 1986) (“[W. Va. R. Crim. P.] 16 impliedly sanctions the use of newly discovered evidence at trial, so long as the evidence is disclosed to the defense as soon as reasonably possible.”)

128. *See, e.g.*, Wis. Stat. § 971.23(1).

129. *State v. Harris*, 680 N.W.2d 737, 754–55 (Wis. 2004) (“We hold that in order for evidence to be disclosed ‘within a reasonable time before trial’ . . . it must be disclosed within a sufficient time for its effective use. Were it otherwise, the State could withhold all *Brady* evidence until the day of trial in the hope that the defendant would plead guilty under the false assumption that no such evidence existed.”).

130. *State v. Golder*, 9 P.3d 635 (Mont. 2000) (defendant argued that the timing of the state’s formal disclosure of the two witnesses and the nature of their testimony constituted unfair surprise and jeopardized his right to a fair trial as assured under the Montana Constitution).

E. Due Diligence Obligations

By various means each state imposes a continuing duty on the prosecutor to locate and disclose additional favorable information discovered throughout the course of a trial. Delaware's Superior Court Rule 16(c) is typical of the rules in most states with a due diligence obligation:

If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.¹³¹

Beyond this basic duty to supplement discovery of information, five states¹³² require prosecutors to certify, in writing, that they have exercised diligent, good faith efforts in locating all favorable information, and that what has been disclosed is accurate and complete to the best of their knowledge or belief. For example, Florida requires the following:

Every request for discovery or response . . . shall be signed by at least 1 attorney of record . . . [certifying] that . . . to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is consistent with these rules and warranted by existing law . . .¹³³

Similarly, Massachusetts provides:

When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided.¹³⁴

F. Sanctions for Noncompliance with *Brady* Obligations

All states provide remedies for prosecutorial nondisclosure that follow closely, if not explicitly mirror, Federal Rule of Criminal Procedure 16(d)(2), which states that a "court may order [the prosecution] to permit the discovery or inspection, grant a continuance, or prohibit [the prosecution] from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."¹³⁵

In addition, eleven states¹³⁶ indicate that willful violations of a criminal discovery rule or court order requiring disclosure may subject the prosecution to other sanctions as the court deems appropriate. These sanctions "may include, but

131. Del. Super. Ct. R. 16(c).

132. Colo., Fla., Idaho, Mass., N.M.

133. Fla. R. Crim. P. 3.220(n)(3). *See also* Idaho Crim. R. 16(e) (Certificate of Service).

134. Mass. Crim. P. R. 14(a)(1)(E)(3) (as amended, effective Sept. 7, 2004).

135. Fed. R. Crim. P. 16(d)(2).

136. Ala., Ark., Fla., Haw., Ill., La., Minn., Mo., N.M., Vt., Wash.

are not limited to, contempt proceedings against the attorney . . . as well as the assessment of costs incurred by the opposing party, when appropriate.”¹³⁷

At least one state, Idaho, expressly states that failure to comply with the time prescribed for disclosure “shall be grounds for the imposition of sanctions by the court.”¹³⁸ Other states probably also permit their courts to impose sanctions for failure to meet time requirements, as their rules provide remedies for failure to comply with *any* discovery rules, which can and often do include a time-limits provision.

At least three states¹³⁹ allow the court to order a dismissal as a possible sanction for particularly egregious violations of disclosure obligations. For example, Maine’s rules state the following:

If the attorney for the state fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the state to comply, granting the defendant additional time or a continuance . . . prohibiting the attorney for the state from introducing specified evidence and *dismissing charges with prejudice*.¹⁴⁰

However, three states¹⁴¹ regard dismissal to be too severe a sanction for non-disclosure. Louisiana’s Code of Criminal Procedure notes that for disclosure violations, their state courts may “enter such other order, *other than dismissal*, as may be appropriate.”¹⁴² Similarly, the Supreme Court of Pennsylvania found dismissal to be “too severe” a sanction for failure to disclose *Brady* material, and explained that the discretion of Pennsylvania trial courts “is not unfettered.”¹⁴³

137. Fla. R. Crim. P. 3.220(n)(2).

138. Idaho Crim. Rule 16(e)(2).

139. Conn., Me., N.C.

140. Me. R. Crim. P. 16(d) (emphasis added).

141. La., Tex., Pa.

142. La. Code Crim. P. Ann. art. 729.5(A) (emphasis added).

143. Commonwealth v. Burke, 781 A.2d 1136, 1143 (Pa. 2001) (“[O]ur research has revealed [no judicial precedents] that approve or require a discharge as a remedy for a discovery violation. In fact, the precedents cited by the trial court and appellant support the view that the discharge ordered here was too severe . . . [W]hile it is undoubtedly true that the trial court possesses some discretion in fashioning an appropriate remedy for a *Brady* violation, that discretion is not unfettered.”).

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ARTICLES

Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process

*Eugene Cerruti*¹

[The White Queen:] For instance, now, ... there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.

[Alice:] Suppose he never commits the crime?

[The White Queen:] That would be all the better, wouldn't it?

—*Lewis Carroll, Through the Looking-Glass*²

THE due process doctrine of *Brady v. Maryland*³ is commonly viewed as simply another of our troubled rules of constitutional criminal procedure: well intentioned but utterly bedeviled in its details. The *Brady* doctrine purports to inscribe as constitutional law the seemingly self-evident proposition that a public prosecutor, charged with the fair pursuit of criminal justice, should provide the criminal defendant with any material in the state's possession which tends to exculpate the accused of the state's charges. But *Brady* wears a mask, for it has never actually required the prosecutor to do what is so manifestly the right thing to do. The failure of the rule is hardly a mere matter of detail. The *Brady* rule fails because it is at

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² LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 89 (Bloomsbury 2001) (1872).

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

bottom grounded in a deeply rooted adversarial pathology unique to the American criminal justice system. It fails because it was never, or at least not for longer than a moment, designed to succeed.

Brady has always benefitted from its iconic status as one of the Warren Court's earliest and most idealistic restatements of the unique and exalted demands placed upon our nation's prosecutors in their pursuit of adversarial criminal justice.⁴ The doctrine has become emblematic of the broad notion that our prosecutors must wear two hats in their joint pursuit of the competitive demands of advocacy and the neutral commands of justice.⁵ To be sure, many of our nation's prosecutors do just that. But in many respects, particularly with respect to the disclosure of exculpatory material to the defendant, many prosecutors are clearly failing to meet the challenge. This Article will demonstrate that the many failings of our nation's prosecutors, most of them clearly unethical in nature, are not best understood as individualized deviations from an idealized norm of criminal justice. Rather, they are better understood as conditioned responses which emanate from a fundamentally skewed normative order within our criminal justice system.

Starting with the premise of an exceptional constitutional system of criminal justice which provides the criminal defendant in America with an extraordinary array of constitutional privileges and protections, our courts over the years have responded reflexively in creating a reciprocal network of privileges for the American prosecutor, ostensibly designed to level or at least maintain some balance on the adversarial playing field. As a result, the American prosecutor is now presented with fewer demands for transparency and fair play than in almost any other mature legal system, whether civil, common, or international law.⁶ In the most recent era, the most no-

4 See Scott E. Sundby, Essay, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGEORGE L. REV. 643-44 (2002).

5

The U.S. attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212 (1960).

6 See, e.g., *United States v. Williams*, 504 U.S. 36, 53 (1992) (prosecutor seeking indictment has absolutely no obligation under federal law to reveal to the grand jury even substantially exculpatory evidence); *id.* at 64 n.9 (Stevens, J., dissenting) (protesting the above holding due to the fact that the ABA Standards for Criminal Justice do impose such an ethical obligation); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-69 (1982) (government may deprive defendant of access to witnesses by deporting them, absent "plausible showing" by defendant that the testimony of the un interviewed witnesses would satisfy the *Brady* standard of mate-

torious example of these endemic tendencies towards sheltering critical information and denying fair access to the criminal defendant is found in the typical refusal of prosecutors to consent to the simple examination of available DNA material in cases where the defendant has earlier been convicted without any forensic testing having taken place and is ultimately exonerated by such evidence.⁷ Still, the *Brady* doctrine remains both the iconic and ironic example of this deeply embedded tendency within our legal system to provide informational privileges designed to create exceptional adversarial protection or advantage to the prosecutor. Contrary to common impression,⁸ what will be demonstrated here is that the Supreme Court's confused yet deliberate unfolding of the *Brady* doctrine has effectively settled upon the same dictate as that of the White Queen: the trial must come first, and the disclosure of exculpatory evidence must come only after a conviction, if at all.

The *Brady* doctrine is indeed something of a stark anomaly in constitutional criminal procedure. This entire field of procedural rights is typically overseen by the doctrine of "harmless" error in which prosecutorial errors will be excused if they are deemed harmless to the outcome of the case.⁹ But the *Brady* doctrine has created something that surpasses even this broad doctrine of prosecutorial excuse. It might better be described as a novel doctrine of harmless conviction, for the Supreme Court has now made it perfectly clear that when a prosecutor operating within our competitive adversarial system fails both deliberately and unethically to dis-

riality); *Roviaro v. United States*, 353 U.S. 53, 59–66 (1957) (recognizing qualified "informant's privilege" which permits prosecutor to withhold identity of confidential informant unless defendant can demonstrate a material need for disclosure); *Jencks v. United States*, 353 U.S. 657, 665–70 (1957) (permitting prosecutor to withhold from the defendant the prior statements of a government witness until after the witness has testified on direct), *superseded by statute by The Jencks Act*, Pub. L. No. 85-269 (codified at 18 U.S.C. § 3500 (2000)) (codifying the holding in *Jencks*), *extended by* FED. R. CRIM. P. 26.2 (extending *Jencks* rule to prior statements of defense witnesses). Perhaps the outer limits of the government's power to deny timely access to critical information was best expressed recently when a court denied a federal prosecutor's exceptional motion to preclude the City of New York from interviewing its own employees regarding a ferry accident for which another of its employees had already been indicted, on the ground that the city intended to share the information gained with counsel for the indicted employee. *See* Robert G. Morvillo & Robert J. Anello, *White-Collar Crime; Government Attempts to Shield Its Witnesses From the Defense*, N.Y.L.J., Feb. 1, 2005, at 3.

7 "In nearly half the sixty-four exonerations, local prosecutors refused to release crime evidence for DNA tests until litigation was threatened or filed." BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xvi (2000).

8 "It's a cornerstone of all democracies that criminal defendants get access to potentially exculpatory evidence." Editorial, *Missing Witnesses*, N.Y. TIMES, Mar. 6, 2004, at A14.

9 *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 23–25 (1967); *see also* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002) (criticizing the application of the harmless error doctrine to constitutional criminal procedure).

close exculpatory material to the criminal defendant at the trial court level, it is not in itself even deemed to be error. It becomes error only when a reviewing court concludes that the nondisclosure *of its own accord* has produced a wrongful conviction *at trial*.

Nor is this doctrinal abyss one of limited consequence. It reveals yet another example of how the Supreme Court's adherence to an exceptional and essentially false theory of the adversarial system of justice has produced a due process doctrine of laissez-faire measures that serves only to shield the lowest standards of professional behavior. The Supreme Court has adopted a view of the adversarial system as an essentially self-regulating market for the production of truth that is best left to its own resources.¹⁰ It is now broadly recognized that the Supreme Court's current expression of the Sixth Amendment standard for the effective assistance of defense counsel tolerates an abysmally low level of professional representation.¹¹ As shall be seen, the Supreme Court's *Brady* doctrine does much the same for our nation's prosecutors. As now constructed, the doctrine does nothing to elevate the constitutional standard for what are otherwise ethically compelled disclosures but rather has lowered that standard to a level of nondisclosure that would not be tolerated of public prosecutors in virtually any other mature system of law, either national or international. The fact that our nation's prosecutors do not routinely fall to the levels tolerated by these minimalist standards spares only the lawyers, not the doctrine itself.

The *Brady* doctrine has nonetheless lived a relatively charmed life in the otherwise caustic community of scholarly critics of our constitutional criminal procedure.¹² The Fourth Amendment, of course, gets no respect,¹³ but even the attacks on that amendment have not gone so far as to suggest that the Fourth Amendment has abandoned its avowed constitutional mission and reverted to something quite the opposite, such as a safe haven for police misconduct. This is in fact what has happened to the *Brady* doctrine. *Brady* purports to be a constitutional rule of pretrial discovery by the criminal defendant, but it is not. In its present construction it not only does not affirmatively require any pretrial discovery of exculpatory information, it effectively discourages it. Rather than operating as a substantive doctrine of due process to the defendant, *Brady* now functions more as a surrogate

¹⁰ See *infra* note 112 and accompanying text.

¹¹ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (holding that the proper standard by which to measure an attorney's effectiveness is "simply reasonableness under prevailing professional norms"); see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

¹² See Sundby, *supra* note 4, at 643 (referring to *Brady* as one of a small pantheon of Supreme Court cases to have achieved "superhero status").

¹³ See, e.g., Daniel McKenzie, *What Were They Smoking?: The Supreme Court's Latest Step in a Long, Strange Trip Through the Fourth Amendment: Kylo v. United States*, 533 U.S. 27 (2001), 93 J. CRIM. L. & CRIMINOLOGY 153 (2002).

doctrine of due compensation to the prosecution. The *Brady* doctrine, at least at the Supreme Court level, has become a rule of adversarial privilege for prosecutorial nondisclosure of the very information it purports to require disclosed.

The principle of transparency in criminal justice, even adversarial criminal justice, has quite recently entered a new era in both foreign and international systems of law. The 1990s are now cast as the “decade of disclosure” with regard to the sudden emergence and almost universal recognition of human rights principles of exculpatory disclosures by the prosecution.¹⁴ The preeminent *Brady* doctrine has therefore been rather abruptly transformed into an ironic outcast in the emerging global regime of criminal justice.

This emergence of a foreign and international law of exculpatory disclosure provides both an opportunity and a challenge to review the *Brady* doctrine in an entirely new context. Until now, the doctrine has typically been considered a sui generis byproduct of the uniquely American constitutional system of adversarial due process. This premise of American exceptionalism has served to shield the doctrine from the ultimate reductions of the typical complaints, found in both the academic literature and the lower court cases, that the doctrine constructed by the Supreme Court fails to declare a rule of disclosure that is either principled or intelligible. Once one accepts the first premise of the adversarial philosophy enunciated and relied upon rather insistently by the Court, namely that due process in our competitive, adversarial system requires an accommodation of certain measured privileges for the prosecutor-as-adversary to countervail the constitutional advantages provided to the criminal defendant, one is consequently restricted in the ability to declare that the various accommodations recognized in the *Brady* case law are simply wrong.¹⁵ Wrong not merely as a matter of construction or detail but wrong as a matter of first principle.

This Article therefore attempts to seize this timely opportunity to develop a baseline critique of the *Brady* doctrine both from within and without.

14 See generally JOHN ARNOLD EPP, BUILDING ON THE DECADE OF DISCLOSURE IN CRIMINAL PROCEDURE (2001).

15 For example, two early and quite excellent reviews of the *Brady* doctrine each provided a penetrating critique of the failings of the doctrine itself, followed by a somewhat lame conclusion as to what should be done to redress the problem. See Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1981–82) (suggesting that the solution to the weaknesses of the *Brady* doctrine might be found in the Supreme Court’s raising of the Sixth Amendment standard of effective assistance of counsel); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984) (suggesting that the most effective, although extraordinarily expensive, solution to the failures of the *Brady* doctrine would be to provide all defendants with a per se right to an in camera review by the trial judge of the entire prosecution file to determine whether there was any exculpatory material to be disclosed).

It will first identify the core doctrinal malignancy that lies at the heart of the Supreme Court's rulings, and it will then demonstrate how the doctrine has now effectively been repudiated by the emerging regimes of human rights law in other adversarial systems, both foreign and international.

Part I will review the abrupt rise and fall of the *Brady* doctrine as a promise of a more equitable and transparent system of justice. This is already an oft-told tale,¹⁶ yet the purpose of this section will be to identify not the many twists, turns, and failures of the case law, but rather the central and durable defect in the doctrine itself: an unmediated and atavistic commitment to an adversarial process in which any pretrial disclosure of evidence to the accused is viewed as a threat to the essential balance and integrity of that process. For several hundred years there was virtually no discovery by the criminal defendant and likewise a deep-seated commitment to keeping things that way. By the late 1950s, things had progressed only to the point where several very limited criminal discovery statutes, most notably Rule 16 of the Federal Rules of Criminal Procedure, had been passed, and a number of appellate courts had recognized that trial courts did have at least some inherent power to order limited discovery in a criminal case. Still, there was no constitutional rule of discovery and no rule at all requiring disclosure of exculpatory material. *Brady v. Maryland*, decided in 1963, was therefore the first Supreme Court ruling in both respects. Despite the transparent beneficence of its holding, the *Brady* rule contravened some of the most deeply grounded instincts of the judicial monitors of the criminal process. At ground level, the case was not well received by either prosecutors or judges. The judicial reaction to its precepts set in almost immediately, particularly at the level of the post-Warren Supreme Court. Not long after *Brady* began percolating new law in the lower courts, the Supreme Court set out on a steady pursuit of retrenchment with regard to the very tolerance of the adversarial process to such constitutionally guaranteed discovery by the criminal defendant.

Part II will reveal how differently the matter of prosecutorial disclosure of exculpatory material has been handled in other nations which, like the United States, rely upon an adversarial system of criminal justice. The discussion here will focus on the extraordinary story of the recent and still unfolding developments in the English "*Brady* law." England discovered somewhat rudely, as was the case much earlier in America, that its public prosecutors could not always be trusted to play fairly and openly in pursuit of a major conviction. The response to this crisis of injustice by both the English courts and Parliament provides a sharp and seemingly provocative contrast to our own high court's inability to raise the floorboards of our criminal justice system. In addition, the Supreme Court of Canada, without the benefit of a national scandal to prod it, has also recently made a major

16 See, e.g., Sundby, *supra* note 4.

and transformative contribution to the law of exculpatory disclosures in that nation.

Part III will then demonstrate how the newly formed and highly regarded international tribunals of criminal justice have likewise created a “*Brady* law” that far surpasses our own. The affair of prosecutorial nondisclosures that created a crisis of confidence in the English criminal justice system, commonly referred to as the “miscarriages of justice” scandal, reverberated throughout Europe and the international community, even though not at all in the American legal theater. At the outset of the 1990s, there was no rule of exculpatory disclosure within the entire corpus of international rules, covenants and protocols. Yet by the end of that decade, there were three new venues of international criminal justice—the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the long-sought International Criminal Court (ICC)—each of which had introduced a rule or article creating an affirmative duty of disclosure of exculpatory material by the prosecution.

Thus, adversarial criminal justice, both foreign and international, has firmly endorsed principles of fairness and transparency that remain explicitly rejected within the Supreme Court’s *Brady* doctrine. The doctrine has recently become yet another instance of how the American position “now stands alone” within the rapidly evolving global standards of fundamental justice.¹⁷ Therefore, the concluding call of this article is for the Supreme Court to reposition its *Brady* doctrine to conform both to inherent principles of contemporary due process as well as to recently settled standards of international human rights.

I. THE RISE AND FALL OF *BRADY*: THE FOUNDING ERA OF NO DISCOVERY

The *Brady* rule, as a constitutional rule of criminal discovery, perhaps never really had much of a chance. It was the odd progeny of a long-standing, deeply entrenched judicial philosophy of adversarial *laissez-faire* that viewed *all* criminal discovery as a serious threat to the essential, yet delicate, balance of adversary in the criminal justice system. Even as the courts have become more accustomed to legislatively imposed discovery in criminal cases, the opposition to compelled disclosure of exculpatory material—a highly sensitive subject matter never covered by any of the statutory rules of discovery—has remained virulent within the adversarial culture of the criminal justice system. To fully appreciate the dramatic rise

¹⁷ “In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.” *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

and fall of the *Brady* rule, it is necessary to recollect and reexamine its very reluctant beginnings.

Until well into the last century, there was virtually no discovery by a defendant in a criminal case. There was therefore nothing exceptional about the fact that there was no discovery by the defendant of specifically exculpatory material. The various legislatures had not passed criminal discovery statutes, the courts deemed themselves without inherent power to order discovery in a criminal case, and the very idea of discovery by a criminal defendant was almost universally regarded as a radical threat to the adversarial system of justice. What is remarkable here is not that times have changed and our attitudes and laws regarding criminal discovery have entered a new era, but rather that our laws and attitudes in this singular area of the state's obligation to provide the defendant with exculpatory information appear to have changed so little.

As shall be seen in the discussion of the actual case law, the *Brady* doctrine has been riddled almost from the outset with a seemingly unrequited urge to return to the earlier adversarial paradigm. While the *Brady* doctrine of today has been popularized as a constitutional rule of discovery designed to prevent a defendant from being denied information that might prevent the injustice of a wrongful conviction, the original doctrinal basis for *Brady* had little to do with discovery as such. The underlying doctrine was in fact but a narrow set of rulings designed to admonish only some of the most egregious forms of prosecutorial corruption which, in turn, had very little to do with a mere denial of discovery.

Criminal discovery in the common law era was indeed something of a legal oxymoron. Apart from a few isolated and exceptional cases,¹⁸ there was no criminal discovery, constitutional or otherwise. On the civil side, expanding rules of discovery had been unfolding since the early nineteenth century and had been met with almost universal acceptance.¹⁹ However, the success of the civil discovery movement had little spillover to the criminal side. Criminal discovery was routinely referred to as a separate "problem" and a rather insoluble one at that.²⁰

Why was criminal discovery deemed to be such a distinct and intransigent problem? There were various reasons given, but three are worth noting. First of all, unlike civil discovery where there was at least an argument to be made that discovery benefited both sides to the litigation more or

18 See generally *People ex rel. Lemon v. Supreme Court*, 156 N.E. 84 (N.Y. 1927) (reviewing the early rule and collecting cases).

19 "[I]t is generally agreed that discovery, as a complement to modern liberal pleading, has improved the operation and administration of our judicial system and has advanced the purposes it was designed to serve." Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

20 See, e.g., JOINT COMM. ON CONTINUING LEGAL EDUC. OF THE ALI AND THE ABA, THE PROBLEM OF DISCOVERY IN CRIMINAL CASES (1961).

less equally, it was clear that on the criminal side only the defendant would benefit substantially from rules of discovery that provided him with access to the other side's files.²¹ Secondly, even if the defendant was considered to have information of interest to the prosecutor, the general understanding at the time was that the Fifth Amendment privilege against self-incrimination would prevent the prosecutor from compelling meaningful discovery from the defendant.²² Thirdly and most perniciously, there was the rather open mistrust and disdain for the lower-tier practices of the criminal defense bar whose members would, according to the prevailing view, stop at nothing to get their man off:

Often district attorneys are willing to open up their files for inspection by defendant's counsel, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense. But they feel that some counsel, especially those who habitually appear for professional criminals, will stop at nothing to get their man discharged, and that discovery will only facilitate such anti-social designs.²³

The problem with discovery by the criminal defendant was, therefore, that it was deemed to be an essentially unfair adversarial burden to impose upon the inherently disadvantaged public prosecutor. What followed from this recognition of a structural handicap imposed on the prosecutor by the Constitution was a well-settled belief that the matter of discovery by the criminal defendant was a matter most appropriately resolved by the exercise of prosecutorial prerogative. The Supreme Court maintained this posture of deference to prosecutorial discretion until well into the 1950s. In *Leland v. Oregon*, decided in 1952, the Court stated that although it was indeed the "better practice" to grant discovery to the criminal defendant

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We should first observe that the prosecution in the usual criminal case is well supplied with evidentiary material. It is the state, not the defense, which first exerts force in the gathering of evidence and in bringing it under exclusive control. Moreover, with the improvements in detection apparatus and methods of modern police organization and operation, the state is much better at fact gathering.

Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 305 (1959–60).

22 "In considering the problem [of criminal discovery] it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him." *State v. Tune*, 98 A.2d 881, 884–85 (N.J. 1953). This notion that the Fifth Amendment precluded discovery against the criminal defendant persisted into the most recent era, where it has been gradually abridged. The seminal case is *United States v. Nobles* where the Supreme Court reversed a Ninth Circuit ruling that criminal discovery was "basically a one-way street." *United States v. Nobles*, 422 U.S. 225, 233 (1975).

23 David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 99 (1961).

of his own written confession, the Court could not compel it.²⁴ The extreme deference the courts were willing to provide to the executive branch prosecutor was perhaps best reflected in the near-total absence of any judicially imposed sanctions on prosecutors who not only failed to fulfill, but willfully and outrageously violated, their presumed obligations to promote justice.²⁵

The received truth within the judicial branch was that our criminal justice system had achieved an essential, yet precarious, balance of opposing forces, and the opposing forces were not of equal merit. Whatever theory of discovery authorized the mutual exchange of information between equally worthy civil litigants, that theory did not apply to the uniquely, and unduly, privileged class of criminal defendants. One of the most widely cited expressions of judicial impatience with demands for greater criminal discovery during this era was made by then-District Court Judge Learned Hand:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.²⁶

Sentiments of the sort expressed by Judge Hand remained redolent throughout the judiciary during the pre-*Brady* era, despite the courts' embrace of civil discovery and even the subsequent advent of the country's first criminal discovery statute in 1946 with Rule 16 of the Federal Rules of Criminal Procedure. Yet the declarative expression of the legal foundation to the doctrine of nondiscovery was attributed to then-Chief Judge Cardozo in the 1927 New York case of *People ex rel. Lemon v. Supreme Court*.²⁷ Car-

²⁴ *Leland v. Oregon*, 343 U.S. 790, 801 (1952).

²⁵ A recent investigative report by the Chicago Tribune reported that out of 381 cases examined where a homicide conviction had been reversed for a *Brady* violation, not one led to any sanction against the errant prosecutors. "With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases." Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at C1; see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960).

²⁶ *United States v. Garsson*, 291 F.646, 649 (S.D.N.Y. 1923).

²⁷ *People ex rel. Lemon v. Supreme Court*, 156 N.E. 84 (N.Y. 1927).

dozo explained that discovery was unknown in the early common law; the common law courts deemed themselves without inherent power to order such relief.²⁸ From Cardozo's opinion emerged the settled understanding of the limits of discovery available in criminal cases: the courts had, at best, a very limited discretionary authority to compel discovery; discovery was in any event limited to items of admissible evidence; and the defendant was recognized to possess no inherent right to any discovery, including items of admissible evidence that were critical to the case against him. What movement there was in the area of criminal discovery came primarily, although not entirely,²⁹ from legislative reform.³⁰ The courts remained, in general aspect, hostile to discovery by the criminal defendant well into the modern era of discovery.³¹

One of the more telling, and foretelling, discovery cases to be decided in this pre-*Brady* era came from the New Jersey Supreme Court. In *State v. Tune*,³² the defendant was arrested for murder and signed a fourteen-page confession on the day of his arrest. The trial court ordered the prosecution to provide the defendant with a copy of his confession. The state was permitted to file an interlocutory appeal with the New Jersey Supreme Court and virtually every county prosecutor in New Jersey joined the prosecution's brief. The New Jersey Supreme Court was sharply split over the issue, and a 4–3 majority reversed the trial court's order. The extreme displeasure with a defendant's demand for discovery expressed by Judge Hand some 30 years earlier was apparently still vital with the majority. Chief Justice Vanderbilt wrote the opinion for the court and wasted no time in getting to the fundamental flaws in criminal discovery:

In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information

28 *See id.* at 84.

29 *See id.* at 84–85 (noting that despite some statutorily mandated discovery, “the remedy of discovery and inspection was framed by courts of equity”).

30 FED. R. CRIM. P. 16, enacted in 1946, was the nation's first criminal discovery statute.

31 Julius and Ethel Rosenberg, for example, were denied discovery of the very overt acts and physical items of espionage cited in their capital indictment. *See United States v. Rosenberg*, 10 F.R.D. 521, 523 (S.D.N.Y. 1950).

32 *State v. Tune*, 98 A.2d 881 (N.J. 1953).

during the investigation of the crime.... To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.³³

The defendant in *Tune* had apparently based his appeal to the court in part on the fact that England, from whom, according to Judge Cardozo, we inherited our doctrine of no discovery, had long since adopted a more liberal approach to discovery in criminal matters. Justice Vanderbilt found this comparison inapposite in part on the basis of certain historical differences with English practice, but more pointedly on the ground that in England "the law-abiding instincts of the population are in marked contrast to the disrespect for law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the American population."³⁴ All of these dire musings were prompted by the simple fact that the defendant *Tune* had been granted permission by the trial court to see a copy of his own signed confession.

There was a stinging dissent in *Tune*. It was written by then-New Jersey Supreme Court Justice William J. Brennan. Brennan's dissent, long since forgotten but no doubt one of the most poignant refutations of the no-discovery doctrine ever put forward, began with a sharp reference to "that old hobgoblin perjury."³⁵ He then proceeded directly to attack the "anachronistic apprehension" that discovery in criminal cases would subvert the adversarial system of justice.³⁶ Brennan acknowledged that the playing field of criminal justice was not level, but he described the tilt as one in favor of the prosecution. He noted that it was the state that bore not only all the resources of criminal investigation but all of the *de jure* advantages as well. "This accused's confession, as indeed is true virtually of all confessions, was the product of *ex parte* discovery in a form which would never be tolerated in a civil cause."³⁷ Brennan's point here is revelatory, for what he describes is the simple insight that during the pretrial stage of our adversarial system, the American prosecutor has investigative powers and privileges that not only match but in some respects exceed those of the state investigator in an inquisitorial system. He emphasized the basic adversarial unfairness of permitting counsel for the state to develop its case for trial with the aid of a confession obtained from the defendant, while that same material was

33 *Id.* at 884 (citations omitted).

34 *Id.* at 889.

35 *Id.* at 894 (Brennan, J., dissenting). Brennan appears to have taken his hobgoblin metaphor from Professor Sunderland, who referred to "this legal hobgoblin of perjury" in an influential article advocating more liberalized rules of discovery. Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 *YALE L.J.* 863, 868 (1932-33).

36 *Tune*, 98 A.2d at 894 (Brennan, J., dissenting).

37 *Id.* at 896.

denied to the defendant's counsel in preparing the defense.³⁸ Also, given that Tune was being tried for a capital offense, the denial of such rudimentary discovery "shocks my sense of justice."³⁹ Justice Brennan still saved his most bitter cut for last. He recognized that the deeper insinuation of Judge Hand's perorations on criminal discovery was not only a thinly veiled bias against the criminally accused and their counsel, but even more so an attack upon the essential integrity of the adversarial system of criminal justice as such:

The implication in the majority's argument is that the accused is guilty so that not only is he not to be heard to complain of the use of the confession by the police as evidence to prove that fact and as a source of leads to make the case against him as ironclad as possible, but also that he has no complaint that his counsel are denied its use to aid them better to develop the whole truth. In other words, the state may eat its cake and have it too. To that degree the majority view sets aside the presumption of innocence and is blind to the superlatively important public interest in the acquittal of the innocent.⁴⁰

To anyone burrowing through the turgid recitations found in the early criminal discovery case law, the sharp insights of Justice Brennan are stunning, if not compelling. He turns upside down the adversarial underpinnings of the no-discovery doctrine. He heralds the modern claim that our adversarial system of justice is not threatened, but rather supported and preserved, by a more transparent prosecution. A decade later, Justice Brennan would find himself in the majority on a different court in ruling for greater prosecutorial disclosure in *Brady*. However, even this success was short lived, for Justice Brennan ended his career on the Supreme Court in much the same manner that he ended his service on the New Jersey court: in sharp dissent over the issue of prosecutorial disclosure. His vision of a more fair and open prosecution has never truly prevailed against the hobgoblins of disclosure. So, despite some genuine movement in the case law of the late 1950s,⁴¹ the situation with regard to criminal discovery had remained much as it had always been: "[t]rial by judicial battle, in which concealment is one of the major weapons, remains the modus operandi of the criminal fact-finding process."⁴²

The Supreme Court, as shall be seen below, has never truly vanquished these hobgoblins. Certainly, prior to its opinion in *Brady* the Court had

38 *Id.*

39 *Id.*

40 *Id.* at 897.

41 See Fletcher, *supra* note 21.

42 Note, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 626 (1951) (citation omitted).

never had occasion to engender any rule making, constitutional or otherwise, with regard to the discoverability of exculpatory material within the prosecutor's files. So who did the high court turn to, in the middle years of the Warren Court era, when it decided to announce for the first time a constitutional rule of discovery for exculpatory material? Tom Mooney.

Mooney was a colorful character of the pre-World War I era whose life story became something of a legend written in law. His case, *Mooney v. Holohan*,⁴³ managed to wind its way to the high court some nineteen years after he had been convicted of murder in San Francisco and sentenced to hang. Mooney was an itinerant radical labor socialist who traveled the country getting into trouble, but it was in San Francisco that he found his true nemesis, a private company detective named Martin Swanson. Swanson instigated charges against Mooney in 1914 for possession of dynamite related to a protracted and violent strike against Pacific Gas and Electric, but after three jury trials, Mooney was ultimately acquitted. Two years later, during a pro-war march in San Francisco, a bomb went off, killing ten people. Swanson again joined the investigation, and Mooney was indicted for the murders. This time, Mooney was convicted. Following a series of stormy protests by the labor community, Mooney's sentence was commuted to life imprisonment, but the challenges to Mooney's conviction did not subside. In 1931, the National Commission on Law Observance and Law Enforcement, better known as the Wickersham Commission, began issuing a series of reports on the state of American criminal justice.⁴⁴ One of its reports reviewed all the claims that had been made regarding Mooney's conviction, and its conclusions have been summarized as follows:

Subsequent investigation showed that every one of the state's witnesses had lied, with the encouragement of the district attorney and his assistants. The state's chief witness was probably at least ninety miles away at the time of the explosion. The district attorney intentionally suppressed evidence concerning the credibility of every witness. And he suppressed a photograph showing Mooney and his friends on top of a distant building two minutes before the explosion.⁴⁵

The California courts remained adamant about not granting relief to Mooney despite an ongoing series of revelations concerning the foregoing irregularities. Mooney's petition for a writ of habeas corpus, alleging a denial of due process, had been denied by both the district and Ninth Circuit courts on the ground that he had not exhausted his state remedies. When the case at long last arrived at the Supreme Court, the state argued that due

43 *Mooney v. Holohan*, 294 U.S. 103 (1935).

44 See Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 136 n.3 (1964).

45 *Id.* at 136.

process did not apply on the facts because: (1) “the acts or omissions of a prosecuting attorney” could never amount to a denial of due process and (2) the defendant had a right only to discovery that constituted “notice” of the charges themselves.⁴⁶ The Supreme Court affirmed the denial of the petition on the ground of nonexhaustion, but nonetheless did pause in what was to become critical dicta to refute the substantive claims of the state:

[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.⁴⁷

So even though *Mooney* lost, the law of due process did gain.⁴⁸ *Mooney* spawned a line of cases that found a due process violation where the prosecutor had either suborned or subordinated perjured testimony at trial.⁴⁹ However, *Mooney* had not separately addressed the matter of the prosecutor’s withholding of exculpatory material, and so neither did the early case law. All of the early cases in the *Mooney* line relied upon a finding of perjury at trial which was known to the trial prosecutor.⁵⁰ By the close of the 1950s, only the Third Circuit had managed to decide two cases which extended the *Mooney* doctrine to circumstances where the prosecutor had concealed critical exculpatory material although there was no explicit finding that the prosecutor had knowingly sponsored perjured testimony.⁵¹

⁴⁶ *Mooney*, 294 U.S. at 111–12.

⁴⁷ *Id.* at 112.

⁴⁸ *Mooney* continued to lose. The Supreme Court rendered its opinion on January 21, 1935. *Mooney* immediately sought a writ in the state court and was just as immediately denied. On May 14, 1935, the California District Court of Appeal denied his writ in a rather brazen opinion which declared that, with regard to the doctrine of due process, only the Supreme Court of California could create such a “departure from the established legal doctrine” of the State of California. *In re Mooney*, 45 P.2d 388, 389 (Cal. Ct. App. 1935).

⁴⁹ The leading cases, all involving similar facts, are *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); and *Pyle v. Kansas*, 317 U.S. 213 (1942).

⁵⁰ See, e.g., *White v. Ragen*, 324 U.S. 760, 764 (1945) (“And we have often pointed out that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process.”)

⁵¹ See *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952).

A. *The Special Case of Exculpatory Discovery*

The traditional judicial aversion to providing the criminal defendant with pretrial discovery of the prosecution's case against him was based on the theory that the defense would likely misuse the information to illicitly undermine the prosecution's case. Exculpatory material in the prosecutor's file, on the other hand, is information that is by definition not part of the prosecutor's case. It is information that the prosecutor would not otherwise present at trial and would be of use only to the defendant in building a defense to the prosecution's case. It might be assumed therefore that the doctrine of no discovery, which was dedicated to preserving the prosecutor's adversarial privilege of keeping one's cards face down until the moment of play at trial, would have no application to cards that were not in fact part of the prosecutor's trial hand. Indeed, it might even seem self-evident that the prosecutor's privilege to withhold discovery until the moment of trial, in order to promote an uncompromised pursuit of truth, operates to contradict the notion that the prosecutor should have any privilege to permanently withhold relevant and exculpatory evidence not only from the criminal defendant but from the trial court and jury as well.

The signal significance of this self-evident distinction between inculpatory and exculpatory information was never acknowledged within the no-discovery doctrine. Indeed, there was absolutely no recognition within the criminal discovery doctrine that the matter of a prosecutor's failure to disclose evidence favorable to the accused presented a special case of any sort. This failure of the doctrine may be explained in part by the fact that prosecutorial nondisclosure was rarely uncovered by a convicted defendant in the era prior to statutory rules of discovery, freedom of information laws, and the like, and therefore, the issue rarely came before the courts. But there is also a more direct and simple explanation rooted in Justice Brennan's dissent in *Tune*.⁵² Consider that if the existence of exculpatory material of any sort was thought by the prosecutor to actually raise a serious doubt as to the guilt of the accused, the case would be unlikely ever to make it to the courtroom. There would be no discovery issue because there would be no case. Thus in virtually all cases where there is an issue of exculpatory material within the knowing possession of the prosecution, the prosecutor has presumptively decided that, despite the "apparently" exculpatory material, the defendant is nonetheless guilty. The prosecutor who finds herself in possession of exculpatory material regarding a case which she nonetheless intends to prosecute to conviction has by circumstance, if not by definition, a strong and quite righteous adversarial incentive to conceal that information.

⁵² See *supra* notes 35-40 and accompanying text.

Viewed in these terms it becomes apparent why the prosecutor, and by extension the courts, would consider the discovery of exculpatory material by the defense to be an even greater threat than is general discovery, no matter how extensive, with regard to obtaining a deserved conviction. Providing a defendant with discovery of his own confession and similar inculpatory evidence is one thing; it merely provides the presumptively unethical defense bar with a better opportunity to falsify its defense to the charges. Exculpatory material presents a more direct and powerful threat to the prosecution, for here the information is in its native state, prior to disclosure, evidence of a weakness in the prosecution's case against the presumptively guilty defendant. This simple insight lies at the heart of Justice Brennan's dissent in *Tune*. There he pointed out that the hobgoblins of criminal discovery made sense only against a backdrop of a presumption of guilt.⁵³ The moment one accepts that the defendant might in fact be not guilty of the charges, the external justification for secreting from him access to information that might very well convince a jury of that fact utterly vanishes.

Thus, on the eve of the Supreme Court's consideration of the defendant's petition in *Brady v. Maryland*, there was virtually no law requiring pretrial discovery by the defense of exculpatory material within the state's possession. *Mooney* required prosecutors to refrain from suborning perjury, but there was no affirmative legal obligation, either in the case law or the new criminal discovery statutes, for a prosecutor to provide the defense with any exculpatory material prior to and independent of the trial itself. The hobgoblins of criminal discovery had to some extent been compromised, but otherwise appeared to remain staunchly on guard.

B. *The Supreme Court Doctrine: the Logic of the Looking-Glass*

The *Brady* doctrine has bedeviled the courts for its entire forty years. It has been reviewed and restated by a succession of high-court justices, and the lower courts have exhibited no clearly independent or even readily discernible point of sail. With each new interpretive turn by the Supreme Court, the academic literature has responded with a collective dissent. The concern of this section is not to replot this field of failures but rather to attempt to identify the central failure of the doctrine in all its iterations. This section will review only the major developments in the Supreme Court cases and only with regard to their bearing on our designated purpose. It will be made evident that the *Brady* doctrine has failed not only with respect to what it should be but even with regard to what it purports to be. *Brady* is not a rule of constitutional discovery designed to entitle a criminal defendant to obtain exculpatory information gathered by the state to be

53 See *supra* note 36 and accompanying text.

used by the defendant in whatever fair manner best serves his defense to the state's charges. Rather, it is quite the opposite. *Brady* is now a rule that both encourages and shields pretrial nondisclosure by the prosecutor. The central failure of the *Brady* doctrine is therefore its unyielding commitment to an idealized regime of prosecutorial privilege, rather than to a modern regime of adversarial transparency and fair play.

1. *Brady v. Maryland*.—John Brady had as little luck before the Supreme Court as did John Mooney: he lost his appeal even though his case helped to transform the law. Brady and his codefendant Boblit had jointly robbed a man named Brooks and dragged him into some woods where one of the defendants then strangled him to death.⁵⁴ The two defendants were tried separately on a capital count of felony-murder. Each of the defendants at trial admitted the robbery but claimed, in apparent hope of avoiding the death penalty, that the other defendant had committed the actual murder. Brady had made a pretrial motion to discover the confessions that his codefendant Boblit had made to the police. The prosecution turned over several such statements but excluded one statement in which Boblit admitted that it was he who had strangled the victim. Brady was tried first, convicted, and sentenced to death.

At Boblit's subsequent trial, where he was also convicted and sentenced to death, the prosecution attempted to introduce the confession in which he admitted strangling the victim. Brady then filed a motion for a new trial on the ground that the earlier failure to disclose Boblit's confession of strangling was a denial of Brady's due process. The Maryland Court of Appeals ultimately agreed with Brady that he had been denied due process but only with regard to his sentencing, not his underlying conviction of felony-murder. The Maryland court ordered that a new jury be empaneled only for the purpose of hearing evidence to reconsider whether Brady should be sentenced to death.⁵⁵ Brady then appealed that order directly to the Supreme Court on the ground that due process required a retrial not only on the issue of punishment but on the issue of guilt as well.⁵⁶ Given that Brady had testified at his trial and fully admitted his role in the underlying robbery, his appeal to the Supreme Court appeared to raise a relatively narrow, complex, and not entirely compelling issue of state capital procedure.⁵⁷

54 See *Brady v. State*, 154 A.2d 434, 435 (Md. 1959).

55 See generally *Brady v. State*, 174 A.2d 167 (Md. 1961).

56 *Brady v. Maryland*, 373 U.S. 83, 85 (1963).

57 The essential issue in *Brady* was evidentiary in nature: was the evidence of the codefendant's confession admissible under Maryland law on the issue of either guilt or punishment? This issue was made extremely complex by both state law and the court record itself. Maryland then conducted capital cases in a unified, rather than a bifurcated, trial. Therefore if the evidence was admissible on either ground, it should have been admitted at trial. But Maryland law was completely uncertain as to whether the evidence was in fact admissible on

The Supreme Court denied the appeal and affirmed the Maryland Court of Appeals. But in so doing the Supreme Court, per Justice Douglas, nonetheless took the opportunity to render a purported “holding” that essentially reiterated the state court holding on the underlying denial of due process: “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁵⁸

The Maryland court had not mentioned *Mooney v. Holohan*, but it did cite both *Almeida* and *Thompson*, the two Third Circuit cases that had extended the *Mooney* doctrine beyond the limits of prosecutorial presentation of perjured testimony.⁵⁹ Justice Douglas therefore noted the Supreme Court’s holding as “an extension of *Mooney v. Holohan*.”⁶⁰ The critical turn in *Brady* came with regard to Justice Douglas’ description of the interests that were put at risk whenever a prosecutor took it upon himself to withhold relevant and favorable evidence from the accused:

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not ‘the result of guile,’ to use the words of the [Maryland] Court of Appeals.⁶¹

This was the passage that appeared to transform the *Mooney* doctrine from a rule of appellate review of factually corrupt trials into a doctrine of adversarial fairness that required disclosure “on demand” to the defense in order to prevent the prosecutor from becoming the sole adversarial “architect” of the trial proceeding. But, even though the opinion sounded in discovery, there was of course no such holding. Three justices wrote separately to repudiate Justice Douglas’ intimation of just such a due process

either ground and the state appellate court had found a due process violation without actually ruling that the evidence would in fact be admissible on retrial on either ground. On top of this, the Maryland Constitution made juries the judges of the law as well as the facts. Therefore the Court also had to wrestle with the question of whether the underlying evidentiary issue was a matter properly for the court or the jury. *See generally id.*

⁵⁸ *Id.* at 87.

⁵⁹ *See Brady*, 174 A.2d at 169.

⁶⁰ *Brady*, 373 U.S. at 86.

⁶¹ *Id.* at 87–88.

rule of discovery. Justice White concurred in the result but recognized the implications of Justice Douglas' opinion for the Court. He first noted that "the due process discussion by the Court is wholly advisory," and then registered his firm disagreement with that advice: "I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery."⁶² Justice Harlan, writing for himself and Justice Black, dissented on the ground that there was no basis for any due process discussion by the Court.⁶³

Despite the fact that there was no actual holding in *Brady*, and certainly no clear establishment of a rule of pretrial discovery, the case was widely received as though the activist Warren Court had issued such a ruling. Thus the immediate response to *Brady* represented a moment of genuine new discovery within the criminal justice system.

2. *Giglio v. United States*.—The Warren Court never rendered another substantive opinion to confirm or clarify its "holding" in *Brady*. The only other case to come before it that raised a *Brady* issue was *Giles v. Maryland*,⁶⁴ but this case so divided the justices that it was resolved only by getting five of them to agree to remand it to the state court.⁶⁵ That Court therefore never delineated what the apparently expanded liberty interests were that the due process doctrine of *Brady* was designed to protect and what the prosecutor's affirmative obligations, if any, were with regard to safeguarding those interests.

The next substantive opinion of the Supreme Court was written by Chief Justice Burger in *Giglio v. United States*.⁶⁶ Giglio had been charged with cashing forged money orders with the aid of an accomplice named Taliento, the bank teller who had cashed the money orders. Taliento was arrested first and he was promised by a federal prosecutor that "if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."⁶⁷ A different federal prosecutor presented the case at trial against Giglio where "the Government's case depended almost entirely on Taliento's testimony."⁶⁸ Under pressing cross-examination, Taliento denied that he had been promised immunity

62 *Id.* at 92 (White, J., concurring in the judgment).

63 *Id.* at 92 & n.1 (Harlan, J., dissenting).

64 *Giles v. Maryland*, 386 U.S. 66 (1967).

65 There were three separate opinions by the majority justices. Two of them, by Justices Brennan and Fortas, contained the strongest claims ever to issue from the Supreme Court as to why the due process rule of *Brady* must apply to pretrial discovery. *See id.* at 67 (plurality opinion of Brennan, J.), 96 (Fortas, J., concurring in the judgment).

66 *Giglio v. United States*, 405 U.S. 150 (1972).

67 *Id.* at 153 n.2.

68 *Id.* at 154.

from the prosecution: “I believe I still could be prosecuted.”⁶⁹ During his summation, the prosecutor compounded the perjury by telling the jury that Taliento “received no promises that he would not be indicted.”⁷⁰ Giglio was convicted and Taliento was not prosecuted.

There were therefore a number of troubling aspects to the process that led to Giglio’s conviction. The star witness against him had entered into a cooperation agreement with the prosecution that essentially guaranteed that he would not be prosecuted in return for his testimony, and that agreement was never disclosed to the defense, despite vigorous attempts to discover it. That witness then committed perjury by denying the prosecutor’s promise. The prosecutor then (perhaps unwittingly) confirmed and relied upon that perjury in his summation to the jury. Furthermore, when called upon to account for their involvement in the foregoing matters, two assistant U.S. attorneys flatly contradicted each other and placed the blame on one another.⁷¹

The Supreme Court presumably could have addressed the manner in which each of these procedural failings contributed to the due process violation found by the Court. But the Court carefully avoided, to the point of dismissing, all of the apparent failures of the prosecutors. Instead the Court focused entirely on the fact that a witness had presented perjurious testimony at trial and treated the issue as one that was resolved almost entirely by the pre-*Brady* case law.

As long ago as *Mooney v. Holohan*, this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with “rudimentary demands of justice.” This was reaffirmed in *Pyle v. Kansas*. In *Napue v. Illinois*, we said, “(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” Thereafter *Brady v. Maryland* held that suppression of material evidence justifies a new trial “irrespective of the good faith or bad faith of the prosecution.” When the “reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of evidence affecting credibility falls within this general rule.⁷²

In this expression of the general rule, *Brady* stands merely for the already settled proposition that where material perjury is presented to the jury, the trial is a violation of due process regardless of any deliberate misconduct by the prosecution. Thus, the *Giglio* opinion uses *Brady* somewhat perversely to render moot the transparent bad faith of one or both of the two federal prosecutors on the case. The opinion not only failed to con-

69 *Id.* at 151.

70 *Id.* at 152.

71 *See generally id.*

72 *Id.* at 153–54 (citations omitted).

sider whether the prosecutors had any affirmative obligation to reveal the rather standard cooperation agreement with the witness prior to trial, but it also rendered irrelevant whether the federal prosecutors on the case had deliberately contrived the deception. The district court judge "did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys" on the nonsensical theory that the original prosecutor did not have the authority to enter into the agreement with the witness and therefore "its disclosure to the jury would not have affected its verdict."⁷³ The Supreme Court exhibited nearly the same insouciance towards the apparently severe misconduct of at least someone in the prosecutor's office: "We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits."⁷⁴ Not only was this opinion hardly an affirmation of the new regime of discovery "on demand" to prevent the prosecutor from becoming the sole adversarial "architect" of the trial evidence presented to the jury, it actually appeared to establish an essential understanding that *Brady* was not a paradigm shift in the due process doctrine of exculpatory disclosures. The governing issue remained, as it was in *Mooney* and *Napue*, a failure to disclose exculpatory information to the jury, rather than to the defense.

Giglio has generally been regarded as an easy case which simply extended the rule of *Brady* to information that was material to the credibility of a state witness. Yet, upon closer examination, it becomes clear that *Giglio* was in fact the Supreme Court's first of many turns against the new protocols initiated by *Brady*.

3. *United States v. Agurs*.—By 1976 the lower courts, with little or no guidance from the Supreme Court, had become thoroughly confused regarding the appropriate standard of review for an alleged *Brady* violation. The Supreme Court therefore made its first attempt at settling a rule of law for the *Brady* doctrine in *United States v. Agurs*.⁷⁵ The opinion for the Court, by Justice Stevens, did not succeed. It appeared only to compound the confusion of the lower courts and was ultimately rejected by the Court nine years later in *United States v. Bagley*.⁷⁶ But the opinion, however unsuccessful, did at least serve for present purposes to reveal the Court's rather obtuse assessment of the critical interests implicated in a *Brady* review.

Linda Agurs had stabbed a man to death after "a brief interlude in an inexpensive motel room."⁷⁷ Her defense at trial was that the man had attacked her and that she had stabbed him in self defense with his own knife.

73 *Id.* at 153.

74 *Id.*

75 *United States v. Agurs*, 427 U.S. 97 (1976).

76 *United States v. Bagley*, 473 U.S. 667, 681-82 (1985).

77 *Agurs*, 427 U.S. at 98.

She relied primarily on the fact that the man was known to carry two knives on his person and had been on top of her and in possession of the fatal knife when motel employees entered the room and separated the two struggling guests. Agurs was convicted. Several months later, her attorney learned that the prosecutor had failed to turn over to the defense the victim's prior criminal record, which contained two convictions for crimes involving the possession of a knife. The defense attorney had made no prior request for such information from the prosecutor, yet the victim's prior convictions would have been admissible at trial.⁷⁸ The circuit court reversed Agurs' conviction on this ground, despite the lack of a pretrial request by the defense attorney.⁷⁹ The Supreme Court reversed the circuit court in part on the ground that there was no violation of due process where the defendant had made no "specific request" for the victim's criminal record.⁸⁰

Agurs was an extremely troublesome opinion which endlessly befuddled the lower courts and legal commentators. What is of concern here is not so much its failed attempt at settling the doctrine, but rather the manner in which the Court engaged the interpretive process to disavow the original promise of *Brady*. Justice Stevens opened the analytic section of his opinion with the declaration that the *Brady* rule "arguably" bore an application in "three quite different situations."⁸¹ What was remarkable about this assertion was Stevens' description of the common element shared by these three situations: "Each involves the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense."⁸² In other words, *Brady* was not even *intended* to have any application to the pretrial discovery process. Although this was certainly not what Justice Stevens intended to convey by that statement, it did certainly reveal the very limited remedial construct in which the Court assumed *Brady* to apply. It applied only when the prosecutor withheld exculpatory information and then the defense, independently and perhaps fortuitously, made that discovery only "after trial." Strictly speaking, therefore, *Brady* had no application to the prosecutor who withheld exculpatory information prior to trial, and no application to cases that were not finally resolved by trial. This was only the first of several telling suggestions in the opinion that *Brady* was not intended to create *any* affirmative obligations on the prosecutor to disclose information favorable to the accused, but was strictly a rule of appellate review to govern those limited situations where the errant prosecutor himself was "discovered."

78 *Id.* at 100 & n.2.

79 *Id.* at 102.

80 *Id.* at 100 n.17.

81 *Id.* at 103.

82 *Id.* (emphasis added).

This truncated interpretation of the reach of *Brady* was made even more explicit in a later section of the opinion. There is of course no reason why the Due Process Clause(s) relied upon in *Brady* should not apply to failures in the pretrial processing of a criminal case.⁸³ However, Justice Stevens made clear that *Brady* had no application to the pretrial discovery process otherwise governed by statute:

We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution.⁸⁴

This statement implied that there was no possibility of a violation of *Brady* in the ninety percent or so of criminal cases that never went to trial.⁸⁵ The opinion went on to confirm the implication. "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."⁸⁶ Justice Stevens then reinforced this limitation by claiming that creating a constitutional rule of pretrial discovery could not be limited to anything short of "complete discovery."⁸⁷ This specter of a complete abrogation of the adversarial system of strictly limited and discretionary disclosure, however exaggerated, was nothing if not a haunting reminder of the hobgoblins of the common law era.

Another aspect of the *Agurs* opinion worth noting is the manner in which it almost totally shifted the burden of disclosure from one adversary to the other. In rejecting the articulation of the standard of materiality that led to the reversal by the circuit court, the opinion asserted that "the constitutional standard of materiality must impose a higher burden on the *defendant*."⁸⁸ At the trial court level, when the defendant moved for a new trial upon her discovery of the withheld information, the prosecution took the position that it had no obligation to turn over any exculpatory

83 The Fourteenth Amendment Due Process Clause has of course "incorporated" virtually all of the Bill of Rights whose provisions have varied and extensive application during the pretrial stage of a criminal case. That clause standing alone also has been directly applied to the commands of fundamental fairness to the defendant in the pretrial setting. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (requiring the state to provide the defendant with pretrial access to a psychiatric expert in order to investigate and prepare an insanity defense).

84 *Agurs*, 427 U.S. at 107.

85 *See United States v. Ruiz*, 536 U.S. 622, 632 (2002) (plea bargaining is used "in a vast number—90% or more—of federal criminal cases").

86 *Agurs*, 427 U.S. at 108.

87 *Id.* at 109.

88 *Id.* at 112.

material to the defense “in the absence of an appropriate request.”⁸⁹ The district court, although it denied the defendant’s motion, soundly rejected the government’s argument: “THE COURT: What are you saying? How can you request that which you don’t know exists? That is the very essence of *Brady*.”⁹⁰ This telling observation by the trial court appears not to have greatly influenced Justice Stevens’ view of where to assign the burden of *Brady*. He developed a multi-tiered rule in which the critical factor was not the conduct of the prosecutor or the nature of the material withheld but rather whether the defense had made a “general,” “specific,” or “no” request for the material, and where the defense made either a general or no request for the specific information, the rule of *Brady* did not apply. What applied instead was an apparently novel “duty to volunteer” on the part of the prosecutor.⁹¹ This somewhat oxymoronic duty created a situation where “the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel.”⁹² This duty, which appeared to have some independent constitutional grounding, could be violated only when the withheld information, standing alone, “creates a reasonable doubt” at the moment of *post-trial* judicial review.⁹³ The Court furthermore expressed confidence that the “prudent prosecutor” could be relied upon to err on the side of disclosure in doubtful situations.⁹⁴ And, to underscore this reassignment of burdens and privileges under the *Brady* rule: “Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.”⁹⁵

4. *United States v. Bagley*.—The next major development in the *Brady* doctrine came nine years later in *United States v. Bagley*.⁹⁶ Here the Court abandoned the multi-tiered materiality standards announced in *Agurs* and replaced them with a single standard: *Brady* was not violated, even where the defendant had made a specific request for the withheld information, unless the defendant could demonstrate “a reasonable probability that, had the evidence been disclosed to the defense, the result of the [trial] proceeding would have been different.”⁹⁷ *Bagley*, therefore, rejected *Agurs* only to extend the essential movement away from the early promise of *Brady* and towards a legal regime in which the prosecutor was once again entirely

89 *Id.* at 101.

90 *Id.* at 102 (emphasis in original).

91 *Id.* at 106–07.

92 *Id.* at 107.

93 *Id.* at 112.

94 *Id.* at 108.

95 *Id.* at 110.

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

97 *Id.* at 682.

privileged to withhold exculpatory information until the defendant managed to both discover and prove, post trial, that the prosecutor's conduct, standing alone, had probably cost him an acquittal.

The facts alone in *Bagley* are intriguing. They appear on their face to be so compromising as to underscore the extremes to which the Court was prepared to take the *Brady* doctrine. Bagley had been indicted on fifteen counts of possession of both drugs and guns. The investigation had been conducted by two state law enforcement officers who had been working as security guards for the Milwaukee Railroad. The Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) had engaged the two guards to conduct the investigation of Bagley. The two guards had entered into standard form contracts with the ATF that bore the revealing title: "Contract for Purchase of Information and Payment of Lump Sum Therefor."⁹⁸ They signed these contracts in the presence of the Special Agent of the ATF in charge of the case. The boilerplate language on the form stated that the two guards were required to testify against the subject of the investigation and would be paid "a sum commensurate with services and information rendered." The contracts contained a blank line titled: "Sum to be Paid to Vendor" which was later filled in with the sum of \$300.00.⁹⁹ During the course of their investigation of Bagley, the two guards also signed a number of standard ATF investigation affidavits, each of which concluded with the statement that the information provided was made "without any threats or rewards, or promises of reward having been made to me in return for it."¹⁰⁰ Prior to trial, Bagley made a formal discovery request for "any deals, promises or inducements made to witnesses in exchange for their testimony."¹⁰¹ The assistant U.S. attorney turned over to the defense all of the affidavits denying any promise of reward, but failed to turn over the contracts signed by each of his two witnesses. The prosecutor later claimed that he had no knowledge of the standard form ATF contracts signed by the two witnesses.¹⁰² At trial, both witnesses testified that they had been outfitted with a concealed transmitter to record their various conversations with Bagley but that the tapes had turned out to be inaudible. Therefore, the government's entire case depended upon the testimony and the credibility of the two witnesses. On cross examination, one of the two guards denied that the ATF agents had done anything to pressure him to cooperate with their investigation.¹⁰³ Bagley waived a jury trial and was tried before the court. When the defense attorney in his summation attempted to argue to the court that the two

98 *Id.* at 670-71.

99 *Id.* at 671.

100 *Id.* at 670 (citation omitted).

101 *Id.* at 669-70.

102 *Id.* at 671 n.4.

103 *Id.* at 686-91 (Marshall, J., dissenting).

witnesses had “fabricated” their account of Bagley’s involvement, the trial judge responded directly:

Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant.¹⁰⁴

Bagley was convicted by the court only of the drug charges. He was sentenced on the various counts to a combination of six months imprisonment, five years’ probation, and a special parole term. Neither Bagley nor the trial court learned of the prosecutor’s withholding of the form contracts until some two-and-a-half years later when his attorney made a request for information pursuant to the Freedom of Information Act¹⁰⁵ and the Privacy Act of 1974.¹⁰⁶ Bagley then filed a motion to vacate his sentence before the district court judge, who referred the matter to a magistrate to conduct an evidentiary hearing. At the hearing, the ATF case agent testified that all the payments made to the two witnesses were for expenses. The magistrate did not credit this particular testimony but then did go on to make some equally remarkable findings. He found that the two witnesses had signed blank contracts which were filled in only after the trial. Therefore, he concluded that “[b]ecause neither witness was promised or expected payment for his testimony, the United States did not withhold, during pre-trial discovery, information as to any ‘deals, promises or inducements’ to these witnesses.”¹⁰⁷ The district court, in turn, rejected this latter finding by the magistrate but nonetheless found “beyond a reasonable doubt” that timely disclosure of the withheld information would have had “no effect” on his verdict.¹⁰⁸ This particular claim by the district court was thereupon rejected by the Ninth Circuit, which found the prosecutor’s failure to disclose the exculpatory information a violation of both the defendant’s due process rights under *Brady* and also his Sixth Amendment right of confrontation under *Davis v. Alaska*.¹⁰⁹

Standing alone, the government’s failure to produce requested *Brady* information is a serious due process violation. In fact, this failure is “seldom, if ever, excusable.” But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is

104 *Id.* at 690 (emphasis omitted).

105 5 U.S.C.A. § 552 (2004).

106 5 U.S.C.A. § 552a (2004).

107 *Bagley*, 473 U.S. at 673.

108 *Id.*

109 *See* *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)), *rev’d*, 473 U.S. 667 (1985).

even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial.¹¹⁰

The Supreme Court, in turn, rejected the Ninth Circuit's holding, finding that the Sixth Amendment was not at issue on the basis of a somewhat tenuous distinction between active and passive restrictions on cross examination. The Court found that the Sixth Amendment applied only to circumstances where the trial court engaged in a "direct restriction" on cross examination by sustaining an objection to a question posed on cross examination.¹¹¹ But that was not the case in *Bagley*. "The constitutional error, if any, in this case was the Government's *failure to assist* the defense by disclosing information that might have been helpful in conducting the cross-examination."¹¹² The Court, therefore, restricted its own analysis to whether the government's nondisclosure was a violation of *Brady*.

The Supreme Court reversed the Ninth Circuit's due process holding and remanded the case for consideration under its new standard of materiality. A new standard was of course required in order to escape the firm declaration in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."¹¹³ What is most pertinent to the present analysis is the actual reasoning that permitted the Court to conclude that the transparently duplicitous conduct of virtually the entire cast of government actors in this case was ultimately excusable. The Court found once again that the burden placed upon the prosecutor to disclose exculpatory information, even in circumstances where the defendant has filed an express request for the specific information, presented too great a threat to the adversarial system and its attendant privileges:

The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.] Thus, the prosecutor is not required to deliver his entire file to defense counsel, [An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice."] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.¹¹⁴

¹¹⁰ *Lumpkin*, 719 F.2d at 1464 (internal citations omitted) (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)).

¹¹¹ *Bagley*, 473 U.S. at 678.

¹¹² *Id.* (emphasis added).

¹¹³ *United States v. Agurs*, 427 U.S. 97, 106 (1976).

¹¹⁴ *Bagley*, 473 U.S. at 675 & nn.6-7 (internal footnotes bracketed) (quoting *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting)).

Taken at face value, this is a rather remarkable claim as to the inherent limitations of our adversary system to accommodate greater transparency and a more equitable and effective search for truth. It asserts that there is a fundamental opposition between the disclosure of exculpatory information and the “primary” status of the adversary system, an opposition which apparently cannot be readily accommodated without threatening the entire “character and balance” of that system. Therefore, privileging the prosecutor to hold cover over information favorable to the accused is essential to preserve “the primary means by which truth is uncovered.”¹¹⁵ Apparently, nondisclosure of truthful information like the signed contracts of the two witnesses best serves the pursuit of truth in our adversary system. *Bagley* has thus arguably become the clearest illustration of how the Supreme Court’s reworking of the *Brady* doctrine, and its insistence on developing an increasingly narrow post-trial standard of review for compromises to the integral pretrial interests of both the criminal defendant and integrity of the system, has created a doctrine in which the tail is now wagging the dog.

5. *United States v. Ruiz*.—The Court’s most recent opinion of note in the *Brady* line is *United States v. Ruiz*.¹¹⁶ The case presented a narrow and utterly unique ruling by the Ninth Circuit Court of Appeals which the Supreme Court reversed on equally narrow grounds. But the case did present something of a frontal challenge to the Court’s constrictive “fair trial” theory of the *Brady* doctrine. *Ruiz* involved the issue of whether, and to what extent, the *Brady* rule applied to the vast majority of criminal cases which are not resolved by trial. The Supreme Court had continually insisted that there was no violation of *Brady* outside the context of a demonstrably unfair trial. “For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor’s constitutional duty to disclose.”¹¹⁷ However, by the late 1990s, the majority of lower courts had concluded that the due process protections of *Brady* had to apply also, in some manner at least, to a case that ended with a conviction upon a plea of guilty rather than a conviction after trial.¹¹⁸ But *Ruiz* was the first case considered by the Supreme Court in which the lower court had granted relief under *Brady* to a defendant who had pleaded guilty.

Angela Ruiz was arrested and charged with having imported thirty kilograms of marijuana in her luggage. A prosecutor in the U.S. Attorney’s

115 *Id.* at 675.

116 *United States v. Ruiz*, 536 U.S. 622 (2002).

117 *Agurs*, 427 U.S. at 108.

118 See Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of “Discovery” Waivers*, 51 STAN. L. REV. 567, 573 & n.43 (1999) (collecting cases).

Office for the Southern District of California offered Ruiz a standard plea agreement, referred to as a “fast track” plea bargain, in which she would plead guilty, waiving a jury trial and related rights and, in return, the prosecutor would recommend a significant sentence reduction to the trial court.¹¹⁹ For the most part, this plea offer took the standard form recognized in all jurisdictions. But the California prosecutor’s office had added one additional feature to its standard agreement as a result of an earlier ruling by the Ninth Circuit that when a defendant pleaded guilty, she did not *automatically* waive her right to appeal the conviction on *Brady* grounds.¹²⁰ The prosecutor’s office had therefore added a clause to its plea agreement that required the defendant to explicitly waive her right to receive the particular type of exculpatory information commonly referred to as “*Giglio* material,” meaning information favorable to the defendant for use as impeachment material against a government witness.¹²¹ Federal defenders in California had taken a stand against this provision,¹²² and so did Angela Ruiz. Ruiz refused to plead guilty to the “fast track” offer because of its inclusion of this provision. So she pleaded guilty without the benefit of the promised sentence reduction but, at the time of her sentencing, argued to the sentencing court that she should nonetheless get the benefit of the sentence reduction because it was unconstitutional to require her to waive her right to *Giglio* material. The trial judge rejected her argument and sentenced her accordingly. The Ninth Circuit accepted her argument and reversed her sentence. The circuit court ruling was complex, but essential to its holding was the conclusion that “a defendant’s right to receive undisclosed *Brady* material cannot be waived through a plea agreement and that any such waiver is invalid.”¹²³ This conclusion was based upon a finding that the due process right guaranteed by *Brady* was one of a limited number of rights deemed not waivable by the defendant because the right affected the very knowing and voluntary character of the waiver itself.¹²⁴ Thus, according to the Ninth Circuit, not only did the disclosure requirements of *Brady* apply to the defendant who pleaded guilty without trial, but also that right could not be waived.

The Supreme Court opinion in *Ruiz* appeared to be a unanimous, somewhat perfunctory reversal of a one-of-a-kind ruling by the Ninth Circuit: it held that *Brady* did not require the disclosure of exculpatory impeachment information prior to the formation of an otherwise valid plea agreement. But

119 *Ruiz*, 536 U.S. at 625.

120 *See Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).

121 “[E]xculpatory evidence includes ‘evidence affecting’ witness ‘credibility,’ where the witness’ ‘reliability’ is likely ‘determinative of guilt or innocence.’” *Ruiz*, 536 U.S. at 628 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

122 *See Franklin*, *supra* note 118, at 568.

123 *United States v. Ruiz*, 241 F.3d 1157, 1165 (9th Cir. 2001), *rev’d*, 536 U.S. 622 (2002).

124 *See id.*

surely it was more than that. Consider first that the peculiar facts of *Ruiz* only appear to make the opinion a narrow one. *Ruiz* was appealing on the ground of legal principle only. There were no “facts” in the ordinary sense of undisclosed information having subsequently come to light. But what if such facts had been present? For instance, the Court’s holding would presumably have been the same if *Ruiz* had accepted the fast-track offer and then, subsequent to her plea of guilty, had discovered that the prosecutor had withheld seriously damaging information regarding the credibility of the main witnesses against her. Although the Court’s holding was narrow, the reasoning behind it appeared to place it at ominous odds with critical developments in the lower courts that have expanded the scope of *Brady* beyond the trial-specific limitations of the Supreme Court doctrine.¹²⁵

The Court briefly cited three reasons for its holding and the first was certainly not the least important:

First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* (“knowing,” “intelligent,” and “sufficient[ly] aware”). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant.¹²⁶

What this reasoning would suggest is that not only may the defendant waive her right to obtain *Giglio* material prior to a plea of guilty, but even more so that she may not have any actual right to waive. This reasoning would support the view that when the criminal defendant chooses on the basis of her own knowledge of the facts to confess to her crime and offers to plead guilty, the only constitutional concern is that her plea is otherwise “voluntary.” In other words, although the opinion for the Court certainly did not take it this far, its reasoning could easily be extended to *all Brady* material. As the Court insisted in *Bagley*, there is no basis in the *Brady* doctrine for distinguished treatment of *Giglio* material.¹²⁷ If a defendant voluntarily chooses to inculcate herself and waive her right to a trial, what principle of *fair trial* is served by requiring disclosure of information that is otherwise repudiated by her very admission of guilt? Only Justice Thomas was willing to confront this issue directly and he did exactly that: “The

¹²⁵ See, e.g., *United States v. Snell*, 899 F. Supp. 17 (D. Mass. 1995) (“There is no question but that as a general matter, the *Brady* obligation includes the requirement to turn over evidence of impeachment.”); see also D. Mass. R. 116.2 (disclosure of exculpatory evidence), available at <http://www.mad.uscourts.gov/LocPubs/combined01.pdf>.

¹²⁶ *Ruiz*, 536 U.S. at 629 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

¹²⁷ “This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.” *United States v. Bagley*, 473 U.S. 667, 676 (1985).

principle supporting *Brady* was 'avoidance of an unfair trial to the accused.' That concern is not implicated at the plea stage regardless."¹²⁸

The second reason given by the Court for the holding that it is not necessary to provide a criminal defendant with exculpatory impeachment information prior to a plea of guilty was that such nondisclosure was essentially a form of "misapprehension" somehow attributed to the defendant herself.

[T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.¹²⁹

The Court then went on to cite the various misapprehensions it was alluding to, all of which involved either the defendant or her counsel misapprehending: the quality of the evidence; the admissibility of the evidence; the available defenses; the applicable law; and the likely sentences.¹³⁰ It is difficult to understand how the failure to provide the defendant with exculpatory impeachment information qualified as a comparable "misapprehension" on her part.

The third reason cited by the Court was perhaps the most portentous. The Court asserted that the very considerations of due process embodied in *Brady* argued in favor of nondisclosure of impeachment information prior to a plea of guilty. These considerations apparently included, and required, a balancing of the defendant's interest in disclosure with the state's interest in nondisclosure.¹³¹ This balancing of interests paradigm, while familiar throughout constitutional criminal procedure, had never before been expressly adopted by the Court in the *Brady* case law. Not surprisingly, the Court found significant, indeed ominous, threats to the interests of both the prosecutor and the system of justice if the prosecutor were required to reveal exculpatory impeachment information prior to a guilty plea. Thus, the Court noted that the Government had "stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding."¹³² For one thing, it risked "premature disclosure of Government witness information."¹³³ Also, "it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90%

¹²⁸ *Ruiz*, 536 U.S. at 634 (Thomas, J., concurring) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

¹²⁹ *Id.* at 630.

¹³⁰ *Id.* at 630-31.

¹³¹ *See id.* at 631.

¹³² *Id.* at 626.

¹³³ *Id.* at 631.

or more—of federal criminal cases.”¹³⁴ It was not at all clear why requiring the disclosure of exculpatory impeachment information attendant to a plea of guilty was deemed such a dire threat to the legitimate interests of the prosecution. Such a requirement would simply place the prosecution in precisely the same position they are in following a conviction after trial. If, subsequent to the conviction by plea of guilty, the defendant managed to discover that the prosecutor had withheld *material* exculpatory information, then the defendant would be entitled to challenge her conviction. The majority of lower courts had found, prior to *Ruiz*, that the defendant was entitled to *both* types of *Brady* material prior to a plea of guilty and had experienced no adverse consequences with that approach.¹³⁵ The Court in *Ruiz*, however, appeared overly concerned with keeping the closet door shut following a plea of guilty, and that concern appeared to reflect all too clearly a muffled fear of the lingering hobgoblins within.

C. Does the Supreme Court Doctrine Really Matter?

Even assuming the validity of the foregoing critique of the *Brady* doctrine, it is fair to question whether the Supreme Court case law really matters. If, despite the gaping loopholes in the doctrine, American prosecutors nonetheless function within an adversarial culture which independently constructs operative conventions of fair play, then perhaps the *Brady* doctrine is best viewed simply as a loosely woven safety net designed to capture only the occasional and larger failures of the practice. But what if that is not the case? What if the *Brady* doctrine itself is in major part responsible for the apparently widespread cynical disregard of disclosure obligations increasingly recognized and reported in the lower court case law? There is no metric by which to measure the virulence, or even the prevalence, of such an ethical malaise, but there is now enough evidence in the case law itself to demonstrate the “materiality” of the doctrine in this respect. A brief look at several recent opinions from the Second Circuit, easily one of the most high profile and highly regarded venues for criminal prosecution, should make the point.

In the case of *In re United States v. Copp*,¹³⁶ the district court, relying upon *Brady*, ordered the government prosecutors to disclose all exculpatory material to the defense prior to trial upon request of the defense, with the exception of any sensitive material the release of which might prove harmful to a government witness. The prosecutors filed an immediate petition for a writ of mandamus to the Second Circuit. The circuit panel ap-

¹³⁴ *Id.* at 632.

¹³⁵ “Courts analyzing *Brady* disclosures at the plea stage also have treated impeachment and exculpatory evidence alike . . .” Franklin, *supra* note 118, at 577.

¹³⁶ *In re United States v. Copp*, 267 F.3d 132 (2d Cir. 2001).

peared to welcome the opportunity to issue an interlocutory rebuke of the district court's adventurous ruling. In an extended discussion, the circuit court made it pointedly clear that the district court's reliance upon the initial mandate of *Brady* itself was in the present era entirely misplaced:

The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted Although many cases continue to use the phrase "*Brady* material" to mean all exculpatory evidence and the phrase "*Giglio* material" to mean all impeachment evidence, these characterizations no longer have such broad meaning after *Agurs* and *Bagley*.¹³⁷

The circuit court explained the critical difference as one that shifted the locus of the *Brady* rule from the pre-trial to the post-trial setting:

Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.¹³⁸

The court then summarized its position thusly: "An assessment of whether an outcome would have been different if undisclosed evidence had been disclosed is best made after a trial is concluded."¹³⁹

The immediate consequence of a ruling like *Coppa* is obvious: district court judges are on notice that they are not empowered to order fair and timely disclosure, and prosecutors are assured that they have no actual duty to disclose anything prior to trial. The more extended consequences are equally severe, as the Second Circuit itself has realized in subsequent cases. For example, in the more recent case of *United States v. Rivas*,¹⁴⁰ a government cooperating witness perjured himself regarding a meeting and critical conversation he had with the prosecutor immediately prior to trial. In that conversation the witness revealed to the prosecutor that it was he, and not the defendant, who had brought the pertinent package of drugs on board a ship. The witness denied the meeting on the stand and the prosecutor in turn did not disclose to the court either the meeting or the statement. The defense found out about the meeting only after the defendant had been convicted through a court interpreter who was troubled by the apparent perjury and nondisclosure. When confronted by the defense with this nondisclosure, the government prosecutors responded with a letter stating

¹³⁷ *Id.* at 142.

¹³⁸ *Id.* at 140.

¹³⁹ *Id.* at 143.

¹⁴⁰ *United States v. Rivas*, 377 F.3d 195 (2d Cir. 2004).

that they had failed to disclose the statement “for sound tactical reasons” and that exposing the witness’s prior statement “at the last minute ... might well have confused him.”¹⁴¹

The trial court judge actually accepted this rather implausible explanation by the government lawyers, but the Second Circuit was not prepared to go that far. The court began its discussion by saying “we note with some dismay the prosecutor’s failure during the trial to correct the falsity of [the witness’s] testimony.”¹⁴² The court then quickly moved away from the matters of the actual perjury and the prosecutor’s apparently brazen duplicity to conclude that the prosecutors’ defense of their conduct was “totally unacceptable” and that the defendant was entitled to a new trial.¹⁴³

Surely the most telling example of the adverse cultural impact the *Brady* doctrine is having in jurisdictions like the Second Circuit has come even more recently in a long, scathing opinion by another district court judge which reversed a conviction he found to be based upon “rampant perjury,” perhaps “deliberately elicited” by federal prosecutors.¹⁴⁴ In *United States v. D’Angelo*, the defendant was tried for a gang murder before District Court Judge John Gleeson.¹⁴⁵ The government case was based upon the testimony of three accomplice witnesses. At the conclusion of the evidentiary stage, the defendant made a standard motion to dismiss based upon the alleged insufficiency of the evidence. Judge Gleeson reserved decision on that motion because he had already become convinced that the testimony of the three government witnesses was “patently incredible.”¹⁴⁶ The jury, however, found the defendant guilty of murder. Judge Gleeson then took up the reserved motion for dismissal. Prompted to conduct a post-trial review of the accomplice testimony, the government shortly conceded that all three of its primary witnesses had indeed committed perjury at trial. “Yet despite this rampant perjury, the government clings to the jury’s verdict like it is the only conviction it ever obtained ...”¹⁴⁷

The judge conducted an extensive review of the evidence and concluded that the trial verdict was a “miscarriage of justice.”¹⁴⁸ He granted the motion to dismiss but he also addressed his “concern that perjury was

141 *Id.* at 198.

142 *Id.* at 199.

143 *Id.* at 200.

144 *United States v. D’Angelo*, No. 02 CR 399(JG), 2004 WL 315237, at *16, *23 (E.D.N.Y. Feb. 18, 2004).

145 Judge Gleeson had previously been the chief of the Criminal Division in the U.S. Attorney’s Office in that district, the Eastern District of New York. Disclosure: the author served briefly as a special assistant U.S. attorney while Judge Gleeson was the chief of that office.

146 *D’Angelo*, 2004 WL 315237, at *15.

147 *Id.* at *16.

148 *Id.* at *15.

deliberately elicited.”¹⁴⁹ He ultimately concluded that he did not have to resolve that concern because it was not a finding essential to his ruling,¹⁵⁰ but he nonetheless reviewed and denounced the government’s arguments proffered in defense of its conduct. He found the government’s arguments to be “utterly disingenuous” and “frivolous.”¹⁵¹ Yet the most telling insight of Judge Gleeson’s came with regard to his expressed exasperation with the looking-glass logic of the prosecutors, who resolutely maintained that there had been no foul because there had been no “material” harm. “At bottom, the government’s position is that the prosecutors in the case still believe D’Angelo is guilty, and therefore the verdict should stand.”¹⁵²

II. *BRADY* ABROAD

The status of the *Brady* doctrine as an icon of adversarial fair play rested largely, if not entirely, on the fact that it stood alone. There were no rules of exculpatory disclosure in any other system, either national or international. In the theoretically “transparent” process of the civil law countries, there is no formal issue of disclosure: the judiciary assumes responsibility for conducting a criminal investigation and both sides are deemed to have equal access to the investigative case file, or dossier.¹⁵³ But the need for a rule specifically targeting the disclosure of exculpatory information had not been recognized in any of the foreign common law or adversarial systems. That situation has changed abruptly in the past decade. There is now a broad set of “*Brady* rules” in foreign adversarial jurisdictions which have transformed the template for the duty of such disclosures. In this Part, the dramatic and now transformative developments in both England and Canada will be examined. The next Part will review the same developments taking place at the international human-rights level. The most telling point of all these developments is their unqualified rejection of the core principles of the Supreme Court’s *Brady* doctrine described above.

A. *England*

The quintessentially American saga of the corrupt conviction of Tom Mooney, which ultimately provided the impetus for the *Brady* doctrine, recently found its counterpart in England. Her name was Judith Theresa

¹⁴⁹ *Id.* at *23.

¹⁵⁰ *See id.* at *31 n.27.

¹⁵¹ *Id.* at *23 n.20, *24.

¹⁵² *Id.* at *16.

¹⁵³ “Where, in some European countries, the police are supposed to be investigators for both prosecution and defence, everyone works from the same file.” JENNY MCEWAN, *EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW* 285 (2d ed. 1998).

Ward. Like Mooney, Ward proudly (although falsely) popularized herself with the police as an itinerant Irish radical very much at the center of a wave of violent protests, including several murderous bombings popularly attributed to Irish Republican Army (IRA) terrorists. Also like Mooney, Ward was eventually convicted of several murders in a severely compromised prosecution and served an extended sentence in jail, in her case eighteen years, before her conviction was quashed by an appellate court. The 1992 reversal in *R v. Ward*¹⁵⁴ became the iconic moment in a “miscarriages of justice” scandal that had been simmering since the late 1970s. The scandal set off a series of reforms of the law of exculpatory disclosure in England and, as shall be seen in the next Part, several international venues as well. While this story of scandal and reform is both complex and compelling in its own right, it will serve here with a singular purpose: to provide a striking comparative demonstration of the fact that the presence of an essentially adversarial system of criminal justice provides no meaningful justification for the thoroughly compromised rule of prosecutorial disclosure exhibited in the *Brady* doctrine.

England had vanquished its own hobgoblins of adversarial criminal discovery by the defendant roughly a full century before American jurisdictions began to recognize even limited rights of criminal discovery.¹⁵⁵ Prior to the 1970s, when the particular matter of exculpatory disclosure first emerged as a major issue of legal scandal and reform, it had been the long-established practice in English criminal courts for the prosecution to disclose to the defense all of the evidence it intended to proffer at trial.¹⁵⁶ But this discovery practice did not include a routine protocol for disclosure of the material the prosecution did not intend to use at trial, what is now referred to in English legal parlance as “unused” material.¹⁵⁷ Beginning with *R v. Bryant*¹⁵⁸ in 1946, there was a recognition of a presumptive “duty” on the part of the prosecution to disclose either the names or the statements of unused witnesses who might provide exonerating information, but there was no positive or enforceable practice of such disclosure. Why was this so? “The answer seems to be that as a general rule trials were heard in a

154 *R v. Ward*, (1993) 96 Crim. App. 1 (Eng.).

155 To be sure, the English law of disclosure of the early nineteenth century reflected a presumption against discovery by the criminal defendant similar to its American counterpart. “The principal reason for this was the fear that if accused persons knew the nature of the evidence against them, they would be tempted to tamper with, or falsify, such evidence or intimidate those who would be called to give the evidence.” JOHN NIBLETT, *DISCLOSURE IN CRIMINAL PROCEEDINGS* 32–33 (1997).

156 *Id.* at 34.

157 See *infra* text accompanying note 165.

158 *R v. Bryant*, (1946) 31 Crim. App. 146 (Eng.).

climate of trust that the prosecution would do what was fair and just and make proper disclosure."¹⁵⁹

So at the point beginning in the late 1970s when England became suddenly overwhelmed with evidence that the prosecution could not be so trusted, the law there was not unlike the law here: there was a largely hortatory declaration of a duty of exculpatory disclosure that relied heavily upon the individualized discretion of the trial prosecutor, yet there was very little in the way of a positively regulated regime of actual pretrial disclosure. The forthright manner in which the English legal system recognized and responded to its own crisis of prosecutorial nondisclosures therefore provides a particularly telling point of comparison to our own muddled and unsuccessful set of responses in the *Brady* case law.

The point here is certainly not to present the multistage unfolding of the English rule of exculpatory disclosure as either an actual or ideal solution to the problems with the *Brady* doctrine.¹⁶⁰ The argument here does not, and could not, suggest a simple transplant of the English rule to the American constitutional corpus.¹⁶¹ The development of an English rule of law has been rapid, complex, discontinuous, incomplete, idiosyncratic and, for the moment, still unsatisfactory to many.¹⁶² The point is rather that in an adversarial setting which, despite its many differences, is in its most pertinent aspects very similar to our own, the English have struggled within a turbulent twenty-year period to construct a law of exculpatory disclosure that now surpasses our *Brady* doctrine in almost every respect. The English rule has developed rapidly in a series of overlapping stages involving multiple branches of government and it does not submit readily to any simplified linear tracking. But, it is possible to at least identify the major stages of development while focusing on the extraordinary narrative of the singular contributions of England's judicial counterpart to our own high court.

1. The Discretionary Stage.—The matter of exculpatory disclosure was very much a sleeping issue in England until the late 1970s. In that era, two separate strains on the English criminal justice system developed. The first involved a series of murderous bombings in England committed in 1973 and

159 NIBLETT, *supra* note 155, at 61.

160 Indeed, several members of the present Supreme Court, particularly Justice Scalia, have expressed grave reservations about learning anything meaningful from "the so-called international community." *Roper v. Simmons*, 543 U.S. 551, 662 (Scalia, J., dissenting). *But see* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004). For a collection of recent cases where the Court has consulted foreign law, see Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2571 n.8 (2004) (book review).

161 *See generally* Daniel Berkowitz, et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

162 *See generally* Joyce Plotnikoff & Richard Woolfson, 'A Fair Balance'? *Evaluation of the Operation of Disclosure Law*, Home Office Occasional Paper No. 76 (2001).

1974 which led to the highly controversial investigations and convictions of a number of alleged IRA republicans during the mid 1970s.¹⁶³ The second stress upon the English system came with the highly publicized reversals of several convictions of defendants who had been wrongfully convicted in part due to errant nondisclosures by the police and prosecution.¹⁶⁴ Each of these developments pushed the matter of exculpatory disclosure to the forefront of concern with the state of English criminal justice.

Beginning in the early 1970s, there was a series of reform packages and commission reports which called for greater disclosure of information helpful to the defense.¹⁶⁵ By the late 1970s, both the Home Secretary and the Attorney General had committed themselves to satisfying the call for such reform.¹⁶⁶ This led to the adoption in December, 1981 of *The Attorney-General's Guidelines for the Disclosure of "Unused Material" to the Defence*.¹⁶⁷ The *Guidelines* may have been an obvious attempt to preempt legislative reform but they were nonetheless a rather remarkable set of broad self-imposed disclosure obligations that radically transformed the prosecution practice regarding disclosure. It was in the *Guidelines* that the now-prevailing term of art "unused material" was first formalized.¹⁶⁸ The term has since been given a broader interpretation,¹⁶⁹ but in the original *Guidelines* it referred primarily to witness statements in the possession of the police.¹⁷⁰ Yet the disclosure obligations attending this unused material were even in the first instance exceptionally broad and demanding.

The *Guidelines* so transformed the practice of disclosure that they ultimately assumed, albeit for a brief period, the apparent force of law,¹⁷¹ but there was never any mistaking their essentially discretionary character. Whatever first-instance interpretations were to be made of the various

163 See NIBLETT, *supra* note 155, at 17–21.

164 See *id.* at 21–24.

165 See *id.* at 59.

166 See DAVID CORKER, DISCLOSURE IN CRIMINAL PROCEEDINGS 27 (1996).

167 74 Crim. App. R 302 (Eng. 1982), reprinted in NIBLETT, *supra* note 155, App. 1 [hereinafter *Guidelines*].

168 *Id.*, at § 1.

169 See, e.g., R. v. Keane, 99 Cr. App. R. 1, 5 (Eng. 1994).

170 *Guidelines*, *supra* note 167, at § 1.

171 In a major, although unreported, trial court opinion, the court stated:

Now, it was initially suggested to me—though I think that there was finally some retreat from this position—that the Attorney-General's Guidelines do not have the force of law. I found a certain unreality in that submission because it seems to me that any defendant must be entitled to approach his trial on the basis that the prosecution will have complied with the Attorney-General's Guidelines and those, accordingly, are the ground rules which govern his trial.

R v. Saunders, TR. T881630 at 7 (Cent. Crim. Ct. Sept. 29, 1989), quoted in NIBLETT, *supra* note 155, at 72.

terms and guidelines, they were to be made autonomously by the prosecutor. "The message in the *Guidelines* was clear—prosecuting counsel could be trusted to do what was right and proper."¹⁷²

2. *The Judicial Stage.*—While the various voluntaristic reforms by the prosecution services were unfolding, the English courts were deciding a series of cases that ultimately superseded the self-regulating measures of the prosecutors. Since the late nineteenth century, English common law had required the prosecution to disclose to the defense prior to trial the evidence it would proffer before the court.¹⁷³ But the early common law had not directly addressed what the prosecution's disclosure obligations were with regard to material that it did not intend to introduce at trial. In the first direct ruling on the issue in the 1946 case of *R v. Bryant*, the Court of Appeals assumed that there was such an implied "duty" on the part of the prosecution at least with regard to witnesses whom the prosecution chose not to call at trial.¹⁷⁴

This common law duty of disclosure was premised on the received understanding that the prosecutor, although an advocate and an adversary, had a primary obligation to inform the court itself of any evidence relevant to the matter *sub judice*. This became explicit in the next case on point decided by the Court of Appeal, almost twenty years after *Bryant*. In *Dallison v. Caffery*,¹⁷⁵ the issue was once again not whether disclosure of witness information provided to the police was required, but rather what form the disclosure should take. In the course of reaffirming, and perhaps extending, the holding of *Bryant*, the Court of Appeal opined:

It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.¹⁷⁶

172 NIBLETT, *supra* note 155, at 69.

173

It is highly improbable that prosecuting counsel in the Crown Court would endeavor to introduce, as part of the case for the prosecution, evidence which had not been disclosed to the defence. In reality, it would be a waste of time even to try as the judge would accede to the inevitable defence application for an adjournment in order that the fresh evidence could be considered.

Id. at 32.

174 *R v. Bryant*, (1946) 31 Crim. App. 146, 147 (Eng.).

175 *Dallison v. Caffery*, (1964) 1 Q.B. 348.

176 *Id.* at 369.

The English rule therefore recognized from the outset that the public prosecutor, as the advocate on behalf of the state, had a special obligation *to the state itself* to reveal any information that bore upon the integrity and competency of the judicial proceedings conducted by the state.

When the troubles of the 1970s began to implicate the competency and the integrity of the English criminal justice system, the English courts at first appeared reluctant to join the fray. The IRA bombings took place in 1973 and 1974; the trials took place several years after that; the original appeals were heard, and denied, in the mid 1980s; and the lid did not come off until the cases were referred back to the Court of Appeals in the late 1980s. So in the late 1970s, despite the clamors in the ranks, the courts were still holding the line regarding their traditional *laissez-faire* approach to prosecutorial disclosure. The assumption appeared to be that the center would hold.

[T]his possibility of the defence being deprived of relevant exculpatory material by the prosecution was regarded as something chimerical. Lawyers and judges alike were content to assume that such a possibility was in practice obviated by a double safeguard: the impartiality of the police and the honourable practice of prosecuting counsel. Particular reliance was placed on the latter....¹⁷⁷

The initial disclosure case law of the 1980s therefore involved the straightforward application of the common law principle of “fairness” to the interpretation of the *Guidelines*.¹⁷⁸ Yet even on this simple standard, the courts quickly began to recognize several recurrent failures of fairness in the *Guidelines* and to assert an increasing role for the courts in reviewing the otherwise unfettered discretion of prosecutors.

In a spate of decisions, the Court of Appeal held that it had a role far greater than that envisaged under the *Guidelines*; first, that of monitoring prosecution decisions as to non-disclosure, and secondly, such monitoring would be carried out based upon what the court regarded as fair, rather than on a narrower basis of whether or not prosecution counsel had properly exercised his discretion in accordance with the relevant sub-paragraph of [the *Guidelines*].¹⁷⁹

It was at this point, in the late 1980s, that the center finally gave way. While the Court of Appeal was gradually taking the blinds off regarding its scrutiny of a variety of cases that appeared to suggest a systemic failure

¹⁷⁷ CORKER, *supra* note 166, at 24.

¹⁷⁸ See, e.g., *R v. Liverpool Crown Court ex parte Roberts*, [1986] Eng. Rep. 622 (Q.B.) (duty of disclosure extends to police as agent of prosecution); *R v. Paraskeva*, (1982) 76 Crim. App. 162 (Eng.) (prosecution has an affirmative duty to disclose prior convictions of prosecution witnesses).

¹⁷⁹ See CORKER, *supra* note 166, at 32.

of "fair" disclosure by the police and prosecution, several cases stemming from the IRA bombing campaign of the early 1970s were continuing to haunt the English criminal justice system. In the fall of 1973, when the bombing campaign had reached the English Midlands in the form of a series of deadly explosions, the English criminal justice system went into a campaign of its own. Several of the bombings had resulted in quick, suspect, and high-profile prosecutions which ultimately reverberated into a nondisclosure scandal of uncommon proportions for English justice, commonly referred to as the "miscarriages of justice" scandal.¹⁸⁰

In February of 1974 there was a motorcoach bombing on the M62 motorway which killed twelve people. In the fall of 1974 there were two bombings in Guildford which killed five and injured many, and also another bombing in Birmingham which killed twenty-one people.

Judith Ward was convicted of the M62 bombing. The "Guildford Four" were convicted of the Guildford bombings. The "Maguire Seven" were convicted of supplying the explosives for the Guildford bombings. The "Birmingham Six" were convicted of the Birmingham homicides. All of the defendants received substantial, in some cases life, sentences. The convictions became immediately notorious and were hotly contested, but leave to appeal was quickly denied in each case by the Court of Appeal. Yet the controversy surrounding these politically charged prosecutions only intensified. An extended campaign of extra-judicial review, remarkably reminiscent of the earlier American drive to "free Tom Mooney," ultimately forced each of the cases back into the Court of Appeal for a second and, in the case of the Birmingham Six, a third review.¹⁸¹ The Court of Appeal indeed acknowledged in the latter case that the ultimate vindication of the defendants would not have occurred but for the outside campaign.

Matters would therefore have rested with the refusal of leave to appeal in 1976, had it not been for the interest taken in the case by Granada television, the publication of Chris Mullin's book *Error of Judgment* in 1986, and the support of senior churchmen and other influential figures, who continued to believe in the appellant's innocence.¹⁸²

Beginning with the case of the Guildford Four in 1989, all four of the IRA cases were reexamined in light of intervening "fresh evidence" that revealed an extraordinary series of withholdings of exculpatory material.¹⁸³

180 NIBLETT, *supra* note 155, at 16.

181 The Court of Appeal, upon referral by the Home Secretary, reviewed the case of the Birmingham Six in 1988 but again denied the appeal. The Home Secretary then referred the case back to the court in 1990 for a third and successful review. *See R v. McKenny*, (1991) 93 Crim. App. 287 (Eng.).

182 *Id.* at 294.

183 *See R v. Richardson* (unreported), *cited in* Quentin Cowdry & Sheila Gunn, *Maguire Seven Framed, Peers Say; Guildford Pub Bombings*, *TIMES* (London) Oct. 20, 1989 ("Guildford

In each of the trials the defendants had been connected to one of the bombings by evidence of either or both a confession and forensic tests of the defendant's hands or clothing which purportedly proved recent contact with nitroglycerine. The fresh evidence generated outside the legal system revealed that the police had withheld information casting doubt on the reliability of the confessions, and both the forensic experts and the prosecutors had withheld evidence undermining the forensics. In the end, each of the defendants in each of the cases was freed after having served an extended, and in some cases the entire, sentence. Although Judith Ward had been the first to be convicted, she was the last to be freed. By the time the Court of Appeal exposed her story as that of a hapless, mentally infirm young woman who had been shabbily exploited by an opportunistic prosecution, the English authorities had already entered upon the "darkest hours of British criminal justice"¹⁸⁴ as a result of the three earlier reversals. "The results of these cases, and the surrounding publicity, had a devastating effect on the reputation of the legal establishment and severely dented the confidence of the general public in the police and prosecuting authorities."¹⁸⁵

Yet the scandal of the nondisclosures did not reach its apex until the case of Judith Ward was decided by the Court of Appeal in June 1992. If the three earlier IRA reversals had brought public disrepute upon the system of criminal justice, the *Ward* case produced "something akin to panic within the ranks"¹⁸⁶ of English police and prosecutors. The earlier cases had each found serious fault with the system that created and concealed the injustice of nondisclosure, but they were each careful to fold the finger of blame regarding the individual responsibility for each such miscarriage. Not so the opinion in *Ward*. Lord Justice Glidewell issued an extended and virtually unprecedented judicial acknowledgment of endemic criminal injustice. The opinion became both the capstone to the scandal of the IRA cases and the foundation for the next generation of disclosure law in England, and as shall be seen in the next Part, in the international arena as well.

In September of 1973, a bomb exploded at Euston station. Many people were injured, but there were no fatalities. In February of 1974, a bomb exploded on a coach carrying military personnel and their families on the M62 motorway. Twelve people were killed, including several children. Several weeks later, another bomb exploded at the National Defence College

Four"); *R v. Ward*, (1993) 96 Crim. App. 1 (Eng.); *R v. Maguire*, (1992) 94 Crim. App. 133 (Eng.) ("Maguire Seven"); *R v. McKenny*, (1991) 93 Crim. App. 287 (Eng.) ("Birmingham Six").

184 Patrick O'Connor, *Prosecution Disclosure: Principle, Practice and Justice*, in JUSTICE IN ERROR 101, 104 (Clive Walker & Keir Starmer eds., 1993).

185 NIBLETT, *supra* note 155, at 17.

186 Plotnikoff & Woolfson, *supra* note 162, at 2 (quoting David Calvert Smith, *The Prosecuting Authority's Role*, Disclosure under the CPIA 1996: British Academy of Forensic Sciences Seminar (Dec. 1, 1999)).

in Buckinghamshire, injuring a number of people. Several days after the Defence College bombing, a twenty-five-year-old woman by the name of Judith Ward was picked up for vagrancy on the streets of Liverpool. She immediately claimed membership in the IRA and entered into a series of interviews and admissions that extended over a period of weeks.¹⁸⁷ She managed to implicate herself in each of the foregoing bombings. Nine months later, in November, 1974, she was convicted of twelve counts of murder and three counts of causing an explosion. The case against her with regard to each of the bombings was based primarily upon her admissions and the same type of forensic evidence used in the other IRA cases to connect her or her belongings to possession of nitroglycerine. She was the only person tried and convicted for each of these bombings. She received a life sentence on each of the twelve counts of murder, and she did not file leave to appeal.

Judith Ward spent the next seventeen years in prison without any review of her conviction. But the integrity, or "safety"¹⁸⁸ of her conviction had been clearly compromised by the ultimate reversals of the convictions in the three other IRA cases. In September, 1991, the attorney general sua sponte referred her conviction for review by the Court of Appeal. The Court itself took fresh evidence from sixteen witnesses over the course of a nine-day hearing. The Court appeared moved, if not indeed overwhelmed, by the manifold disclosures which came to light in this belated post-conviction review. "This was and is a most extraordinary case,"¹⁸⁹ intoned the Court, which thereupon issued an equally extraordinary opinion that resonated throughout Europe, the Commonwealth countries, and international tribunals, even though it was given no sounding in America.

The opinion in *Ward* is not an easy read. It is exceptionally long, recitative, prolix, and circuitous, but it makes its point: Judith Ward was the hapless victim of a criminal justice apparatus that had willfully failed the cause in almost every essential aspect. The opinion portrayed the entire cast of the prosecution—police, prosecutors, forensic experts, psychiatrists—as having succumbed to the adversarial zeal of producing a conviction. The Court found that at virtually every turn of the investigation and prosecution of Judith Ward, the public servants or agencies responsible for preparing her case had failed to disclose critical information that might well have prevented her conviction.

187 One of the more benign ironies of this case is that, in making a series of fanciful claims and confessions to the police, Ward managed to implicate, falsely, a fellow by the name of "Joe Mooney." *Ward*, 96 Crim. App. at 36-37.

188 The standard of appellate review in England requires the Court of Appeal to reverse a conviction when it determines that a conviction is "unsafe." See Criminal Appeal Act, 1995, c. 35, § 2(1) (Eng.).

189 *Ward*, 96 Crim. App. at 66.

The *Ward* opinion provides a sharp and telling contrast to typical American court opinions, especially those of the Supreme Court, in its reaction to the revelation of deliberate nondisclosure by public officials. The Supreme Court's *Brady* doctrine has rendered the wilfulness, and even the lawfulness, of such prosecutorial misconduct to be something with which judges "need not concern [them]selves."¹⁹⁰ As previously seen, even in cases where exculpatory evidence is withheld and two federal prosecutors file sworn statements contradicting one another as to who bore responsibility for the failure, the Supreme Court quickly blinks at the accountability issue and moves on to a more vigorous scrutiny of the controlling issue of whether the defendant has sufficiently demonstrated the "materiality" of the nondisclosure misconduct.¹⁹¹ To the contrary, the English Court of Appeal made attribution and accountability the essential order of its opinion. Despite the then-nascent state of the law of disclosure in England, the Court treated the principles of disclosure as at least self-evident, if not settled, and spent most of its time unpacking the long, twisted tale of Judith Ward's attempts to get herself arrested and the cynical exploitation of those public officials and servants, who were carefully named, who took advantage of her mental disarray to "solve" a notorious domestic offense.

The *Ward* Court began its opinion with an extended recitation of its own de novo factfinding. It even offered an introductory biographic section captioned "Judith Ward's life and activities before September 10, 1973," the date of the first bombing, at the Euston station, for which Ward was convicted. The opinion portrayed the young Ward as a troubled and aspiring victim who repeatedly failed to secure her calamity with the police. In one of her more innocuous run-ins with the police, when she was then twenty-three years old, she reported herself as a highly vulnerable waif of fourteen named "Teresa O'Connell" who appeared to be endlessly dependent upon the kindness of strangers. "It was a graphic story, almost every word of which was fiction."¹⁹² Several months later she surrendered herself for going AWOL from her enlisted military service. She promptly identified herself as a lieutenant in the IRA who had helped "to blow places up and things like that," but the private who interviewed her reported that she "did not take much notice" of Ward's claims.¹⁹³ In early 1973, she volunteered to the police a series of claims involving her role in a variety of IRA affairs. The detective who interviewed her wrote it off as "total nonsense."¹⁹⁴ Yet this was the same Judith Ward who was convicted several

190 *Giglio v. United States*, 405 U.S. 150, 153 (1972).

191 *See supra* text accompanying notes 71–72.

192 *Ward*, 96 Crim. App. at 58.

193 *Id.* at 4.

194 *Id.* at 33.

months thereafter of being a principal terrorist in the midland IRA bombings—based largely upon her own extended admissions.

The jury at Ward's trial did not get to know the Judith Ward depicted in the Court of Appeals opinion because the various police reports in both England and Ireland recounting her compulsion for making self-inculpatory statements were never disclosed. The Court referred to these failures of disclosure as "the most substantial"¹⁹⁵ nondisclosures simply in terms of their number. "The principal relevance of the statements in question lies in their bearing on the appellant's proclivities for attention-seeking, fantasy and the making and withdrawal of untrue confessions."¹⁹⁶ With regard to Ward's positive right to disclosure of her own many statements to the police, the Court referred to this as "merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. No authority is needed for this proposition . . ."¹⁹⁷ This simple description of the defendant's entitlement to transparently exculpatory information as virtually primordial in character is also in telling contrast to the compromised and complex descriptions of the right in the *Brady* line of cases. Here the Court of Appeal made it perfectly plain that the prosecution-as-adversary is entitled to no privileges of nondisclosure but rather bears an equal public responsibility with the court to ensure the defendant a fair trial.

The *Ward* court went even further in its condemnation of the adversarial practices of the prosecution's forensic experts. Here the Court all but accused three senior forensic experts of engaging in criminal conduct in pursuit of their adversarial zeal to convict Judith Ward. After having first declared the experts retained by the prosecution to be part of the "prosecution" itself for purposes of the right of disclosure,¹⁹⁸ the Court found the failure of the experts to disclose a series of forensic omissions and misrepresentations to itself be an egregious and independent violation of the defendant's right.

Three senior R.A.R.D.E. [a forensic lab] scientists took the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial. . . . It is in our judgment also a necessary inference that the three senior R.A.R.D.E. forensic scientists acted in concert in withholding material evidence.¹⁹⁹

Further, rather than attempting to find some manner of excusing or privileging the adversarial partisanship of the forensic scientists, the Court de-

195 *Id.* at 23.

196 *Id.* at 29.

197 *Id.* at 25.

198 *Id.* at 23.

199 *Id.* at 51.

livered an extended analysis and rebuke of those very partisan tendencies.

For the future it is important to consider why scientists acted as they did.... The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process.... They misled both the prosecution and the defence in order to promote a cause which they had made their own, namely that Miss Ward had been in contact with NG.²⁰⁰

The Court of Appeal clearly did not ignore the “adversarial character of the proceedings”²⁰¹ but rather used it as the platform for analyzing the real call of English criminal justice regarding unused material. The wide-ranging opinion in *Ward* ultimately settled and transformed the common law of disclosure in several critical respects, all of which are the more remarkable for their utter disdain of the blinking and hedging so common to the *Brady* line of opinions.

There are three major accomplishments of *Ward* worth noting here. The first is the broad characterization of the public officials and agencies who shall bear and share the burden of disclosure. The Court of Appeal did not adopt the American view of the duty of disclosure as a matter of adversarial discovery limited to what the prosecutor actually knew or reasonably should have known under the circumstances. The *Ward* court included all public officials and agencies responsible for some aspect of the investigation and prosecution of a case in its definition of “the prosecution.” The court identified four separate categories of public agents who were directly responsible for the disclosure of information material to the defense: (1) the three separate police forces that worked on the case, (2) the entire staff of the prosecution office, (3) the prosecution psychiatrists, and (4) the prosecution forensic scientists.²⁰² The court then devoted a separate section to each of the four groups, in which each was found to have failed its individual and positive responsibilities for disclosure. The court therefore made it clear throughout its opinion that the duty of disclosure was triggered not just by the adversarial responsibilities and demands of discovery but rather by the more fundamental imperatives of public accountability.

The court also settled upon a standard of materiality that surpasses its American counterpart in both principle and scope. It will be recalled that the *Brady* standard of materiality is limited to evidence which, at the point of post-trial review, “probably would have resulted in acquittal.”²⁰³ The

200 *Id.* at 51–52.

201 *Id.* at 51.

202 *Id.* at 23.

203 *United States v. Agurs*, 427 U.S. 97, 111 (1976).

Brady standard is therefore not so much a standard of material evidence as it is a standard of material, or reversible, error. The *Ward* court approached the issue as one driven by the simple principle of fairness to the accused at the point of indictment. It therefore carefully distinguished between material evidence and material error, and made it plain that the duty of *disclosure* had a principled application only to the former.

The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity.²⁰⁴

The Court of Appeal then proceeded to make clear that it was entirely inappropriate for a prosecutor to measure the duty to disclose material evidence by the likelihood that nondisclosure will ultimately constitute a material error. One Mr. Langdale presented the appeal for the government, and at several points he conceded the nondisclosure of material evidence but argued that the error itself was not material. The court conceded the distinction but went on to caution against confusing the principle with the exception.

We would emphasize, however, that the scope for the application of Mr. Langdale's proposition is limited to matters which, at the end of the day, can be seen to have been of no real significance. The possibility that this view will ultimately be taken of any particular piece of disclosable evidence should be wholly excluded from the minds of the prosecution when the question of disclosure is being considered. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defense.²⁰⁵

This is of course in sharp contrast to the reasoning of the Supreme Court in *Ruiz* where the Court insisted that only with "the benefit of hindsight" could the measure of materiality be taken. The *Ward* court appeared so intent on cementing this understanding of the duty of disclosure as a prospective, *pretrial* obligation of the prosecution that it returned to it on several occasions.

"Material evidence" means evidence which tends either to weaken the prosecution case or to strengthen the defence case.²⁰⁶

....

²⁰⁴ *Ward*, 96 Crim. App. at 22.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 56.

We would emphasize that “all relevant evidence of help to the accused” is not limited to evidence which will obviously advance the accused’s case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.²⁰⁷

....

It extends to anything which may arguably assist the defence.²⁰⁸

In its analysis of the failure to disclose scientific evidence to the defence, the *Ward* court provided a compelling illustration of the inherently prospective quality of material evidence.

It is necessary to consider the impact of the legal rules governing the disclosure by the prosecution of material scientific evidence. An incident of a defendant’s right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial. The materiality of evidence on the scientific side of a case may sometimes be overlooked before a trial. If the significance of the evidence becomes clear during the trial there must be an immediate disclosure to the defence.²⁰⁹

The third major accomplishment of *Ward* was to bring to a close the traditional privilege of prosecutorial discretion in matters of disclosure. Once again the court found a review of the “adversarial character of the proceedings”²¹⁰ to provide good reason to remove rather than to sustain the privilege. The court found the self-regulating posture of the prosecution to be incompatible with the “positive”²¹¹ duty of disclosure now being imposed upon it. The court also found the manifold failures of disclosure in this very case to be ample evidence of the dissonance between the duty and the discretion of the prosecution. In reference to the argument regarding the positive nature of this duty made by one Mr. Mansfield, counsel for the defense, the court responded as follows:

Mr. Mansfield’s position was simple and readily comprehensible. He submitted that there was such a duty, and that it admitted of no qualification or exception. Moreover, he contended that it would be incompatible with a

²⁰⁷ *Id.* at 25.

²⁰⁸ *Id.* at 52.

²⁰⁹ *Id.* at 50–51.

²¹⁰ *Id.* at 51.

²¹¹ *Id.* at 1.

defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own cause on the asserted claim to immunity. ... We are fully persuaded by Mr. Mansfield's reasoning on this point. It seems to us that he was right to remind us that when the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. These considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence.²¹²

This passage certainly reflects a superior understanding of the essential checks and balances that both distinguish and safeguard the competitive enterprise of an adversarial system, for here the Court of Appeals recognizes that the inherent tendencies of such a system, in which the market of information is not an open one, contradict an unregulated privilege in the hands of law enforcement officials.²¹³ No mechanism to check or balance the competitive advantages of secrecy held by the prosecution can be made operable without a triggering mechanism that is itself dependent upon a certain measure of disclosure. The *Ward* opinion therefore repudiates the laissez-faire tradition of the *Brady* doctrine in a most fundamental sense. It forcefully articulates a recognition that fundamental fairness is a preemptive state responsibility and not a negotiable characteristic of the competitive exercise. In turn, it provides a compelling account of the need to set a principled check on the ability of the prosecution to abuse this power rather than to rely upon the market of criminal justice to "balance"²¹⁴ the privileges of the defendant with those of the prosecution.

Ward was certainly a "watershed,"²¹⁵ "landmark"²¹⁶ decision in English law. It contained a series of both factual findings and legal conclusions which firmly stamped the evolving judicial response to the scandals of non-disclosure. It was in the ordinary course followed by a handful of cases which served both to affirm and to modify the broad holdings of *Ward*.²¹⁷

212 *Id.* at 57.

213 In a subsequent case, the Court of Appeal stated this point even more succinctly: "[I]n our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial." *R v. Brown*, [1995] 1 Crim. App. 191, 198 (Eng.).

214 *Ward*, 96 Crim. App. at 22.

215 NIBLETT, *supra* note 155, at 3.

216 CORKER, *supra* note 166, at 36.

217 *See, e.g.*, *R v. Blackledge*, [1996] 1 Crim. App. 326 (Eng.) (reverses conviction based upon plea of guilty where material information not provided to defendant prior to plea); *R v. Brown*, [1995] 1 Crim. App. 191 (Eng.) (*Ward* does not require pretrial disclosure of prior convictions of defense witnesses); *R v. Keane*, [1994] 99 Crim. App. 1 (Eng.) (providing very broad restatement of standard of materiality); *R v. Davis, Johnson and Rowe*, [1993] 97 Crim. App.

The case law sponsored an ambitious solution that extended well beyond the simple *Brady* paradigm regarding the disclosure of explicitly exculpatory material. The English Court of Appeal adopted a “general principle of open justice”²¹⁸ which required the government to disclose whatever information it possessed that was “material” in the sense that it could be deemed:

- (1) to be relevant or possibly relevant to an issue in the case;
- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
- (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).²¹⁹

Yet it is also true that the high-water status of *Ward* was relatively short lived. However solidly grounded it was in notions of due process and fundamental fairness, in English law *Ward* had the status of only a common-law opinion. The English doctrine of Parliamentary supremacy provided that that body was entitled to have the next, if not the last, word on the matter. So, the matter of disclosure quickly became embroiled in the then broader activist ambitions of the Conservative government to redraw some of the more established ground rules of English criminal justice.

3. *The Legislative Stage.*—The scandals of nondisclosure had seriously compromised the state of English criminal justice, and the widely heralded opinion in *Ward* served in large measure to underscore the damage. *Ward* was quickly followed by a period of nearly unrestricted “open file” discovery throughout England in which “defense lawyers sometimes bombard[ed] the prosecution with requests for thousands of documents with little regard to their relevance.”²²⁰ The Court of Appeal itself shortly called upon the government to conduct a thorough legislative review of the discovery dilemma given that “the ideal solution might be a statutory statement of the duties of the Crown regarding disclosure of relevant information.”²²¹ The Conservative government wasted no time with an extended review. In 1995, the Home Office prepared a white paper entitled *Disclosure: A Consultation Document*, which listed seven principal problems with the recently developed common law of disclosure.²²² The following year

110 (Eng.) (ex parte application to conceal sensitive material requires notice to defense).

218 *Keane*, 99 Crim. App. at 1.

219 *Id.* at 6.

220 *Brown*, 1 Crim. App. at 202.

221 *Id.*

222 Cm 2864, London: HMSO, 1995, cited in NIBLETT, *supra* note 155, at 221

the government introduced and Parliament passed the Criminal Procedure and Investigations Act of 1996 (CPIA 1996).²²³

The CPIA 1996 is a remarkable piece of legislation that has invited enormous controversy and reaction among the unallied partisans of criminal justice in England.²²⁴ It has abruptly introduced into the English criminal justice system the already adopted concept in America of “reciprocal” discovery. There is no question that the statute was designed to reverse the compromise to the prosecution’s status and autonomy affected by the recent spate of Court of Appeal rulings. “The CPIA 1996 features the return of unfettered prosecution discretion in the primary disclosure stage, a change aimed directly at the decision in *Ward*.”²²⁵ Yet, in the end, this extraordinary Conservative reaction to the progressive rulings of the courts serves only to underscore the essential failings of the American *Brady* doctrine. As reactionary as the statute may be, it nonetheless recognizes and affirms an essential principle of disclosure that is still denied by our Supreme Court. “While the CPIA 1996 has imposed many restrictions on disclosure to the defence, it does not purport to alter the important principle that primary disclosure should be given as early in the proceedings as practicable.”²²⁶

It would therefore appear that throughout the tumultuous period of the IRA scandals and the contentious folding and refolding of a new national regime of disclosure law, it has never occurred to any of the multiple parties involved in England to suggest that the adversarial system itself mandated a prosecutorial privilege to withhold exculpatory material subject only to the perchance ability of the defendant, subsequent to his conviction at trial, to demonstrate a likelihood that pretrial disclosure of the withheld information would have altered the verdict at his trial. The entire body of case law, the various governmental studies and reports, the prosecution’s own self-governing guidelines, as well as the CPIA 1996 all emphatically repudiate such an empty standard.

4. Convergence: The Human Rights Stage.—England has already entered upon its next stage in the development of a national law of prosecutorial disclosure. Two years after enacting the CPIA 1996, England passed the Human Rights Act (HRA 1998),²²⁷ which went into effect in October of 2000. The essential command of the HRA 1998 is to require English judges

223 Criminal Procedure and Investigations Act, 1996, c. 25, § 27 (Eng.).

224 See generally Plotnikoff & Woolfson, *supra* note 162; SIR ROBIN AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 28, 53 (2001), available at <http://www.criminal-courts-review.org.uk/auldconts.htm>; JOHN ARNOLD EPP, BUILDING ON THE DECADE OF DISCLOSURE IN CRIMINAL PROCEDURE (2001).

225 EPP, *supra* note 14, at 258.

226 *Id.* at 262.

227 Human Rights Act, 1998, c. 42 (Eng.).

to make every effort to interpret English law to be consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²²⁸ Article 6 of the ECHR is the basis for the European fair-trial convention of “equality of arms.” The case law of the European Court of Human Rights has already established that the principle requires timely pretrial disclosure to the defendant of all exculpatory material.²²⁹ Therefore, English law will likely continue on its path towards greater convergence with the equitable principles of fair disclosure already established in European and, as will be developed in the next Part, international law.

B. Canada

During the same period in the early 1990s when the tempest of nondisclosure was raging in England, the Canadian Supreme Court quietly made its own independent, yet compelling, contribution to the emerging law of prosecutorial disclosure. Indeed, the exceptionally lucid and principled discussion found in the leading Canadian case of *R v. Stinchcombe*²³⁰ has become required reading for courts and commentators alike, and it has also been adopted more recently by the English House of Lords.²³¹

The Canadian legal system has traditionally been patterned on the English common law adversarial system, but the Canadian criminal justice system reflects a greater influence of the European civil law tradition. Thus, whereas the tradition in England for over 100 years has been to provide the defense with pretrial discovery of all evidence to be proffered at trial (the “used” material), Canada had virtually no tradition of formal discovery by the defense. Rather, the Canadian approach was to require the prosecutor in the first instance, as an obligation to the court itself, to provide the tribunal with all evidence, both inculpatory and exculpatory, material to the charge.²³² The defense was thereby presumed to be a secondary beneficiary of this primary, governmental obligation. The cases indeed required the prosecution itself to present all exculpatory material at trial.²³³ Therefore, until the very eve of the new era prompted by the nondisclosure scandals in England, the only reform issue percolating in Canadian law was whether to create an obligation on the prosecution to provide the defense with direct notice of the inculpatory evidence it intended to proffer at trial.

228 *Id.* at § 3.

229 The seminal case is *Jespers v. Belgium*, App. No. 8403/78, 5 Eur. H.R. Rep. 305, 307 (1982). See also *Rowe v. United Kingdom*, App. No. 28901/95, 30 Eur. Ct. H.R. 1, 2 (2000); *Edwards v. United Kingdom*, App. No. 13071/87, 15 Eur. Ct. H.R. 417, 426 (1993).

230 *R v. Stinchcombe*, [1991] 3 S.C.R. 326.

231 See *R v. Mills*, [1998] A.C. 382 (H.L.) (appeal taken from Eng.).

232 See *R v. Cook*, [1997] 1 S.C.R. 1113.

233 See *Lemay v. R.*, [1952] 1 S.C.R. 232, 240–41.

The Canadian criminal justice system has undergone a significant series of independent changes in the modern era. The creation of a prosecutorial service, independent of the police, occurred in most of the Canadian provinces prior to the 1986 creation of the Crown Prosecutions Services (CPS) in England. This alone generated greater attention to the professional ethics of the prosecutor as such, independent of the investigative practices of the police. In 1985, Canada passed its own national bill of rights, which provided the Canadian Supreme Court with powers of judicial review not unlike those of our own Supreme Court.²³⁴ These changes reflected a broader, more fundamental concern in Canada with the nature of the modern prosecutorial role in a traditionally adversarial system. In the early 1970s, the Law Reform Commission of Canada, after conducting a broad survey of Canadian prosecutors, sounded an early warning that "prosecutors cannot be expected to ignore the adversary nature of their role in exercising their discretionary power as to whether or not to grant discovery."²³⁵

The development of a new national protocol for prosecutorial disclosure therefore arose independently of the scandals in England yet ultimately merged with the common law resolution expressed in *Ward*.

Briefly, the modern common law has concluded that the accused's right to disclosure is an inseparable part of his right to a fair trial. Fair disclosure includes early disclosure by the prosecution of its case and any unused information that may assist the defence case or lead to new lines of inquiry.²³⁶

In Canada this common law evolution has now taken the next step in recognizing the right to disclosure as not only an inseparable part of a fair trial but also a freestanding right independent of trial.

There were no major scandals in Canada, yet there have been a handful of recent cases involving nondisclosures and wrongful convictions.²³⁷ In the very first of these cases to receive the attention of the Canadian Supreme Court, the Court struck a resounding blow against the hobgoblins of the premodern era of adversarial nondisclosure.

In *R v. Stinchcombe*,²³⁸ the defendant was a lawyer charged with the serious yet mundane crimes of theft, fraud, and breach of trust involving financial instruments he had held in trust for his client. At a preliminary inquiry in the case, the Crown had taken testimony from the defendant's former secretary which was "apparently favourable" to the defendant.²³⁹ The tes-

234 Canadian Bill of Rights, R.S.C., app. III, § 2 (1985).

235 LAW REFORM COMM'N OF CANADA, WORKING PAPER NO. 4, CRIMINAL PROCEDURE: DISCOVERY, para. 45 (1974), reprinted in LAW REFORM COMM'N OF CANADA, STUDY REPORT: DISCOVERY IN CRIMINAL CASES (1974).

236 EPP, *supra* note 14, at 33.

237 *See id.* at 43 nn.105-08.

238 *R v. Stinchcombe*, [1991] 3 S.C.R. 326.

239 *Id.* at 326.

timony itself was not a matter of record in the proceeding. Subsequent to that inquiry, the police had also taken two statements from the secretary, once prior to and once during the actual trial. The former secretary refused to speak to the defense prior to trial. The defense made a request for disclosure following each of the two statements but was denied. It was not until the third day of trial that the defense learned that the prosecution did not intend to call the secretary at trial on the ground that her testimony “was not worthy of credit.”²⁴⁰ The defendant therefore made a demand to the court for the pretrial disclosure of the secretary’s statements. Both the trial and intermediate appellate court upheld the nondisclosure on the broad ground that “under the circumstances” the prosecution had no obligation to call the witness and the defendant had no recognized right to compel such disclosure.²⁴¹

The Supreme Court began its analysis of the disclosure issue with the understated recognition that the law in Canada up to that point was “not settled.... No case in this court has made a comprehensive examination of the subject.”²⁴² The Court, per Justice Sopinka, made quick note of the fact that “[p]roduction and discovery were foreign to the adversary process of adjudication in its earlier history,”²⁴³ and then just as quickly repudiated that history. “It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming.”²⁴⁴

It was at this point in the opinion that Justice Sopinka made the simple observation that has now become the most cited passage in the burgeoning annals of the jurisprudence of disclosure: “I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”²⁴⁵

The Court was not unaware of the traditional arguments against disclosure in an adversarial system. It responded to the well-traveled hobgoblin that prosecutorial disclosure would provide the defense with an undue advantage to tailor its defense to the prosecution’s evidence with the observation that in the modern era of adversarial justice disclosure itself had become a normative process.²⁴⁶ “The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all rel-

240 *Id.* at 330.

241 *Id.* at 331.

242 *Id.* at 331–32.

243 *Id.* at 332.

244 *Id.* at 333.

245 *Id.*

246 *Id.* at 335.

evant material.”²⁴⁷ The Court described this historical trend as a “wholly natural evolution of the law in favour of disclosure.”²⁴⁸

Stinchcombe designated a broad national standard of disclosure for Canadian prosecutors. There was a general rule of “disclosure of all relevant information” whenever there was a “reasonable possibility” that a failure to disclose would impair the defendant’s ability to make a “full answer and defence.”²⁴⁹ This primary concern with the functionality of disclosure also led the Court to set a strict standard for the timing of such disclosures. Disclosure serves its mission only when it occurs prior to the point at which the defendant is required to make informed decisions regarding his answer to the charges. Therefore, “initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way.”²⁵⁰

The significance of this timely disclosure provision is rather profound for our purposes, because it reveals the Canadian Supreme Court’s recognition that it is the *entire* criminal justice process and not just the trial process alone that must be fair. The *Brady* doctrine expressly excludes from its purview any nondisclosure by the prosecutor, however willful or unethical, unless it affects the outcome of an actual trial. It therefore limits the due process requirement of fair disclosure to a mere handful of criminal cases. The *Stinchcombe* court, however, requires the prosecutor to maintain a fair and ethical standard throughout the criminal process in all cases, regardless of whether the defendant chooses to plead guilty or otherwise independently manages to uncover the nondisclosure by the prosecutor.

There is one passage in *Stinchcombe* that alone poignantly highlights the striking contrast between the respective approaches to disclosure of the Canadian and the American Supreme Courts. As will be recalled, the *Brady* rule as developed by the Supreme Court posits that the only value regarding prosecutorial disclosure cognizant within our due process matrix is that of a factually fair *result* at trial.²⁵¹ If there is no trial or if there is a guilty verdict at trial which the defendant cannot retroactively demonstrate to be probably incorrect, then there has been no constitutional violation even where the prosecutor has willfully, even unethically, failed to disclose clearly exculpatory information. The *Brady* rule therefore posits that it is *only* in the post-trial setting where the courts can properly perform the trial-based analysis required to determine due process. “An assessment of whether an

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 338.

²⁴⁹ *Id.* at 340.

²⁵⁰ *Id.* at 342.

²⁵¹ “[S]trictly speaking, there is never a real ‘*Brady* violation’ unless the [Government’s] nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

outcome would have been different if undisclosed evidence had been disclosed is best made after a trial is concluded.”²⁵²

The Canadian Supreme Court in *Stinchcombe* flatly rejected this inverted, looking-glass logic of the *Brady* doctrine. The statements of the secretary that had been withheld by the prosecutor were never revealed and were not part of the record before the high court. Therefore, the Canadian prosecutor attempted to produce the statements before the Supreme Court in order to demonstrate what American prosecutors are routinely permitted to demonstrate even in a most protracted post-trial setting, namely, that the withheld evidence would not have altered the outcome of the case. The Canadian Supreme Court found this approach so inappropriate that it did not even permit the prosecution to produce the statements.

During argument before this court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether statements would have been material to the defence if produced at trial.²⁵³

It is therefore clear that the high courts in both England and Canada, the two mature adversarial systems most closely resembling our own, have each, under vastly different circumstances, arrived at the same conclusion regarding the essential logic of the Supreme Court’s *Brady* doctrine: it not only fails to recognize but affirmatively contravenes the principles of natural or fundamental justice required of a modern system of adversarial criminal justice. As shall be seen in the next Part, the modern systems of international criminal justice agree.

III. INTERNATIONAL *BRADY*

The 1990s have become the decade of disclosure for international criminal justice as well. Since Nuremberg, the template for international criminal justice has been adversarial; there are no common law juries, but there is always an independent office of the prosecution. “It is generally recognized that the adversarial system is more suitable when it comes to offering protection to the rights of the accused.”²⁵⁴ The assumption has been that, with regard to any tribunal convened to prosecute crimes against international law, there would be an independent prosecutor to present the charges and the defendant would in turn be provided with a set of adversarial rights to

²⁵² *In re United States v. Coppa*, 267 F.3d 132, 143 (2d Cir. 2001).

²⁵³ *Stinchcombe*, 3 S.C.R. at 331.

²⁵⁴ SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 16 (2003).

guarantee him an "equality of arms"²⁵⁵ with the prosecutor. This principle of adversarial equality has over time led to the development in international law of a widely adopted list of basic rights, located principally in Article 14 of the International Covenant on Civil and Political Rights (ICCPR)²⁵⁶ and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).²⁵⁷

Yet neither Article 14 nor Article 6, nor any of the many derivative international human rights protocols, contains a positive right of exculpatory disclosure.²⁵⁸ Also, until recently there had been no independent tribunal of original jurisdiction convened since Nuremberg and Tokyo to prosecute crimes against international law. The early 1990s witnessed the creation of two such tribunals to prosecute war crimes arising from hostilities in Yugoslavia and Rwanda, as well as the creation of the International Criminal Court (ICC). These three newly created international criminal venues have dramatically expanded and transformed the arena of international criminal prosecutions. Each has relied directly upon the principle of equality of arms to create a specific rule requiring early and extensive disclosure of exculpatory material. Thus within several years of the heralded English Court of Appeal opinion in *Ward*, these three tribunals have each adopted a rule of prosecutorial disclosure that has put the *Brady* rule sharply at odds with present standards of international human rights and criminal justice.

The equality-of-arms principle has served as an analogue to our principle of due process to extrapolate the specific guarantees of the broader right to a fair trial. It has thus led to the principled development of an affirmative right of disclosure derived from the original declaration of a right to a fair trial contained in Article 10 of the Universal Declaration of Human Rights.²⁵⁹ This incremental, yet principled, progression has been best captured by the European Court of Human Rights in a recent case in which it reviewed certain of the disclosure provisions of England's CPIA 1996:

255 "The principle of 'equality of arms' should ensure that the machinery of state, with its investigative and prosecutorial strength and resources, does not prevent an accused from learning any relevant information which may assist in establishing innocence." NIBLETT, *supra* note 155, at 265.

256 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

257 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5.

258 "[O]ne should note that the defendants in both Nuremberg and Tokyo had no possibility of obtaining exculpatory evidence from the Prosecutor." ZAPPALA, *supra* note 254, at 20.

259 "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (Dec. 10, 1948).

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition [ECHR] Article 6(1) requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.²⁶⁰

A. *The Two War Crimes Tribunals*

The early 1990s witnessed war crime atrocities in Yugoslavia and then Rwanda. The United Nations Security Council responded by creating the first two international war crimes tribunals since Nuremberg and Tokyo. The International Criminal Tribunal for Yugoslavia (ICTY) was created in May of 1993²⁶¹ and the International Criminal Tribunal for Rwanda (ICTR) followed in November, 1994.²⁶² The statute creating each tribunal left to the judges presiding over the respective tribunal the task of creating a detailed set of rules of evidence and procedure.²⁶³ The ICTY created the first set of Rules of Procedure and Evidence in February of 1994,²⁶⁴ which were later adopted virtually in toto by the ICTR in June of 1995. The original rules of both tribunals therefore contained the same rule, Rule 68, specifically requiring the disclosure of exculpatory material. “The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.”²⁶⁵

A formative body of case law has already developed pursuant to Rule 68, almost all of it decided by trial court panels of the ICTY. Discovery generally and of exculpatory material in particular has been a prominent defense strategy in a number of the ICTY cases. Disclosure of exculpatory material appears not yet to have surfaced as a matter of concern in the less developed case law of the ICTR.

There have been two general aspects to the early Rule 68 case law of the ICTY. The first has been to separate and identify the unique role of the Rule 68 right of disclosure within the context of a broad set of discovery

260 *Rowe v. United Kingdom*, 30 Eur. Ct. H.R. 1, 2 (2000).

261 *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

262 *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

263 *See* S.C. Res. 827, *supra* note 261, art. 15; S.C. Res. 955, *supra* note 262, art. 14.

264 *See* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, available at http://www.un.org/icty/basic/rpe/IT32_rev36.htm.

265 *Id.* at R. 68(i).

rules and the second has been to identify the actual contours of the right itself. Adversarial justice in the international setting, directed largely by the principle of equality of arms, places a high premium on transparency. Rules 66 and 67 of the two tribunals provide for very broad initial discovery by the defense, and then rather broad reciprocal discovery by the prosecution. In order to avoid the reciprocal discovery provisions of the general discovery rules, the defense in many of the ICTY cases has bypassed Rule 66 in favor of making a broad, open-ended motion for discovery of exculpatory material pursuant to Rule 68. This has led to the first aspect of the case law developments which attempted to prevent this bypass strategy by imposing an initial prima facie burden of entitlement upon the defense in order to support a Rule 68 motion. Interestingly, the ICTY panels have employed the equality-of-arms principle itself to defeat the bypass strategy.

[B]y expressly restricting itself to Rule 68 of the Rules, the Defence, while requesting such broad access to Prosecution documentation, is avoiding the reciprocal obligation which it would have pursuant to Rules 66 and 67 of the Rules. Acceding to its request without limitations would consequently disturb the balance of the trial, particularly since such a disclosure would manifestly occur beyond the strict requirements of Rule 68 which requires the disclosure of exculpatory "evidence" and not all or an entire section of the Prosecutor's documentation.²⁶⁶

This in itself is a notable development in the initial case law of a tribunal struggling on many fronts to create a standardized protocol of adversarial justice in a setting of extreme urgency and complexity. The tribunal appears to have rather deftly and expeditiously retired the hobgoblin of "open file" defense discovery that continues to haunt the Supreme Court's development of the *Brady* doctrine. The Supreme Court has routinely raised the specter of ungovernable discovery by the criminal defendant as a ground for its crabbed approach to the disclosure of strictly exculpatory material.²⁶⁷ Yet the tribunal has expressed little difficulty in separating the two. It therefore has been able to formulate a very broad rule of affirmative disclosure regarding the discovery of exculpatory material while at the same time maintaining the adversarial balance intended by the rules of general discovery.

The ICTY case law has therefore constructed a set of limitations on Rule 68 motion practice which appear designed primarily to prevent misuse of the rule rather than to restrict what is in fact affirmatively required of prosecutors with regard to exculpatory material. The trial court panels

²⁶⁶ Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Defence Motion for Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence, ¶ 20 (Apr. 29, 1998).

²⁶⁷ See *supra* text accompanying note 96.

in their Rule 68 decisions acknowledge their formal “consideration” of the prosecutor’s initial affirmative obligation to search for and disclose any information that falls within the tribunal’s broad purview of exculpatory material.²⁶⁸ Once the prosecutor has affirmed compliance with that obligation, the courts do not permit the defendant to engage in a “fishing expedition” by way of broad demands for disclosure pursuant to Rule 68.²⁶⁹ In order to overcome the prosecutor’s initial declaration of compliance with the rule, the defendant is required to make a prima facie showing that the prosecutor is indeed in possession of material which qualifies as exculpatory under the rule.²⁷⁰ Where the prosecutor has complied with her pretrial obligation to disclose but exculpatory material has nonetheless come to her attention in a post-trial setting, the courts have adopted what is an essentially harmless error standard of review.²⁷¹

Yet even in this formative stage of constructing a Rule 68 jurisprudence, the ICTY has managed to issue a series of declarative rulings that implicitly yet clearly reject and surpass the limitations of the Supreme Court’s jurisprudence in the *Brady* doctrine. The tribunal easily recognized that a request by the defendant had absolutely no bearing on the prosecution’s affirmative duty to disclose exculpatory material,²⁷² thereby repudiating the Supreme Court’s ultimately failed attempt in *Agurs* to create a multi-tiered system of disclosure which was critically dependent upon the nature and timing of a request for disclosure by the defendant.²⁷³ The ICTY courts have also made it perfectly clear that a right of disclosure is only meaningful if it accomplishes the fundamental purpose of disclosure: to provide the defendant with a fair opportunity to prepare and present his initial defense to the charges. The tribunal’s unqualified, and virtually unchallenged, imperative regarding the timeliness of disclosure is therefore in itself an essential repudiation of the looking-glass logic of the *Brady* doctrine.

The Trial Chamber strongly believes that if a rule is created and intended to have some value, especially if it creates a right, then the remedy must be

268 One of the early amendments to Rule 68 replaced the word “evidence” with that of “material” to conform to the early case law which held that the rule was not limited to exculpatory information that was admissible as evidence. *See* Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, ¶ 11 (Nov. 1, 1999).

269 Prosecutor v. Brdjanin, Case No. IT-99-36, Decision on Motion by Momir Talic for Disclosure of Evidence, ¶ 7 (June 27, 2000).

270 *See* Prosecutor v. Delalic, Case No. IT-96-21, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, ¶ 13 (June 24, 1997).

271 *See* Prosecutor v. Tadic, Case No. IT-94-1, Decision on Motion for Review, ¶ 20 (July 30, 2002).

272 *See* Prosecutor v. Blaskic, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, ¶ 47 (Jan. 27, 1997).

273 *See supra* text accompanying note 91.

an effective one. The principle of a fair trial has the following implications with respect to the meaning of Rule 68. *First*, the principle of a fair trial requires that disclosure of exculpatory material be made in sufficient time. Thus, if the Prosecution has the statement of a person which contains exculpatory evidence and does not intend itself to call that person as a witness, disclosure as soon as practicably possible is a must to ensure that the Defence has an opportunity to subpoena that witness or to use that exculpatory material during the cross-examination of witnesses whom the Prosecution intends to call.²⁷⁴

The ICTY case law has also implicitly rejected the Supreme Court's insistence in the *Brady* doctrine that the principle of exculpatory disclosure applies narrowly and exclusively to its impact on the trial proceeding itself. The tribunal has treated it as self-evident that the entire prosecution and not just the trial itself must satisfy the standards of fairness.²⁷⁵ Therefore, the cases have held that information which would not itself be admissible at trial is subject to Rule 68 disclosure.²⁷⁶ They have also held that even information which was not available to the prosecution at trial but surfaced only during the pendency of an appeal is subject to the fair trial principle of Rule 68.²⁷⁷ The tribunal, as part of its ongoing efforts to separate general discovery from exculpatory disclosure, has also explicitly set a higher standard for the very form and detail of disclosure required in the case of exculpatory material.²⁷⁸

274 Prosecutor v. Brdjanin, Case No. IT-99-36, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved, ¶ 26 (Oct. 30, 2002).

275 "When one looks at the jurisprudence of the ICTY and ICTR one notices that the Chambers are generally aware of their obligation to ensure the fairness of the trial as a whole." Goran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 943 (2003).

276 "The expression 'evidence' is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence." Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, ¶ 11 (Nov. 1, 1999).

277 "[T]he Appeals Chamber also believes that the Prosecution is under a *legal* obligation to continually disclose exculpatory evidence under Rule 68 in proceedings before the Appeals Chamber. The application of Rule 68 is not confined to the trial process." Prosecutor v. Blaskic, Case. No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, ¶ 32 (Sept. 26, 2000).

278 See Prosecutor v. Blaskic, Case. No. IT-95-14, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, ¶ 15 (Jan. 30, 1998).

B. *The International Criminal Court*

The International Criminal Court (ICC), established by the Rome Statute of 1998,²⁷⁹ is the first permanent court of international criminal justice. It represents the fulfillment of an ambition of the international community that began shortly after the First World War and has persisted in fits and starts ever since.²⁸⁰ It would be difficult to overstate the significance of the court, both immediate and extended, to the development of a universal protocol of criminal justice. “Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in the respect of fundamental human rights.”²⁸¹ The creation of the ICC has produced a merger of the longstanding conventions of human rights with the operational practice of a court of first instance. It is a seminal development of first magnitude. “The Rome Statute takes the form of an international treaty, but has the status of a constitution.”²⁸²

The early drafts of the Rome Treaty, written in the immediate post-*Ward* era, included the first appearance in international law of a rule of exculpatory disclosure. The initial draft of the statute, issued in May of 1993, did not contain such a rule.²⁸³ However, several months later the first revision of the draft did contain a rule combining the disclosure of exculpatory material with that of general discovery by the defendant: “[a]ll incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.”²⁸⁴

A year later, in July 1994, there was another major reworking of the draft statute. At this point the rule of exculpatory disclosure was separated from the rule of general discovery and given its own independent listing. “Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of

279 Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

280 See M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 3 (1998).

281 William A. Schabas, *Article 67: Rights of the Accused*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 846 (Otto Triffterer ed., 1999).

282 Leila Nadya Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1077 (2003).

283 See U.N. Int'l Law Comm'n, *Draft Statute for an International Criminal Court, Eleventh Report of the Draft Code of Crimes against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/449 (March 25, 1993) (prepared by Doudou Thiam).

284 U.N. Int'l Law Comm'n, *Report of the Working Group on a Draft Statute for an International Criminal Court*, art. 44, ¶ 3, July 16, 1993, 33 I.L.M. 253, 281 (1993).

doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.”²⁸⁵

As will be recalled, shortly after the first appearance of this rule in the drafts of the Rome Statute, the ICTY in early 1994 adopted its own Rule 68. Thereafter the experience of the tribunal with Rule 68 was reflected in the evolving revisions to the ICC rule. Finally, the rule emerged as Section 2 of Article 67: Rights of the Accused.

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.²⁸⁶

Thus it is that international law, following the disclosure scandals in England and the extended litigation at the ICTY, now has a constitutional law of exculpatory disclosure that will, over time, likely become the exemplar of the standard for fair and equitable disclosure not only in the international arena but also in national jurisdictions both common law and civil.

IV. CONCLUSION

The *Brady* doctrine, as developed by the Supreme Court, has never lived up to its billing. It begins with the right idea—fundamental fairness requires state disclosure of exculpatory information to the criminal defendant—but then immediately cabins and compromises that idea. The only consistent and compelling explanation for the unprincipled reductions of the doctrine is an unreconstructed fear of the hobgoblins of an earlier era regarding the dangers of disclosure to overly zealous defense counsel. *Brady* is now best understood as a rule of prosecutorial privilege rather than a rule of disclosure. The doctrine at present is an ill-supported house of cards which will likely not even be able to sustain itself against the mounting challenges developing within the lower courts as a result of increasing revelations of prosecutorial foul play and abuse regarding such nondisclosures. But there is now a new dimension of criticism and pressure to reform which has developed outside our legal system. The “decade of disclosure”²⁸⁷ in foreign and international law has resulted in a *Brady* doctrine which now stands very much alone in the world community regarding the essential commands of

²⁸⁵ U.N. Int'l Law Comm'n, *Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session*, art. 41(2), U.N. Doc. A/49/10 (May 2–July 22, 1994), reprinted in [1994] 2(2) Y.B. Int'l L. Comm'n 56, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

²⁸⁶ Rome Statute, *supra* note 279, art. 67, ¶ 2.

²⁸⁷ See EPP, *supra* note 14.

human rights and fundamental fairness. The Supreme Court should simply abandon the looking-glass logic behind its frustrated attempts to limit the doctrine to the post-trial setting and recognize instead that due process must begin when the process itself begins.

ARTICLES

BRADY'S BLIND SPOT: IMPEACHMENT EVIDENCE IN POLICE PERSONNEL FILES AND THE BATTLE SPLITTING THE PROSECUTION TEAM

Jonathan Abel*

The Supreme Court's Brady doctrine requires prosecutors to disclose favorable, material evidence to the defense, but in some jurisdictions, even well-meaning prosecutors cannot carry out this obligation when it comes to one critical area of evidence: police personnel files. These files contain valuable evidence of police misconduct that can be used to attack an officer's credibility on the witness stand and can make the difference between acquittal and conviction. But around the country, state statutes and local policies prevent prosecutors from accessing these files, much less disclosing the material they contain. And even where prosecutors can access the misconduct in these files, their ability to disclose this information, as required by the Constitution, is constrained by the efforts of police officers and unions who have used litigation, legislation, and informal political pressure to prevent Brady's application to these files. Suppression of this misconduct evidence can cost defendants their lives, but disclosure can also be costly. It can cost officers their livelihoods.

Using interviews with prosecutors, police officials, and defense attorneys around the country, as well as unpublished and published sources, this Article provides the first account of the wide disparities in Brady's application to police personnel files. It argues that critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access

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to the personnel files and as a result of the conflict within the prosecution team over Brady's application to these files. Further, the Article challenges Brady's assumption that prosecutors and police officers form a cohesive "prosecution team" and that, in the words of the Supreme Court, "the prosecutor has the means to discharge the government's Brady responsibility if he will" by putting in place "procedures and regulations" to bring forth information known only to the police. Finally, the Article contends that privacy protections for police misconduct are incompatible with core aspects of the Brady doctrine and that systems that attempt to balance Brady against police privacy wind up sacrificing the former to the latter. As both a doctrinal and a normative matter, police misconduct should receive no protections from Brady's search and disclosure obligation.

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INTRODUCTION

The Supreme Court decided *Brady v. Maryland* in 1963,¹ and it has spent the past fifty years expanding the doctrine.² *Brady* requires prosecutors to disclose favorable, material evidence to the defense, including anything known to the prosecutor or to any member of the prosecution team.³ Recently, *Brady* violations have received much attention, with blame focused squarely on prosecutors. Courts have appointed special counsel to investigate *Brady*-violating prosecutors, threatened criminal proceedings against prosecutors who withhold *Brady* material,⁴ and gone as far as to declare “an epidemic of *Brady* violations abroad in the land.”⁵ Prosecutors must “stop playing games with *Brady*,” and courts must “deal more harshly with prosecutors who don’t play fair,” according to a recent *Los Angeles Times* editorial.⁶ The *New York Times* editorial board attacked *Brady* violations under the heading “Rampant Prosecutorial Misconduct.”⁷ Meanwhile, the scholarly literature has criticized prosecutors who “willfully bypass[] the disclosure rules,”⁸ “intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence,”⁹ and “require the accused to undertake a scavenger hunt for hidden *Brady* clues.”¹⁰

But there is a critical source of *Brady* material that even well-meaning prosecutors are often unable to discover or disclose: evidence of police misconduct contained in police personnel files. These files contain internal affairs reports, disciplinary write-ups, and performance evaluations, documenting a range of information that defendants can use to their advantage at trial. In many cases, these files contain evidence of an officer’s dishonesty—evidence that can be critical to impeaching the officer’s testimony. In some jurisdictions, this evidence of police misconduct is freely available to the public. But in other ju-

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

2. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

3. *Id.*

4. *United States v. Jones*, 620 F. Supp. 2d 163, 166 (D. Mass. 2009); Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), 2012 WL 858523; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/us/politics/08stevens.html>.

5. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

6. Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, L.A. TIMES (Dec. 29, 2013), <http://articles.latimes.com/2013/dec/29/opinion/la-ed-brady-20131229>.

7. Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html>.

8. Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010).

9. Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2128 (2010) (summarizing “the traditional *Brady* literature”).

10. Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. C.R.-C.L. L. REV. AMICUS 11 (2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf.

risdictions, state laws and local policies make this information so confidential that not even the prosecutor can access the files without a court order. These restrictions on access, in turn, result in the routine and systematic suppression of *Brady* material. While the U.S. Supreme Court's constitutional interpretations are supposed to govern all criminal trials, the reality is that *Brady*'s due process demands are applied in dramatically different ways depending on where the defendant is tried.

Brady's application to police personnel files has grave implications for defendants and police officers. For defendants, the impeachment material in these files can mean the difference between life and death. Misconduct findings are so valuable because they are the police department's own assessment of the officer's credibility. A report in one case found that a detective's "image of honesty, competency, and overall reliability must be questioned."¹¹ Records in another revealed a detective's repeated lies to internal affairs investigators, a psychological assessment that the detective "should not be entrusted with a gun and badge," and a warning to the police department from the office of the state attorney general: "If you had a homicide tonight . . . , I would instruct you that [the detective] not be involved in the case in any capacity."¹² Findings from other cases excoriated officers for making false overtime claims,¹³ filing false police reports,¹⁴ and stealing from the police department.¹⁵ When this misconduct has come out, sometimes decades after trial, murder convictions have been overturned and people have been released from death row.¹⁶

Meanwhile, for officers, *Brady*'s application to their files jeopardizes not their lives but their livelihoods. Officers whose credibility is called into question by police misconduct may not be able to testify in future cases. And officers who cannot testify—so-called "*Brady* cops"—cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand. Such officers would be well advised to start looking for a new profession. Making matters worse, officers fear that prosecutors and police chiefs will abuse the *Brady*-designation system by labeling officers as *Brady* cops in order to punish them outside the formal channels of the police disciplinary system and all its procedural protections. For the officers, then, *Brady* is a matter not only of defendants' due process rights but also of their own due process rights. To protect their interests, officers and police unions have pushed back on

11. *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (internal quotation mark omitted).

12. *State v. Laurie*, 653 A.2d 549, 553 (N.H. 1995) (internal quotation marks omitted).

13. *Fields v. State*, 69 A.3d 1104, 1110 (Md. 2013).

14. *Miller v. City of Ithaca*, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012).

15. *United States v. Robinson*, 627 F.3d 941, 946 (4th Cir. 2010); see also *Problem Officers: What They Did to End Up on List*, SEATTLE TIMES (June 24, 2007, 12:00 AM), http://seattletimes.com/html/localnews/2003760492_bradylist24m.html; *Spokane Officer Suspended for Link with Prostitute*, KHQ (May 20, 2013, 11:08 AM PDT), <http://www.khq.com/story/22299873/straubreleasesstatementaboutofficer>.

16. E.g., *Milke*, 711 F.3d at 1001, 1019; *Laurie*, 653 A.2d at 554.

Brady's application to police files, launching a campaign of litigation, legislation, and informal political pressure aimed at prosecutors and police chiefs.¹⁷ This conflict over *Brady*'s application has split the prosecution team, pitting prosecutors against police officers and police management against police labor.

Despite the high stakes of applying *Brady* to police personnel files—or, perhaps, because of them—there is no nationwide consensus on how to approach this issue. Wide variations in *Brady*'s application to these files stem from a multiplicity of state laws and local policies protecting personnel files, as well as from differences in the institutional dynamics between and within prosecutors' offices and police departments.

Using interviews with prosecutors, police officials, and defense attorneys around the country, as well as unpublished and published sources, this Article provides the first account of the wide disparities in *Brady*'s application to police personnel files. It argues that critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access to the personnel files. Beyond these policies, *Brady*'s application to the files is further impeded by the conflict within the prosecution team. *Brady* assumes that prosecutors and police officers form a cohesive “prosecution team” and that, in the words of the Supreme Court, “the prosecutor has the means to discharge the government’s *Brady* responsibility if he will” by putting in place “procedures and regulations” to bring forth information known only to the police.¹⁸ But when it comes to *Brady*'s application to these personnel files, the prosecution team is at war with itself, and this internal battle makes the concept of the prosecution team fall apart. Finally, the Article contends that privacy protections for police misconduct are incompatible with core aspects of the *Brady* doctrine and that systems that attempt to balance *Brady* against police privacy wind up sacrificing the former to the latter. The Article argues that, as both a doctrinal and a normative matter, police misconduct should receive no protections from *Brady*'s search and disclosure obligation, and that, because the blame for *Brady* violations goes far beyond the prosecutor's office, so must the solutions.¹⁹

This Article proceeds in five parts. Part I looks at how the Supreme Court's *Brady* doctrine applies to police personnel files and at the doctrinal ambiguities the federal courts have failed to resolve.

17. See *infra* Part III.B.

18. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (internal quotation mark omitted).

19. Oft-advocated reforms—giving bite to prosecutors' ethical guidelines, humiliating withholding prosecutors, and providing defendants access to prosecutors' files—would be little help with this issue because they target the prosecutor. For examples of reform proposals, see R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1460 (2011); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 436-39 (2010) (surveying a range of proposed *Brady* reforms); and Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 708-14 (1987).

Parts II and III discuss how the states have applied *Brady* to these files. Part II examines how varying state laws and local policies affect *Brady* compliance. The discussion provides a novel framework that divides jurisdictions into four groups: (1) those where prosecutors cannot access the personnel files; (2) those where prosecutors need not access the files because the records of misconduct are accessible to the public and thus not considered *Brady* material; (3) those where prosecutors have access to the files and use that access to search for and disclose the misconduct information; and (4) those where prosecutors have access to the files but do not put systems in place to search for or disclose the information. Part III contends that, even when prosecutors can discover and disclose *Brady* material in the files, they face much pressure from police officers and unions not to. This conflict within the prosecution team over *Brady*'s application to the files—a conflict described as the “third rail” of the prosecutor-police relationship²⁰—has also pitted police brass against police labor. Part III argues that the internal conflict within the prosecution team is a further impediment to *Brady*'s application to records of police misconduct.

Part IV argues that police misconduct does not deserve the confidentiality protections it currently enjoys. Even if it did deserve such protections, the systems that purport to balance *Brady* against police confidentiality violate core tenets of the *Brady* doctrine and make bad public policy by allowing dishonest officers to continue to testify. Part V argues that the solutions for this *Brady* problem must look beyond prosecutors, and even beyond the police. Making police misconduct more accessible would benefit not only defendants but also society, ensuring fairer trials and forcing dishonest cops off the job.

I. *BRADY* IN THE FEDERAL COURTS

The Supreme Court significantly expanded *Brady*'s sweep over the last fifty years, charging prosecutors with the responsibility for learning of and disclosing favorable evidence found in an increasingly broad array of sources. This expansion took place with the Court focused on evidence in the prosecutor's or the police department's case files. But the logic and the language of the doctrine also dragged along another expanse of *Brady* material, sometimes referred to as “hidden” *Brady* evidence.²¹ This Article refers to this “hidden” *Brady* material as “unrelated-case” evidence. Such evidence meets the three criteria of *Brady*: it is (1) favorable to the defendant, (2) materially so, and (3) known to a member of the prosecution team. But what makes this evidence different from traditional *Brady* material is that it is unrelated to the case: it came to the prosecution team's attention not through the investigation of the

20. Telephone Interview with Jerry Coleman, Chief, Brady, Appellate & Training Div., S.F. Dist. Att'y Office (Feb. 12, 2014).

21. Application of Jeffrey F. Rosen, Santa Clara County District Attorney, for Leave to File Amicus Curiae Brief in Support of Petitioner; Amicus Curiae Brief at ii, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768).

case at hand but through the team members' involvement in other cases. Police misconduct evidence generally falls into this "unrelated-case" category.

However, while the Supreme Court's case law draws this material into the orbit of *Brady*, the Court never considered the special challenges posed to prosecutors by unrelated-case material. Specifically, the Court's *Brady* case law has provided no logical limit on how far the prosecutor must go to learn of and disclose material that is unrelated to the case at hand but is still known by some member of the prosecution team. And while the lower federal courts have fashioned some practical, case-by-case answers to the general question of *Brady*'s application to unrelated-case material, these guidelines do not settle the question of how *Brady* applies to police personnel files. This gap in the federal case law, in turn, has allowed the states to go in widely divergent directions on this issue. But before discussing the state of the federal case law, a short primer is required.

A. *Basics on Brady, Personnel Files, and Impeachment Evidence*

Brady requires prosecutors to disclose to defendants any favorable, material evidence known to any member of the prosecution team, including the police. A *Brady* violation has three elements.²² First, the evidence in question must be favorable to the defendant because it is either exculpatory or impeaching.²³ Second, the prosecutor must have suppressed the evidence, either by hiding it or by failing to learn of and disclose it. Good or bad faith on the part of the prosecutor is irrelevant. Finally, the suppressed evidence must be material enough that its disclosure would create a "reasonable probability" of a different outcome as to guilt or punishment.²⁴

This Article focuses on suppression, the second element of a *Brady* violation, and particularly on suppression that occurs when prosecutors fail to learn of something they should have learned of. This inquiry necessarily requires a definition of what the prosecutor should have known. The Supreme Court held, in a 1995 decision extending the *Brady* doctrine, that "the 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."²⁵ Because officers are members of the prosecution team, and because they know of the misconduct in their own files, *Brady* requires the prosecutor to learn of and disclose this information. But this duty to learn raises difficult line-drawing questions about how far the prosecutor must go in scouring the officer's past. The Article ad-

22. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

23. *Id.* Evidence that is impeaching, as opposed to exculpatory, is sometimes called *Giglio* material, after the Supreme Court case extending *Brady* to impeachment evidence. *See Giglio*, 405 U.S. 150.

24. *Strickler*, 527 U.S. at 281.

25. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also* *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam); *Banks v. Dretke*, 540 U.S. 668, 693 (2004); *Strickler*, 527 U.S. at 275 n.12.

dresses those questions later on. For now, it is important to note that the Article's frequent discussion of the prosecutor's duty to learn is geared toward this second element of a *Brady* violation: suppression.

A brief discussion of police personnel files is also required.²⁶ These files contain many forms of *Brady* material. The Article focuses mostly on impeachment evidence in the files—performance evaluations, disciplinary write-ups, and internal affairs investigations that show an officer has lied. This information can be critical to a defendant in attacking the officer's credibility on the stand. Examples include findings that officers falsified reports, provided false testimony, stole money, or otherwise lied on the job.²⁷ Even when the initial misconduct does not implicate the officer's truthfulness, the internal affairs investigation that follows may do so if the officer is caught in a lie or a cover-up.²⁸

In addition, the files may also contain exculpatory, as opposed to impeachment, evidence. In one case, for example, internal affairs findings showed that a forensic technician's "lab work was characterized by sloppiness and haste."²⁹ The Ninth Circuit concluded that the findings "could have supported a defense theory that [the technician] inadvertently contaminated" the evidence.³⁰ Exculpatory evidence may also appear in the files when a police department launches an internal affairs investigation in parallel to a criminal investigation and comes across witness statements that are favorable to the defense, or when an officer's history of excessive force allows a defendant to argue that the officer was the aggressor and, thus, that the defendant acted in self-defense.³¹

The focus of this Article is on impeachment evidence contained in these files, so the basics of impeachment are worth mentioning. Impeachment evidence is anything that tends to call into question the credibility of a witness.

26. For simplicity's sake, the Article uses "police" as shorthand for "law enforcement." This is not intended to distinguish police from sheriffs' offices or other types of law enforcement agencies.

27. See, e.g., *United States v. Veras*, 51 F.3d 1365, 1374 (7th Cir. 1995); *State v. Richard W.*, 971 A.2d 810, 820-21 (Conn. App. Ct. 2009); *City of Hastings v. Law Enforcement Labor Servs., Inc.*, BMS Case No. 12-PA-0020, 2012 WL 759075, at *3 (Feb. 13, 2012) (Kapsch, Arb.); Mark Fazlollah, *Prolific Officer's Credibility at Issue*, PHILA. INQUIRER (Apr. 15, 2013), http://articles.philly.com/2013-04-15/news/38531719_1_drug-arrests-defense-attorneys-public-defender; *Problem Officers: What They Did to End Up on List*, *supra* note 15; Shawn Vestal, *Dismissal of Detective Sheds Light on 'Brady Officer'*, SPOKESMAN-REV. (July 23, 2011), <http://www.spokesman.com/stories/2011/jul/23/shawn-vestal-dismissal-of-detective-sheds-light>.

28. See, e.g., *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013); *State v. Laurie*, 653 A.2d 549, 552-53 (N.H. 1995).

29. *United States v. Olsen*, 704 F.3d 1172, 1181 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2711 (2014).

30. *Id.*

31. E.g., Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3d 1170, § 2[a], 3[c] (West 2015).

Trial judges have broad discretion in setting limits on the use of impeachment evidence, and rules differ across the country about how a witness may be impeached. In general, as provided by Federal Rule of Evidence 608(a) and its state-law equivalents, “[a] witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.”³² The information contained in the personnel files may be critical to a defendant in alerting her to the officer’s credibility problems and may help her locate people who can testify about the officer’s credibility problems.

The documents in the personnel file can also be critical in another form of impeachment: cross-examination of a witness about specific instances of conduct. Under Federal Rule of Evidence 608(b) and its state-law analogues, the court may allow a witness to be asked about “specific instances of . . . conduct” on cross-examination provided they are “probative of the character for truthfulness or untruthfulness of . . . the witness.”³³ While the internal affairs findings themselves will generally not be allowed into evidence,³⁴ defense counsel’s knowledge of these findings allows for questioning of the officer that can demolish the officer’s credibility. If asked about a specific instance of dishonesty, the officer will be forced into a cruel trilemma: Admit the misconduct, and come off as a liar. Deny the misconduct, and commit perjury. Claim no recollection, and have his memory called into question.

In cases that hinge on an officer’s testimony, the value of these various forms of impeachment evidence cannot be overstated. But the evidence is meaningless if the defendant never learns about it, and that is where *Brady* comes in.

B. *The Supreme Court*

What has the Supreme Court said about *Brady*’s application to police personnel files? The short answer is that the Court has never been required to decide a case involving *Brady*’s application to these files. What it has said is that the prosecutor has a duty to learn of favorable information known to any mem-

32. FED. R. EVID. 608(a).

33. *Id.* 608(b); see also 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6111, at 25 (2d ed. 2012) (“Most of the state versions of Rule 608 are identical to the federal provision as originally enacted or make no substantive changes.”). Some states, either by rule or by case law, limit questioning on specific instances of conduct to those that resulted in convictions. *E.g.*, LA. CODE EVID. ANN. art. 608(B) (2014) (“Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.”). But courts have held that even these limitations must sometimes give way if the specific instances are particularly crucial to the defendant’s case. See, e.g., *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999).

34. I say “generally” because some states, including Hawaii, do allow extrinsic evidence of specific instances of conduct. See HAW. R. EVID. 608(b).

ber of the prosecution team, including the police.³⁵ But, as noted earlier, the question of how far the prosecutor must go in probing the officer's background is not easily answered by the doctrine. This line-drawing problem has its roots in the story of how the Supreme Court expanded *Brady* over the years.

In 1963, the Court announced *Brady*'s due process doctrine, holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."³⁶ But the doctrine quickly became more demanding. In the Court's 1972 decision in *Giglio v. United States*, *Brady* was expanded to include impeachment evidence.³⁷ *United States v. Bagley* further extended *Brady* in 1985, eliminating the requirement that the defendant make a request for the evidence.³⁸ The elimination of the need for a defense request placed a self-executing, affirmative obligation on the prosecution to discern and disclose the evidence, independent of any defense action.³⁹ In 1995, *Kyles v. Whitley* again extended *Brady*, announcing that "the 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."⁴⁰

As a matter of doctrine and policy, there is much to recommend these extensions. They helped effectuate the original purpose of *Brady*: to prevent the government from suppressing evidence critical to a fair trial. But these expansions also had the effect of making the prosecutor's duty to discover, analyze, and disclose favorable information much more complicated. The literature has discussed how this expansion affected the prosecutor's *Brady* duties.⁴¹ The point to emphasize, however, is that *Brady*'s expansion had a much greater effect on unrelated-case material than it did on case-related material.⁴²

The expansion's effect on case-related material was relatively modest. "Case-related" material refers to information dredged up in the course of inves-

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

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

37. 405 U.S. 150, 154-55 (1972).

38. 473 U.S. 667, 682 (1985) (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment).

39. *Id.* at 682 (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment); *Banks v. Dretke*, 540 U.S. 668, 696 (2004); see 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 256, at 151 (4th ed. 2009) ("The Court reiterated in *Banks v. Dretke* the requirement that prosecutors have an independent duty to disclose *Brady* material that is not conditioned on a defendant's request for such material" (footnote omitted)).

40. 514 U.S. at 437.

41. *E.g.*, Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 692 (2006).

42. Some commentators, however, question whether *Brady*'s reach has actually expanded. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 645 (2002) ("As *Brady*'s scope has been expanding to cover a broader range of government behavior and evidence, however, the Court simultaneously has been contracting the *Brady* right on another front, that of materiality.").

tigating the case—in short, the information in the prosecutor's and police department's case files. In the cases expanding *Brady*, the Justices frequently referred to *Brady* information as being contained in “the file,” by which they meant the case file.⁴³ But while the case law makes the prosecutor responsible for everything discovered in the process of investigating the case (i.e., the case-related material), the expanded *Brady* doctrine also seems to encompass unrelated-case material, provided the material is known to some member of the prosecution team.⁴⁴

This creates a difficult line-drawing problem for which Supreme Court cases provide no definitive answer: How far does the prosecutor's “duty to learn” extend? On the one hand, the duty to learn of unrelated-case material could become unmanageable if the prosecutor in each case had to search all the files in her office—or in the police department—to ensure those files do not contain any *Brady* material. Similarly, it would be very difficult if the prosecutor had a duty to learn of impeachment material contained in an officer's divorce proceedings or high school report cards. On the other hand, it is hard to imagine that the prosecutor could be allowed to turn a blind eye to evidence of a witness's dishonesty, known to members of the prosecution team, simply because the evidence was housed in a different case file and was not uncovered in the course of investigating this particular case. Clearly, the prosecutor's duty to learn cannot extend infinitely. But just as clearly, it cannot be strictly limited to case-related information, as such a strict limitation would permit a police officer to stay quiet about his knowledge of, say, an informant's history of lying, so long as those lies were discovered in a separate case.

Not only would a strict line against unrelated-case material clash with the language and logic of *Brady*'s “duty to learn,” but it would also ignore the fact that three Supreme Court *Brady* cases involved unrelated-case material. In

43. Supreme Court cases mentioning the *Brady* files always refer to case-related files. See, e.g., *Cone v. Bell*, 556 U.S. 449, 459 (2009) (discussing, in the *Brady* context, a criminal defendant's right to review “the prosecutor's file in his case”); *Bagley*, 473 U.S. at 695, 702 (Marshall, J., dissenting) (arguing that *Brady* requires the prosecutor to disclose “all evidence in his files that might reasonably be considered favorable to the defendant's case”); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (“[W]e have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (discussing, in the *Brady* context, “a combing of the prosecutors' files” (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)) (internal quotation mark omitted)). The focus on case-related material is further evidenced by dicta suggesting that open-file policies would be sufficient for *Brady* compliance, even though open-file policies—which allow defendants direct access to the prosecutor's case file—never give the defendant free run of unrelated-case files in the prosecutor's office or police department. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1386 n.27 (2011) (Ginsburg, J., dissenting); *Strickler v. Greene*, 527 U.S. 263, 283 n.22 (1999); *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 699 (Marshall, J., dissenting).

44. Cf. Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1677 (1996) (“A search *Brady* claim arises when the prosecutor fails to gather, or to receive from others, evidence that might be material and favorable to the defense.”).

United States v. Agurs, the undisclosed evidence was a murder victim's criminal record, which was not drawn from the particular case.⁴⁵ In *Kyles v. Whitley*, information about a key informant's criminal conduct was among the evidence deemed to be *Brady* material, even though it was unrelated to the case.⁴⁶ And in *Pennsylvania v. Ritchie*, the Court dealt with a defendant's *Brady* request for child abuse records "related to the immediate charges" as well as earlier records stemming from "a separate report" of the defendant's abuse—a report that was unrelated to the investigation.⁴⁷ The *Ritchie* Court spent no time distinguishing between case-related and unrelated-case material, instead remanding the matter for the state court to conduct an in camera review.⁴⁸ In these three cases, the Supreme Court never indicated that the evidence's lack of connection to the case meant that it did not count as *Brady* evidence. At the same time, the Court never acknowledged the special challenges this material posed for the prosecutor's duty to learn, nor did it articulate where to draw the line on the prosecutor's duty to search unrelated-case material.

Evidence of police misconduct, contained in police personnel files, falls into this doctrinal crack insofar as it is generally not related to any specific case. But wherever the line is drawn on the prosecutor's duty to learn, the personnel files would seem to be within the prosecutor's constructive knowledge. Unlike the far-flung records of officers' divorce proceedings or high school report cards, the personnel files are official documents relating to the officers' official duties and found within the possession of the prosecution team. These factors mean that the misconduct is not only more likely to be useful to the defendant at trial—that is, to be favorable, material evidence—but also more likely to be practicably obtainable, given that the prosecutor need only check a few files to look for it. In short, on the spectrum of what the prosecutor has a duty to discover, the police misconduct records are not the borderline case.

Nonetheless, the Court's failure to acknowledge the special problems posed by this unrelated-case material has created an unfortunate ambiguity about the extent of the duty to learn. Typically, such ambiguities could be dealt with by the lower federal courts, but in the case of *Brady*'s application to law enforcement personnel files, that clarification has not occurred.

C. *The Lower Federal Courts*

The lower federal courts have fashioned practical, case-by-case rules to define whether a prosecutor has a duty to learn of unrelated-case material. These rules ask whether a reasonable prosecutor would have learned of the information in light of the following factors: Was the person with actual knowledge

45. 427 U.S. at 100-01, 114; Brief for the United States, *Agurs*, 427 U.S. 97 (No. 75-491), 1976 WL 181371, at *5-7.

46. 514 U.S. at 428-29.

47. 480 U.S. 39, 43 (1987).

48. *Id.* at 61.

of the information on the prosecution team? Did the prosecutor have notice of the information's existence and importance? Was it logistically possible to locate the information? But the federal courts have not been able to settle how *Brady* applies to police personnel files. Nor have they been required to settle this question, because the Justice Department adopted a policy that requires federal agents' files to be searched upon request by the defense. As a result, there is a gap in the federal case law on how *Brady* applies to police personnel files.

1. *The limits of constructive knowledge*

How much of what the police know should be imputed to the prosecutor? The courts steer between two extremes in answering this question. Impute too little and the prosecution can "get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."⁴⁹ Impute too much and the search requirements become so onerous as to "condemn the prosecution of criminal cases to a state of paralysis."⁵⁰ A number of practical distinctions have been employed to limit a prosecutor's constructive knowledge.

First, the prosecutor is not responsible for information held by third parties or information held by arms of the government not "closely aligned" with the prosecution.⁵¹ The third-party determination is straightforward, but determining how closely aligned an agency must be is not, and it has resulted in a spatter of ad hoc judgments about what the prosecutor can be held to constructively know.⁵² A variation on this factor is that courts are inclined to impute knowl-

49. *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *see also* *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. Unit A 1980); *cf.* *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) ("The prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses.").

50. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995)) (internal quotation marks omitted).

51. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) ("The cases finding a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution,' and in each case the court has found the bureaucratic boundary too weak to limit the duty." (citation omitted) (quoting *United States ex rel. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985))).

52. *See* *United States v. Rivera-Rodríguez*, 617 F.3d 581, 595 (1st Cir. 2010) (finding a probation officer outside the prosecution team); *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (finding Pension and Welfare Benefits Administration (PWBA) records outside the prosecutor's constructive knowledge because the PWBA had no working relationship with the prosecution team); *Morris*, 80 F.3d at 1169 (finding the Office of Thrift Supervision, the Securities and Exchange Commission, and the Internal Revenue Service outside the prosecution team because the case law could not "be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"). Judge Richard Nygaard syn-

edge to the prosecutor when she had authority over the person with actual knowledge of the information—though some courts say such authority is not necessary.⁵³

A second factor in determining the prosecutor's constructive knowledge is logistical. Circuit courts have held that prosecutors need not "search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information," because that "would place an unreasonable burden on prosecutors."⁵⁴ They have also held that it would be "an unreasonable extension" of *Brady* to require prosecutors "'to sift fastidiously' through millions of pages" of documents in the government's possession.⁵⁵ Some circuits apply a sliding scale to the logistical question: "As the burden of the proposed examination rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort."⁵⁶ Others require specific requests from the defense to trigger the prosecutor's duty to learn:

[W]here a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information—specific in the sense that it explicitly identifies the desired material and is objectively limited in scope.⁵⁷

A third factor is the reasonable diligence doctrine, which holds that prosecutors do not have to learn of or disclose information that a reasonably diligent defendant could have located on her own.⁵⁸ While the definition of reasonable diligence is not always clear, the doctrine generally absolves prosecutors of

thesized the doctrine's development in *United States v. Risha*, 445 F.3d 298, 307-09 (3d Cir. 2006) (Nygaard, J., dissenting).

53. *Compare Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002) (authority required), and *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (same), with *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (authority not required), and *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991) (same).

54. *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).

55. *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) (quoting *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010)); see also *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("It is unrealistic to expect federal prosecutors to know all information possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation.").

56. *Brooks*, 966 F.2d at 1504; see also *United States v. Combs*, 267 F.3d 1167, 1175 (10th Cir. 2001) (citing the minimal "burden" on the prosecution of checking with Pretrial Services about its "star witness," but not reaching the issue because of materiality).

57. *Joseph*, 996 F.2d at 41.

58. See *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009); *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government."); 2 WRIGHT & HENNING, *supra* note 39, § 256, at 135 ("Evidence equally available to the defendant by the exercise of due diligence means that the government is not obligated under *Brady* to produce it.").

having to search court records or other publicly available government sources for *Brady* material.⁵⁹

These guidelines create a good deal of uncertainty about how far the prosecutor's constructive knowledge extends in general, and that uncertainty has not been settled in the context of police personnel files.

2. *Law enforcement personnel files*

Federal courts have had little to say about how *Brady*'s constructive knowledge doctrine—that is, the prosecutor's duty to learn—applies to law enforcement personnel files. In the 1980s and 1990s, a circuit split developed regarding federal prosecutors' duties, upon a defense request, to search federal agents' files. This split seemed primed for reevaluation and resolution in the wake of the Supreme Court's 1995 decision in *Kyles v. Whitley*. Instead, the split faded in significance because of a Justice Department policy requiring federal prosecutors, upon receiving a request from the defense, to have federal agents' files searched for *Brady* material. Because of this policy and the effect of the Antiterrorism and Effective Death Penalty Act (AEDPA) on the federal review of state convictions, the federal courts of appeals were left largely without the opportunity—or the need—to settle how *Brady* applies to these personnel files.

a. *The circuit split*

Going back to the 1970s and early 1980s, a few circuit decisions addressed *Brady*'s application to law enforcement personnel files. But they did so in a case-by-case manner that did not purport to create a blanket rule for the files.⁶⁰ The Ninth Circuit took the first step toward establishing a blanket rule in *United States v. Henthorn*, holding that federal prosecutors, upon request of the defendant, must search federal agents' personnel files for potential impeachment material.⁶¹ The Third Circuit later adopted this position.⁶² But the Sixth, Seventh, Eighth, and Eleventh Circuits came out differently.⁶³ Those circuits held

59. 2 WRIGHT & HENNING, *supra* note 39, § 256, at 140-41.

60. *E.g.*, *United States v. Muse*, 708 F.2d 513, 517 (10th Cir. 1983); *United States v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973).

61. 931 F.2d 29, 30-31 (9th Cir. 1991); *see also* *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (following *Henthorn*). The first attempt at such a rule was in *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984), but this case, for unknown reasons, had little effect.

62. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998).

63. *See* *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997); *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992); *United States v. Pou*, 953 F.2d 363, 366-67 (8th Cir. 1992); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) (“Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial.” (quoting *United States v. Na-*

that if a personnel file was not searched, there was no need to remand the case for such a search unless the defendant, on appeal, could show more than “mere speculation” that the file would contain impeachment material.⁶⁴ Several other courts expressed ambivalence about which side of the split to join.⁶⁵

The difference in these approaches to the personnel files has been portrayed as a split between those circuits that require a *Brady* search upon defense request and those that do not. But the nature of the ostensible split was never so clear.⁶⁶ First, it was unclear whether the *Brady* rule articulated by these cases—whichever way the rule went—would apply to state prosecutors’ searches of state law enforcement files or whether it applied only to federal prosecutors’ searches of federal agents’ files.⁶⁷ Second, the courts on the majority side of the split—the Sixth, Seventh, Eighth, and Eleventh Circuits—did not explicitly absolve prosecutors of their *Brady* duties with respect to these files; rather, they applied a form of harmless error review in deciding whether to remand the case.⁶⁸ Third, in a number of the decisions on the majority side of the split, prosecutors did actually conduct *Brady* searches of the personnel files. What the reviewing courts refused to do was to order lower courts—or to allow defendants—to conduct additional searches on appeal.⁶⁹ Fourth, the Supreme Court destabilized whatever rules might have emerged from this putative split when it held, in *Kyles v. Whitley*, that prosecutors have a duty to learn of any favorable evidence known to other members of the prosecution team, including the police.⁷⁰ Indeed, *Kyles* so undermined these cases on both sides of the split that commentators expected the split would have to be reexamined in the wake of *Kyles*.⁷¹ But that reexamination never occurred.

varro, 737 F.2d 625, 631 (7th Cir. 1984)); see also *United States v. Van Brocklin*, 115 F.3d 587, 594 (8th Cir. 1997).

64. See, e.g., *Andrus*, 775 F.2d at 843.

65. *United States v. Brooks*, 966 F.2d 1500, 1502-04 (D.C. Cir. 1992); *Murray v. U.S. Dep’t of Justice*, 821 F. Supp. 94, 106 (E.D.N.Y. 1993).

66. Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, CHAMPION, May 2001, at 14, 20 (“In short, in the Ninth Circuit ask and ye shall receive. Elsewhere, you better be prepared to make a showing of what you expect to find of an impeaching nature in a testifying officer’s personnel records.”).

67. See, e.g., *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (holding that, in federal prosecutions, the government “is not obligated to review state law enforcement files not within its possession or control”).

68. This deferential standard of review may amount to the same thing as excusing the search in the first place, but the uncertainty adds to the murkiness.

69. See, e.g., *United States v. Quinn*, 123 F.3d 1415, 1421-22 (11th Cir. 1997).

70. 514 U.S. 419, 437 (1995).

71. Cf. Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 WASH. L. REV. 73, 104-05 (1997).

b. *The Justice Department policy*

To this day, the circuit split has not been resolved, but it has long since grown stale. Why did the courts of appeals never establish a uniform rule for *Brady*'s application to these files? Part of the explanation may well be the Justice Department's policy decision, in 1991, to require federal prosecutors to have federal agents' files searched upon defense request.⁷² This policy was designed to bring Ninth Circuit federal prosecutors in line with the search requirements articulated in *United States v. Henthorn*. But federal prosecutors around the country soon adopted this approach, essentially resolving the split as a matter of policy.⁷³ The Justice Department policy required each investigative agency within the Department's control to search agents' files for *Brady* material⁷⁴ and, if anything was found, to notify the prosecutor, who would then "determine whether the information should be disclosed or whether an in camera review by the district court is appropriate."⁷⁵

This policy evolved several times over the years to articulate specific definitions of *Brady*-qualifying material and specific protocols by which prosecutors could gain access to the files.⁷⁶ Despite the centralized guidelines, however, variations appeared in federal practice with respect to the personnel files. Federal agencies and federal prosecutors differed on which of their files were searched,⁷⁷ whether prosecutors received summaries or raw documentation of the misconduct,⁷⁸ and whether searches were required even without a defense

72. *Id.* at 106 (describing the 1991 memo sent to all U.S. Attorneys' Offices in the wake of *United States v. Henthorn*).

73. *See infra* notes 74, 79.

74. For example, in *Quinn*, the district judge stated at a suppression hearing: "As far as personal [sic] records go, the government has to see if they're . . . *Brady* or *Giglio* . . . Everybody knows that. . . [T]he government should be reviewing those records to determine whether this is *Brady* material . . ." 123 F.3d at 1421 (first, second, and third alterations in original); *see also* *United States v. Bertoli*, 854 F. Supp. 975, 1041 (D.N.J.) ("The Government is complying with, and will continue to comply with, the Department of Justice's *Henthorn* policy concerning the personnel files of all Government agents and all present or former Government employees expected to testify at trial." (quoting Government Personnel Files Brief at 6)), *aff'd in part, vacated in part*, 40 F.3d 1384 (3d Cir. 1994).

75. *United States v. Jennings*, 960 F.2d 1488, 1492 n.3 (9th Cir. 1992) (describing the federal government's counsel's explanation of the policy).

76. Office of the Att'y Gen., Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy") (Dec. 9, 1996), <http://www.justice.gov/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law>; *see also* Lisa A. Regini, *Disclosing Officer Misconduct: A Constitutional Duty*, FBI L. ENFORCEMENT BULL., July 1996, at 27, 31.

77. *See* Brief for the United States at 6-8, *United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996) (Nos. 95-10521, 95-10541) (describing Drug Enforcement Administration, Immigration and Naturalization Service, Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, and Federal Bureau of Investigation policies).

78. *See id.*

request.⁷⁹ The current *United States Attorneys' Manual* requires prosecutors “to seek all exculpatory and impeachment information from all the members of the prosecution team,” including “federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.”⁸⁰ Whatever flaws it possesses,⁸¹ the Justice Department policy nonetheless acknowledges that personnel files contain *Brady* material and that they must be searched accordingly.⁸²

c. *The policy's effect on the doctrine*

The gap in the federal case law on *Brady's* application to personnel files may well be an unintended consequence of this Justice Department policy. Under the policy, a federal defendant could simply request a search of the federal agents' files, and the ease of making this request arguably reduced the number of federal cases that otherwise would have put the *Brady* question before the

79. *United States v. Brassington*, No. 09-CR-45 (DMC), 2010 WL 3982036, at *16 (D.N.J. Oct. 8, 2010); Brief of Appellee & Supplemental Appendix, *United States v. Dent*, 149 F.3d 180 (3d Cir. 1998) (No. 97-1666), 1997 WL 33565644, at *35; Government's Omnibus Response to Defendant Jones' Pretrial Motions at 11, *United States v. Jones*, No. 2:07-cr-145-KJD-PAL (D. Nev. Aug. 11, 2008), 2008 WL 8626186; *see also* Response to the Defendant's Omnibus Pretrial Motions at 7, *United States v. Ramos*, No. 12-CR-103-S (W.D.N.Y. May 31, 2013) (“A search of the personnel files of the agents and officers who will [be] testifying for instances where they have been found to have engaged in misconduct and/or been disciplined will be made in this case (as it is done in all cases)”); Defendant Demarco Deon Williams's Motion to Compel Production of Impeachment Material & Brief in Support at 2, *United States v. Williams*, No. 08-CR-21-CVE, 2008 WL 938957 (N.D. Okla. Apr. 7, 2008) (quoting a federal prosecutor as acknowledging during a prior hearing a *Brady* policy of inquiring with local police agencies about internal affairs findings); Telephone Interview with Charles Miller, Assistant Prosecutor, Kanawha Cnty., W. Va., Former U.S. Att'y for the S. Dist. of W. Va. (Mar. 12, 2014) (“Every time a witness was identified who was a law enforcement officer or agent, a letter was sent to their agency asking for a review of their file, asking if there were any substantiated allegations of misconduct.”).

80. UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(2) (2014).

81. *See* Telephone Interview with Rob Cary, Att'y, Williams & Connolly (Apr. 4, 2014) (describing the Justice Department's *Giglio* policy as “offensively protective” of agents).

82. UNITED STATES ATTORNEYS' MANUAL, *supra* note 80, § 9-5.100(5)(c) (“[P]otential impeachment information relating to agency employees may include, but is not limited to . . . i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding; ii) any past or pending criminal charge brought against the employee; iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.”).

federal courts. At the same time, the passage in 1996 of AEDPA greatly reduced the other major source of cases in which the federal courts could have made case law on this *Brady* issue: habeas review of state convictions.⁸³ The combination of the Justice Department's policy and AEDPA thus worked to choke off the opportunity—and the need—for the federal courts to settle the question of *Brady*'s application to police personnel files. And this helped create the gap in the federal case law.

I do not want to overstate the claim. Even with the Justice Department's policy and AEDPA, federal cases have addressed *Brady*'s application to law enforcement personnel files.⁸⁴ But these cases have not been interpreted—at least not yet—as defining uniform rules about whether *Brady* requires a search of testifying officers' files. Indeed, the federal case law applying *Brady* to these files has tended to address issues on the margins of the Justice Department's policy: Can prosecutors delegate the search duties?⁸⁵ Does a prosecutor have constructive knowledge of misconduct known to the officer but yet to be detected by anyone else?⁸⁶ These cases do not answer the core questions: Will knowledge of what is in the agents' personnel files be imputed to prosecutors? And does this constructive knowledge require prosecutors to conduct routine searches of the files?

In the end, the key point is that the federal courts, from the Supreme Court down, have not made explicit how *Brady* applies to law enforcement personnel files, and the Justice Department's policy, combined with AEDPA, helped take this question off the agenda. For federal defendants, it may not matter whether the files are searched as a matter of policy or as a matter of case law—so long as they are searched. But it does matter for state defendants. The lack of federal case law on this issue provided the states much leeway in deciding how *Brady*

83. Under the relevant AEDPA provision, federal courts cannot reach the merits of the case unless the state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," meaning a holding. 28 U.S.C. § 2254(d)(1) (2013); *see also* *Williams v. Taylor*, 529 U.S. 362, 405 (2000). That leaves little opportunity to make new law on habeas, because if the law announced is new, then it is not established enough for the state court's contrary decision to qualify for review on the merits. *See* *Harrison v. Lockyer*, 316 F.3d 1063, 1066 (9th Cir. 2003) (deferring to the California courts under AEDPA, but questioning how the defendant can be required to know what is in a personnel file before he can review it).

84. *E.g.*, *Milke v. Ryan*, 711 F.3d 998, 1006 (9th Cir. 2013); *Simmons v. Anderson*, 209 F.3d 718, 2000 WL 283172 (5th Cir. 2000) (per curiam) (unpublished table opinion); Michael Pariente, *The Fight for Personnel Files in Defending DUI Charges: Using Milke v. Ryan to Help Your Client*, Nevada CLE Webinar (May 7, 2014) (noting that *Milke v. Ryan* has had modest success in getting Nevada police files reviewed under *Brady*); *see infra* notes 85-86.

85. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998) (finding that *Brady* requires the government to "direct the custodian of the [police personnel] files to inspect them for exculpatory evidence and inform the prosecution of the results of that inspection, or, alternatively, submit the files to the trial court for *in camera* review"); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992).

86. *United States v. Robinson*, 627 F.3d 941, 952 (4th Cir. 2010); *see also* *Breedlove v. Moore*, 279 F.3d 952, 962 (11th Cir. 2002).

applies to records of police misconduct, and this leeway has resulted in dramatic variations in *Brady*'s application across the nation.

II. *BRADY*'S APPLICATION TO POLICE PERSONNEL FILES IN THE STATES

In the absence of federal case law, a variety of *Brady* approaches have emerged in the states. This Part divides jurisdictions into four groups. In Group 1, state statutes and local policies make police personnel files so confidential that not even the prosecutor can look inside them to search for *Brady* material. In Group 2, state statutes make the misconduct a matter of public record, and, as public record, it is not considered to be within the scope of *Brady*. In Group 3, prosecutors have access to the personnel files while defendants do not, and the prosecutors put systems in place to learn of and disclose this *Brady* information. In Group 4, prosecutors have special access to the files that defendants do not, but the prosecutors do not put systems in place to learn of or disclose the *Brady* evidence.

There are several consequences to this inconsistent application of *Brady*. First, it deprives defendants of their constitutional due process rights simply by virtue of where they happen to be tried and thus calls into question the idea that *Brady* provides a floor of procedural rights below which state law cannot drop. Second, this patchwork of *Brady* regimes demonstrates the ways in which factors outside of constitutional law—state statutes, local policies, institutional conflicts—have real bearing on the meaning of doctrine. Any constitutional analysis of *Brady* must take into account these nontraditional factors. Finally, the disparities in *Brady*'s application across these four groups suggest that *Brady* violations have deeper, more seemingly legitimate causes than prosecutorial cheating, at least as far as police personnel files are concerned. When it comes to these files, the people suppressing impeachment evidence often do so overtly and under color of law, albeit law that appears to conflict with the Constitution.

A. *Group 1: "No Access" Regimes*

Brady requires prosecutors to learn of and disclose favorable, material information known to anyone on the prosecution team, including the police. In this first group of jurisdictions, however, prosecutors are barred by state laws or local rules from looking in the police personnel files to see whether the files contain *Brady* material. Whether a prosecutor can satisfy his disclosure requirement when he cannot access these files is the central tension in this first group of jurisdictions.

The poster child for these jurisdictions is California, where more than 500 law enforcement agencies employ roughly 80,000 police officers, or about one-

tenth of all the officers in the country.⁸⁷ By statute, law enforcement personnel records are “confidential and shall not be disclosed in any criminal or civil proceeding”⁸⁸ unless the party seeking the information shows “good cause for the discovery or disclosure sought.”⁸⁹ If good cause is shown, the judge will review the files in camera to decide what must be disclosed.⁹⁰ The officer and the officer’s representative are the only ones allowed to attend this in camera review.⁹¹

California’s legislature created these statutory protections for the files—collectively known as the *Pitchess* provisions—to protect police personnel files from overly intrusive discovery requests by criminal defendants and civil litigants.⁹² These statutory provisions were part of an effort by the legislature in 1978 to limit the reach of a 1974 California Supreme Court decision, *Pitchess v. Superior Court*, which gave criminal defendants the ability to subpoena certain materials from police personnel files.⁹³ The legislative history shows no indication that lawmakers were thinking of prosecutors or *Brady* when they passed the *Pitchess* laws; the legislation was designed to block discovery requests by defendants and civil litigants. But California courts have held that these statutory protections apply to prosecutors seeking access to the files for *Brady* purposes, just as they apply to everyone else.⁹⁴

The practice of applying these personnel file restrictions to prosecutors creates the obvious potential for a conflict between *Pitchess* and *Brady*. After all, how can a prosecutor carry out his *Brady* obligation to disclose evidence in these files if, under state law, he cannot look inside them on his own? Despite the apparent tension between the *Pitchess* statutes and *Brady*, California courts have done their best to avoid acknowledging a conflict. In 2002, the California Supreme Court explicitly left open the question whether *Pitchess* would violate *Brady* “if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*.”⁹⁵ The court was not bothered by any *Brady* implications the next year when it stated matter-of-factly that, unless prosecutors go through the *Pitchess* procedures, “peace of-

87. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 15 app. tbl.6 (2011).

88. CAL. PENAL CODE § 832.7(a) (West 2014).

89. CAL. EVID. CODE §§ 1043, 1045 (West 2014); see also Miguel A. Neri, *Pitchess v. Brady: The Need for Legislative Reform of California’s Confidentiality Protection for Peace-Officer Personnel Information*, 43 MCGEORGE L. REV. 301, 304 (2012) (discussing conflict over personnel files in California).

90. CAL. EVID. CODE § 1045(b); *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 134 (Cal. 2002) (quoting *City of Santa Cruz v. Mun. Court*, 776 P.2d 222, 226 (Cal. 1989) (en banc)).

91. CAL. EVID. CODE § 1045(b) (referring to procedures in CAL. EVID. CODE § 915(b)); see *People v. Mooc*, 36 P.3d 21, 29 (Cal. 2001).

92. See *City of Santa Cruz*, 776 P.2d at 227; Neri, *supra* note 89, at 309.

93. 522 P.2d 305, 309 (Cal. 1974) (en banc).

94. See Neri, *supra* note 89, at 309; *infra* notes 95-98.

95. *Brandon*, 52 P.3d at 136 n.2.

ficer personnel records retain their confidentiality vis-à-vis the prosecution.”⁹⁶ Shortly thereafter, the California Court of Appeal held that *Pitchess*’s bar on prosecutorial access to personnel files did not violate *Brady*.⁹⁷ The court reasoned, rather circularly, that because the prosecutor “does not have access to confidential peace officer files,” he could not have a *Brady* obligation to disclose information contained in them.⁹⁸ Other California appellate decisions have similarly concluded that the *Pitchess* statutes apply to prosecutors’ *Brady* searches.⁹⁹

In light of the restrictions on accessing the files, prosecutors around the state have taken a number of different approaches to applying *Brady* to the files. One approach is to say that prosecutors are excused from having to search the files, given that they are statutorily denied access to the contents of these files.¹⁰⁰ This approach finds support in the Court of Appeal’s decision in *People v. Gutierrez*, which held that prosecutors cannot be expected to disclose what they are not allowed to access.¹⁰¹ But it seems to be at odds with the U.S. Supreme Court’s decision in *Kyles v. Whitley*, which held that prosecutors have a duty to learn of favorable information known by members of the prosecution team.¹⁰²

Another approach to the conflict between *Brady* and the personnel file protections is to acknowledge that prosecutors have constructive knowledge of information in the personnel files and then enlist the help of the police and the judiciary in bringing forth that *Brady* material without the prosecutors’ directly accessing the files. One quarter of the state’s counties, including some of its largest, embrace disclosure systems like San Francisco’s, in which the police department—not the prosecutor—reviews officers’ personnel files for potential *Brady* material.¹⁰³ If the department’s *Brady* committee finds any material that

96. *Alford v. Superior Court*, 63 P.3d 228, 236 & n.6 (Cal. 2003).

97. *People v. Gutierrez*, 6 Cal. Rptr. 3d 138, 145-47 (Ct. App. 2003).

98. *Id.* at 147.

99. *E.g.*, *Abatti v. Superior Court*, 4 Cal. Rptr. 3d 767, 781-82 (Ct. App. 2003).

100. Telephone Interview with Jerry Coleman, *supra* note 20 (discussing *Brady* practices around California).

101. 6 Cal. Rptr. 3d at 147.

102. 514 U.S. 419, 437 (1995). Apparently, another approach is just to ignore the issue. See Jaxon Van Derbeken, *Police with Problems Are a Problem for D.A.*, S.F. CHRON. (May 16, 2010, 4:00 AM), <http://www.sfgate.com/bayarea/article/Police-with-problems-are-a-problem-for-D-A-3264681.php> (reporting the view of one retired prosecutor that “his colleagues were not eager to dig into officers’ backgrounds—even though the risks of not doing so were obvious”).

103. See Application of Gregory D. Totten, Ventura County District Attorney, for Leave to File Amicus Curiae Brief in Support of Petitioner; Amicus Curiae Brief at ii, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768) (listing counties with notification systems); Application of Michael L. Rains, on Behalf of Peace Officers’ Research Ass’n of California (PORAC), the PORAC Legal Defense Fund & the San Francisco Police Officers’ Ass’n, for Leave to File Amici Curiae Brief in Support of Petitions for Writ of Mandate, Prohibition or Other Appropriate Relief & Re-

might impeach the officer's credibility or otherwise materially help a defendant, it notifies the prosecutor that the officer "has material in his or her personnel file that may be subject to disclosure under *Brady*."¹⁰⁴ When the officer is slated to testify, the prosecutor uses this generic notification from the police to try to convince the court that there is good cause to trigger the in camera review allowed by the *Pitchess* statutes.¹⁰⁵ If the court finds good cause, it will review the file and decide what must be disclosed.¹⁰⁶ The allure of this system is the compromise it strikes among the interests of prosecutors, police officers, and defendants. Prosecutors and defendants get the *Brady* information disclosed, while police officers get to keep their files secret from everyone except the judge.

But the viability of this system is now in jeopardy, thanks to a recent California Court of Appeal decision. In August 2014, a panel of the Court of Appeal held that prosecutors have an obligation to learn of *Brady* material in law enforcement personnel files and that the statutory protections for the files do *not* prevent prosecutors from searching the files for *Brady* purposes.¹⁰⁷ The court reasoned, on statutory construction rather than constitutional grounds, that the prosecutor and the police form a single prosecution team, so allowing the prosecutor to search the files for *Brady* material is not the type of disclosure that the personnel file statute was designed to guard against.¹⁰⁸

This recent decision created conflicts within California appellate case law both on the question of whether prosecutors have a *Brady* duty to learn of information in police personnel files¹⁰⁹ and on the question of whether the *Pitchess* protections limit prosecutors' ability to search the files for *Brady* ma-

quests for Stay at iii, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) (listing counties where prosecutors must file *Pitchess* motions).

104. S.F. Police Dep't, Bureau Order No. 2010-01, Procedure for Disclosure of Materials from Law Enforcement Personnel Records in Compliance with Brady and Evidence Codes § 1043 Et Seq (Aug. 3, 2010) [hereinafter SFPD Disclosure Order]; Petition for Writ of Mandate, Prohibition or Other Appropriate Relief & Stay Request; Memorandum of Points & Authorities in Support of Petition at 16-17, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) [hereinafter SFPD Brief]. The possibility that the file might have more idiosyncratic impeachment material is ignored. See Petition for Writ of Mandamus/Prohibition at 45, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) ("[P]olice legal staff and its *Brady* committee have segregated from officer personnel files *only* information reflective of dishonesty, bias, or other evidence of conduct of moral turpitude." (bolding omitted)).

105. SFPD Disclosure Order, *supra* note 104.

106. *Id.*

107. *Johnson*, 176 Cal. Rptr. 3d at 346, 361-63, *depublished and review granted by* 336 P.3d 159 (Cal. 2014).

108. *Id.* at 350, 354-56, 358 ("[W]hen a prosecutor acting as the head of a prosecution team inspects officer personnel files, or portions thereof, for *Brady* purposes, that inspection does not constitute disclosure of the files in a criminal proceeding, or otherwise breach the confidentiality of the files.").

109. Compare *id.* at 362 (holding prosecutors do have a duty to learn), with *People v. Gutierrez*, 6 Cal. Rptr. 3d 138, 147 (Ct. App. 2003) (holding prosecutors do not have a duty to learn).

terial.¹¹⁰ By giving prosecutors direct access to the files, the recent appellate decision also threatened to upend the delicate compromises between prosecutors and police officers around the state over access to the files.

In October 2014, the California Supreme Court granted a petition for review in order to resolve the conflicts this case created within California appellate case law.¹¹¹ The grant of review makes the recent appellate decision uncitable.¹¹² More importantly, the California Supreme Court's involvement in the case means we are soon likely to have more answers about how *Brady* applies to law enforcement personnel files, at least in the eyes of the highest court in the nation's most populous state.¹¹³

California is not the only state to face a conflict between *Brady* and police privacy protections. In New Hampshire, a state statute long protected the personnel files at the expense of *Brady* and its state-law analogue, *State v. Laurie*.¹¹⁴ In 2004, New Hampshire's Attorney General urged prosecutors and police agencies to create a system, much like the one in California, to reconcile these competing pressures.¹¹⁵ The system called for the police to notify prosecutors "whenever one of that agency's officers has been found to have engaged in conduct that would fall within one of the categories" of *Brady* material.¹¹⁶ This notification was to contain no "information regarding the underlying disciplinary matter, as that information is confidential by statute," the Attorney General explained.¹¹⁷ If one of these tainted officers was slated to testify, the prosecutor would ask for an in camera review of the officer's file and a protec-

110. Compare *Johnson*, 176 Cal. Rptr. 3d at 361 (holding prosecutors do have the ability to search files for *Brady* purposes), with *Gutierrez*, 6 Cal. Rptr. 3d at 147 (holding prosecutors do not have the ability to search files for *Brady* purposes), and *Abatti v. Superior Court*, 4 Cal. Rptr. 3d 767, 781-82 (Ct. App. 2003) (same).

111. *Johnson*, 336 P.3d 159.

112. CAL. R. CT. 8.1105(e)(1) ("Unless otherwise ordered . . . , an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.").

113. Case Summary, No. S221296, *People v. Superior Court (Johnson)*, CAL. CTS., http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2087847&doc_no=S221296 (last visited Mar. 30, 2015) ("This case presents the following issues: (1) Does the prosecution have a duty to review peace officer personnel files to locate material that must be disclosed to the defense under *Brady v. Maryland* (1963) 373 U.S. 83? (2) Does the prosecution have a right to access those files absent a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531? (3) Must the prosecution file a *Pitchess* motion in order to disclose such *Brady* material to the defense?").

114. 653 A.2d 549, 550 (N.H. 1995). *Laurie* interprets the New Hampshire Constitution with reference to federal *Brady* law.

115. Memorandum from Peter W. Heed, Att'y Gen., N.H., to All Cnty. Att'ys & All Law Enforcement Agencies, Identification and Disclosure of *Laurie* Materials (Feb. 20, 2004), available at <http://www.gcglaw.com/resources/police-litigation/pdf/NH-Laurie.pdf> ("Because police department internal investigations files and personnel files are confidential by statute, a prosecutor cannot conduct a search of those files for *Laurie* material.").

116. *Id.*

117. *Id.*

tive order placing “all matters relating to the motion” under seal.¹¹⁸ The judge would then decide whether the information in the file had to be released under *Brady*.¹¹⁹

Compared to California courts, however, courts in New Hampshire have shown more flexibility in addressing the conflict between the personnel file statutes and *Brady*. In 2006, the state supreme court held that a trial judge did not abuse his discretion by ordering a prosecutor to review the personnel file directly, because the personnel file statute “cannot limit the defendant’s constitutional right to obtain all exculpatory evidence.”¹²⁰ Further, in 2012, the legislature amended the personnel file statute to say that “[e]xculpatory evidence in a police personnel file . . . shall be disclosed to the defendant” and that in camera review was required only “[i]f a determination cannot be made as to whether evidence is exculpatory.”¹²¹ However, the amendment did not make clear who “shall” search for the *Brady* material: prosecutors or police.

Nonetheless, New Hampshire prosecutors report that they are still unable to search the files, even in furtherance of their *Brady* responsibilities. “We’re not allowed to look into it,” said Assistant Attorney General Stacey Coughlin. “We rely on the police department to keep accurate record and to let us know if there are any issues”¹²² Defense attempts to get prosecutors to review the files directly, in light of the new statute, have also failed. In rejecting a defense motion to compel such a review, one judge ruled that “the plain language” of the statute “does not impose an affirmative duty on all prosecutors to examine the personnel files of all law enforcement witnesses.”¹²³ Meanwhile, police officers continue to lobby for increased confidentiality protections. In early 2014, the legislature took up—and rejected—a bill that would have further interfered with prosecutors’ *Brady* duties by preventing them from deciding what in the file is exculpatory.¹²⁴ Under the bill’s language, the assessment of what was exculpatory was up to the court and the court alone: “To determine whether or

118. *Id.*

119. *Id.*

120. *State v. Theodosopoulos*, 893 A.2d 712, 714 (N.H. 2006).

121. N.H. REV. STAT. ANN. § 105:13-b (2014) (emphasis added). The amendment has yet to be interpreted in a reported decision.

122. Telephone Interview with Stacey Coughlin, Assistant Att’y Gen., N.H. (Apr. 1, 2014). Of the amendment, Coughlin said, “I don’t think it has really changed anything. We still have the same duty.” *Id.*; see also Telephone Interview with Jeffery Strelzin, Senior Assistant Att’y Gen., N.H. (Mar. 31, 2014) (“We typically don’t look at the personnel files or have access to them”). Patricia LaFrance, head of the state’s largest prosecutor’s office, said her prosecutors generally rely on the police to flag misconduct, but occasionally they review the files directly. “Technically we are still operating under former AG Heed’s memorandum,” she added. E-mail from Patricia M. LaFrance, Hillsborough Cnty. Att’y, to author (Mar. 31, 2014) (on file with author).

123. Nancy West, *Court’s Denial of Police Record Review Raises Broader Question*, N.H. UNION LEADER (July 13, 2013, 11:12 PM), <http://www.unionleader.com/article/2013/07/13/NEWS03/130719612> (internal quotation mark omitted). The Attorney General’s Office is reexamining its policy. *Id.*; E-mail from Patricia M. LaFrance, *supra* note 122.

124. H.R. 1315, 163d Gen. Court, 2014 Sess. (N.H. 2014).

not evidence is exculpatory, an in camera review by the court shall be required.”¹²⁵ As it drags on, New Hampshire’s conflict over the personnel files continues to endanger *Brady* compliance.

Halfway across the country, the justice system in Colorado faces a similar conflict. In Colorado, the personnel files are confidential, and prosecutors cannot access them without a subpoena.¹²⁶ The Colorado Supreme Court announced, in a civil case, that courts should employ an ad hoc balancing test to determine whether to grant a subpoena for police personnel records.¹²⁷ The state’s high court later adopted that same test for criminal cases.¹²⁸ Anyone seeking access to the records—including the prosecutor—must subpoena them, thus forcing an in camera review of all factors that lean in favor of and against disclosing the material.¹²⁹ Among those factors are the importance of the information to the case, the extent to which disclosure would discourage future cooperation with investigators, and the effect disclosure would have on the government’s ability to engage in honest self-evaluation.¹³⁰

The Colorado Court of Appeals added one more hurdle to any attempt to gain access to the records: a threshold requirement needed to trigger in camera review. According to the court, to trigger in camera review, the moving party must present more “than bare allegations that the requested documents would relate to the officer’s credibility” and must “show how they would be relevant to his defense of the charges against him.”¹³¹ This threshold was necessary, the court explained, lest demands for in camera review become “unnecessarily burdensome to the courts and the police” by allowing defendants “in virtually every criminal case” to “obtain *in camera* review of all documents concerning the prior conduct of arresting officers.”¹³² The effect of this threshold requirement is to prevent prosecutors from routinely checking the files, given that they

125. *Id.*

126. Telephone Interview with Ken Kupfner, Chief Deputy Dist. Att’y, Boulder, Colo. (Mar. 28, 2014) (stating that personnel files are considered “privileged” and confidential”); *id.* (“Truth is, we don’t know anything about the internal affairs investigations Based on my experience, I know law enforcement sure as hell is not going to hand them over to [us] without a fight.”). Lynn Kimbrough, spokesperson for the Denver District Attorney’s Office, said prosecutors are “not really entitled to have” the personnel files. Christopher N. Osher, *Denver Cops’ Credibility Problems Not Always Clear to Defenders, Juries*, DENV. POST. (July 10, 2011, 1:00 AM MDT), http://www.denverpost.com/ci_18448755 (internal quotation mark omitted); see also Colo. Ass’n of Chiefs of Police et al., *Situational Examples in Support of “Best Practices” 1* (2014) (on file with author) (describing the subpoena process the defendant and prosecutor must use for personnel records).

127. *Martinelli v. Dist. Court*, 612 P.2d 1083, 1088 (Colo. 1980) (en banc).

128. *People v. Walker*, 666 P.2d 113, 122 (Colo. 1983) (en banc); see also *Denver Policemen’s Protective Ass’n v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981).

129. *Walker*, 666 P.2d at 122.

130. *Id.* (citing *Martinelli*, 612 P.2d at 1089).

131. *People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000). It was not enough for the subpoena to “essentially request[] any documents that reflected on the officer’s credibility.” *Id.*

132. *Id.*

must know something about what the files contain before they can get the court to consider granting access.¹³³ This impediment to routine inspection of the files, like those in California and New Hampshire, is troublesome because *Brady* is supposed to impose a self-executing, affirmative duty on the prosecution to search for material in every case.¹³⁴

In the spring of 2014, however, the associations representing Colorado prosecutors, police chiefs, and sheriffs—but not police officers—drafted a “best practices” protocol that would create a notification system like those in California and New Hampshire. Under the system, the prosecutor is “required to notify the defendant . . . when there is information in a peace officer’s or civilian employee’s personnel or internal affairs file that may affect the agency employee’s credibility.”¹³⁵ For the prosecutor to carry out her *Brady* obligation, the policy declares, it is “necessary for the law enforcement agencies in the State of Colorado to notify the District Attorney’s Office of the existence of such information.”¹³⁶ But the notification is not supposed to say anything about the contents of the officer’s file except that the file contains material that “may affect his/her credibility in court.”¹³⁷

Other states have also brushed up against this issue. In Vermont, where state troopers’ personnel files are made confidential by statute, the state supreme court denied a defendant’s *Brady* claim that he should have received material from a trooper’s file.¹³⁸ In Maine, the legislature amended its personnel file statute in 2013 to create a *Brady* exception. The law making the files confidential, the amendment reads, “does not preclude the disclosure of confidential personnel records” to prosecutors for purposes “related to the determination of and compliance with the constitutional obligations . . . to provide discovery to a

133. Some prosecutors apparently can access the files. Osher, *supra* note 126.

134. *See* *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (“[T]he prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.”); *United States v. Garrett*, 238 F.3d 293, 302 (5th Cir. 2000) (“The *Brady* line of cases announces . . . the self-executing constitutional rule that due process requires disclosure by the prosecution . . .”); *infra* Part IV.C.2; *see also supra* note 39 and accompanying text (noting the self-executing nature of the prosecutor’s *Brady* obligation).

135. Colo. Ass’n of Chiefs of Police et al., *Brady/Rule 16 “Best Practices”* 1 (2014) (on file with author).

136. *Id.* (emphasis omitted).

137. *Id.* at 4 ex. 1; *see also id.* at 3 (“The actual personnel or internal affairs file or any material contained therein shall not be provided to the District Attorney’s Office absent a court order following an in-camera review.”). The protocols line up with the Denver Police Department’s “asterisk list,” which was implemented after criticism by an independent police monitor. *See* Osher, *supra* note 126.

138. *State v. Roy*, 557 A.2d 884, 893 (Vt. 1989) (“There is no exception in the statute for use of the records in court proceedings. It is clear that the intent of the statute is that the records not be subject to disclosure except for the statutory purposes.”), *overruled in part by* *State v. Brillon*, 955 A.2d 1108 (Vt. 2008). The court left open “the possibility that a defendant could have access to internal investigation files in a proper case and in a proper manner.” *Id.* at 895.

defendant in a criminal matter.”¹³⁹ The amendment was supported by the Maine Association of Criminal Defense Lawyers and by the Maine Attorney General.¹⁴⁰

Jurisdictions that prevent prosecutors from reviewing the personnel files create a host of doctrinal problems for *Brady*, and the notification systems they employ to get around these problems are themselves deeply flawed, as will be discussed later on.¹⁴¹ But it is important to note here that, for all the problems with these notification systems, they at least acknowledge the prosecutor’s duty to have the files searched for *Brady* material.

B. Group 2: “Public Access” Regimes

Jurisdictions in this second group of *Brady* regimes make records of police misconduct publicly accessible. The fact that these records are public eliminates the prosecutor’s obligation to discover and disclose them under *Brady*. That is because, under the reasonably diligent defendant doctrine, the prosecutor does not have to learn of or disclose any information that a reasonably diligent defendant could have accessed on his own.¹⁴² Nonetheless, some prosecutors in these jurisdictions do seek out and disclose this information.

Florida is the flagship for this public access group, which includes Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina.¹⁴³

139. ME. REV. STAT. tit. 30-A, § 503 (2014). Courts have yet to interpret the amendment.

140. *An Act Regarding the Disclosure of Certain Records in Criminal Matters: Hearing on L.D. 900 Before the J. Standing Comm. on the Judiciary*, 126th Leg., 1st Reg. Sess. (Me. 2013) (prepared statement of Walter F. McKee, Chair, Legislative Committee, Maine Association of Criminal Defense Lawyers) (“There is no good reason why records that may show a defendant is innocent should somehow be protected from disclosure because of the confidentiality of personnel records.”); *id.* (prepared statement of William R. Stokes, Deputy Att’y Gen., Maine) (stating that *Brady* compliance could be more effective “if state law authorized the law enforcement employer to disclose the confidential personnel records to the prosecutor for determination of whether discovery of the material is warranted”).

141. *See infra* Part IV.C.

142. *See supra* note 58.

143. *See* *City of Baton Rouge v. Capital City Press, L.L.C.*, 7 So. 3d 21, 22-23 (La. Ct. App. 2009) (noting records’ public status in Louisiana); *Burton v. York Cnty. Sheriff’s Dep’t*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (“[W]e find the manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye.”); REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRIVATE EYES: CONFIDENTIALITY ISSUES AND ACCESS TO POLICE INVESTIGATION RECORDS 3 (2010), available at <http://www.rcfp.org/private-eyes/internal-investigation-records> (noting that Tennessee makes records public with minor exceptions); Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAWYER, Fall 2004, at 34, 35 (quoting Kentucky’s Attorney General as stating that “disciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know” (quoting *Stewart*, Ky. Op. Att’y Gen. 00-ORD-97, 2000 WL 641066, at *5 (Apr. 13, 2000)) (internal quotation marks omitted)); E-mail from Sharon Ruiz, Pub. Defender, Nashville, Tenn., to author (Mar. 12, 2014) (on file with author) (“Yes, personnel files are public rec-

In Florida, disciplinary findings in police personnel files are open to the public, including defendants, so prosecutors do not have to seek out or disclose information from the files.¹⁴⁴ In Broward County, for example, the district attorney's office notifies defendants when there is an ongoing criminal investigation of an officer, as this information would not be publicly available, but it does not track internal affairs issues. The task of tracking down internal affairs reports falls to the defendant, explains Tim Donnelly, Special Prosecutions Chief at the Broward County prosecutor's office: "A savvy defense attorney will go to the department and they'll get the internal affairs records on the officer."¹⁴⁵

A similar story plays out in Texas. "Police personnel files are actually available to defense attorneys by either open-records requests or subpoena, just as they are to us," said Kevin Petroff, Felony Division Chief of the Galveston County District Attorney's Office. "That arguably takes them out of traditional notions of 'Brady' evidence."¹⁴⁶ In Harris County, home to Houston, prosecutors do not review personnel files for *Brady* material, nor do they maintain a list of officers with *Brady* problems, because disciplinary records are already publicly available. "[I]f it's an allegation of untruthfulness or something else that reflects upon moral turpitude or that would—if you were putting your defense attorney hat on—would cause you to want to pursue it, sometimes we hear about it and sometimes we don't," said Scott Durfee, general counsel for the district attorney's office.¹⁴⁷

However, some prosecutors still do review the personnel files for *Brady* material, even though it is publicly available. In Ramsey County, Minnesota, prosecutors maintain an aggressive *Brady* policy, even though misconduct records are accessible to the public. Several years ago, prosecutors in the county asked the St. Paul Police Department to search all of its personnel files for any of eleven categories of "potential" *Brady* information covering dishonesty, bias, and excessive force.¹⁴⁸ Once the files had been pulled, prosecutors person-

ord. We generally ask our investigators to pull them. Officers are notified when their files are pulled, so it sometimes causes some political ill will.").

144. See FLA. STAT. § 119.07 (2014); Telephone Interview with Bob Dillinger, Pub. Defender, Sixth Judicial Circuit, Fla. (Feb. 11, 2014). Only records of open investigations are confidential, and this exemption is set to expire in 2018. FLA. STAT. § 119.071(2)(k).

145. Telephone Interview with Timothy Donnelly, Chief, Special Prosecutions Unit, Broward State Att'y Office, Fla. (Mar. 31, 2014).

146. E-mail from Kevin Petroff, Felony Div. Chief, Galveston Cnty. Dist. Att'y Office, to author (Apr. 7, 2014) (on file with author). It is worth noting, however, that a number of large municipal agencies in Texas are governed by the state's civil service code, which limits public access to disciplinary records. TEX. LOC. GOV'T CODE ANN. § 143.089(g) (West 2013). The Houston Police Department, which is governed by this civil service code, makes summaries of police misconduct publicly available through the city's human resources department but requires a subpoena before it will release the information to defendants. Telephone Interview with Tuan Nguyen, Att'y, Hous. Police Dep't (Apr. 9, 2014).

147. Telephone Interview with Scott Durfee, Gen. Counsel, Harris Cnty. Dist. Att'y Office, Tex. (Apr. 8, 2014).

148. Telephone Interview with Rick Dusterhoft, Prosecutor, Ramsey Cnty. Dist. Att'y Office, Minn. (Feb. 26, 2014).

ally reviewed them to decide which officers to put on the *Brady* list, and they have continued to update the list monthly based on new misconduct findings from the police.¹⁴⁹ Prosecutor Rick Dusterhofs, who led the project, said prosecutors keep track of this information, even though not required to by *Brady*, because they want to avoid cross-examination ambushes by defendants whose attorneys obtained the police records and ineffective assistance of counsel claims by defendants whose attorneys did not obtain the information.¹⁵⁰

Another example of voluntary *Brady* disclosures can be found in Arizona's Maricopa County, home to Phoenix. In 2004, the Maricopa County Attorney's Office launched an aggressive policy aimed at digging up *Brady* material in police personnel files, even though Arizona is a public-record state.¹⁵¹ Bill Amato, the prosecutor who led the project, met with the chiefs of the county's two dozen law enforcement agencies and warned them of possible civil liability if they withheld *Brady* material from these files. "[I]f I get screwed on this," he remembers saying, "I'm taking my finger and I'm pointing it directly at you . . . [Y]ou guys now have some skin in the game."¹⁵² Within weeks, the police agencies dumped so many personnel records on Amato that he had to get a second office for the overflow.¹⁵³

Under the Maricopa County policy, law enforcement agencies are required to provide records of all disciplinary actions that concern "a law enforcement employee's truthfulness, bias, or moral turpitude."¹⁵⁴ Prosecutors have even used tips from police officers and the defense bar to ask about misconduct the police agencies did not initially disclose.¹⁵⁵ Once the prosecutor receives the records, she can then disclose them on her own or provide them to the trial

149. *Id.*

150. *Id.*; MINN. STAT. § 13.43 (2014) (describing the public-record status of government personnel data); *see also* Wiehl, *supra* note 71, at 118.

151. ARIZ. REV. STAT. ANN. § 39-121 (2014); Phx. Police Dep't, Operations Order 2.9(8) (rev. June 2013), *available at* <https://www.phoenix.gov/policesite/Documents/Public%20Ops%2006%2001%2014.pdf>; Telephone Interview with Jeremy Mussman, Deputy Dir., Maricopa Cnty. Pub. Defender, Ariz. (Feb. 27, 2014); *see also* State v. Robles, 895 P.2d 1031, 1035 (Ariz. Ct. App. 1995) ("Although we have found no Arizona authority directly on point, we decline appellant's invitation to adopt *Henthorn*. Rather, we adopt the threshold materiality showing required in *United States v. Driscoll*." (citations omitted)). *But see* Telephone Interview with Daisy Flores, Former Cnty. Att'y, Gila Cnty., Ariz. (Mar. 3, 2014) (stating that the public-record rule "doesn't necessarily mean agencies are very forthcoming about internal investigations").

152. Telephone Interview with Bill Amato, Police Legal Advisor, Tempe Police Dep't, Ariz., Former Prosecutor, Maricopa Cnty., Ariz. (Mar. 28, 2014).

153. *Id.*

154. MARICOPA CNTY. ATT'Y OFFICE, PROSECUTION POLICIES & PROCEDURES § 6.4 (rev. Oct. 3, 2011) (on file with author).

155. Letter from Bill Amato, Police Legal Advisor, Tempe Police Dep't, to Karl Auerbach, Acting Chief, Salt River Police Dep't (Dec. 10, 2004) ("Unfortunately we continue to receive information from the defense bar and other police officers about cases that have not been reported to our office.").

judge, who will decide what to release.¹⁵⁶ Why did prosecutors establish such a system, given the information's public-record status? Amato said that, under his reading of *Brady* case law, "there is an affirmative obligation on the prosecution" to have that information, regardless of whether the defendant could get it on his own.¹⁵⁷

This description of *Brady*'s application in public-record states helps to demonstrate the diversity of approaches to the *Brady* issue. It also provides a retort to the claim that prosecutors could not possibly handle the burden of keeping track of misconduct in police personnel files: make the misconduct public, and prosecutors need not spend any time worrying about it.¹⁵⁸

C. Group 3: "Access and Disclosure" Regimes

In the third group of jurisdictions, prosecutors have access to police personnel files while defendants do not, which places a *Brady* obligation on the prosecutors to learn of and disclose material from these files. In these jurisdictions, prosecutors use their access to put in place systems to comply with their *Brady* duties. Of the four types of disclosure regimes, this is the most straightforward because it treats personnel file evidence like any other favorable, material information known to the prosecution team.

Prosecutors in Washington State fall into this disclosure group. Statewide associations representing prosecutors, police chiefs, and sheriffs have adopted model rules calling on law enforcement agencies to "review all their internal investigation files to determine if any possible *Brady* information exists on any of their employees who may be called as witnesses by the prosecution."¹⁵⁹ Where such information exists, the agencies "must submit the information to the prosecutor," who is then free to disclose it without asking the court for permission.¹⁶⁰ Prosecutors in King County, home to Seattle, employ *Brady* lists

156. *Id.*; Bill Amato, BRADY and Officer Integrity, PowerPoint Presentation to Tempe Police Dep't (n.d.) (on file with author).

157. Telephone Interview with Bill Amato, *supra* note 152; Kyle Daly, *Pinal County Attorney's Office Compiling List of Cops with Questionable Integrity*, INMARICOPA.COM (Aug. 12, 2013, 12:29 PM), <http://www.inmaricopa.com/Article/2013/08/12/pinal-county-attorney-office-lando-voyles-brady-list-cops-questionable-integrity-lizarraga> (announcing the Pinal County Attorney's Office's *Brady* list).

158. *See infra* notes 184-87 and accompanying text.

159. WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING BRADY EVIDENCE AND LAW ENFORCEMENT WITNESSES WHO ARE EMPLOYEES/OFFICERS 3 (2009); *see* Mary Ellen Reimund, *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officers? A Need for Expansion and Uniformity*, INT'L J. HUM. & SOC. SCI., Sept. 2013, at 1, 2 (discussing *Brady* list use in Washington); *see also* WASH. ASS'N OF PROSECUTING ATT'YS, MODEL POLICY, DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES 3-5 (2013).

160. WASH ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 159, at 3.

to track the misconduct of the 3000 law enforcement agents in the county, as do prosecutors in other Washington counties.¹⁶¹

In North Carolina, police personnel files are confidential by statute,¹⁶² and case law prevents defendants from subpoenaing them without providing “specific factual allegations detailing reasons justifying disclosure.”¹⁶³ But prosecutors have easy access to the files, and some use that access to seek out and disclose *Brady* information. In 2013, District Attorney Ben David, former head of the North Carolina Conference of District Attorneys, implemented a “heightened Giglio screening process” for New Hanover and Pender Counties.¹⁶⁴ The policy requires all officers to self-report *Brady*¹⁶⁵ issues in their backgrounds and requires all police agencies to search officers’ personnel records for credibility issues going back ten years.¹⁶⁶ “Our duty in North Carolina is nearly absolute to disclose what we know and what we should know,” said Tom Old, the prosecutor directing the project. “What we should know is what is contained in internal affairs files”¹⁶⁷ In Old’s estimation, prosecutors have “an affirmative duty to gain access to those [files] and disclose anything that reflects on an officer’s credibility or bias.”¹⁶⁸

Elsewhere in North Carolina, disclosure is less formal and less forthcoming. Prosecutors in Buncombe County, home to Asheville, have no policy for checking personnel files for *Brady* material.¹⁶⁹ In Pitt County, the city attorney—not the prosecutor—has the task of going through the personnel files for potential *Brady* material. According to the policy of one police department there, the city attorney is allowed to disclose the information to prosecutors only if prosecutors agree not to disclose it to the defense without in camera review.¹⁷⁰

In the District of Columbia, prosecutors maintain a list of officers with credibility issues.¹⁷¹ Upon disciplining a police officer, the Metropolitan Police

161. Reimund, *supra* note 159, at 2.

162. See N.C. GEN. STAT. § 126-24 (2014); *id.* § 160A-168.

163. *In re Brooks*, 548 S.E.2d 748, 755 (N.C. Ct. App. 2001).

164. Procedure for Disclosure of *Brady/Giglio* Material, Attachment to Memorandum from Benjamin R. David, Dist. Att’y, N.C. Fifth Prosecutorial Dist., to Law Enforcement Officers of the Fifth Prosecutorial Dist. (Apr. 3, 2013) (on file with author).

165. The policy speaks of “*Giglio* material,” which is a reference to *United States v. Giglio*, in which the Supreme Court extended *Brady* to impeachment evidence. 405 U.S. 150, 154 (1972). Any *Giglio* material is *Brady* material.

166. Procedure for Disclosure of *Brady/Giglio* Material, *supra* note 164.

167. Telephone Interview with Tom Old, Assistant Prosecutor, Fifth Prosecutorial Dist., N.C. (Mar. 31, 2014).

168. *Id.*

169. Telephone Interview with Megan Apple, Assistant Dist. Att’y, Buncombe Cnty., N.C. (Mar. 31, 2014).

170. See GREENVILLE POLICE DEP’T, POLICIES & PROCEDURES MANUAL § 104.1.2 (rev. Aug. 15, 2013).

171. Barker, OEA No. 1601-0143-10, slip op. at 8, 10, 13 (D.C. Office of Employee App. Nov. 28, 2012) (quoting testimony by Roy McCleese, Chief of the Appellate Division of the U.S. Attorneys Office); CONVICTION INTEGRITY PROJECT, CTR. ON THE ADMIN. OF

Department forwards the officer's name to a *Brady* committee within the prosecutor's office, which reviews the officer's records to decide whether she should be included on the *Brady* list.¹⁷² When a *Brady* officer is slated to testify, the prosecutor checks with the officer's supervisor for more details about the nature of the misconduct and ultimately decides whether the officer's testimony in that case would withstand the impeachment evidence that must be disclosed.¹⁷³

D. *Group 4: "Access but No Disclosure" Regimes*

In some jurisdictions, even though prosecutors have special access to the personnel files, they do not put in place systems to seek out *Brady* material in the files. This failure is sometimes attributable to ignorance of or disregard for the law. Other times, the decision not to search the files is driven, or at least abetted, by police departments and courts that treat the personnel files as a land where *Brady* does not shine. In some jurisdictions, prosecutors, police, and the courts effectively ignore *Brady*'s application to personnel files, leaving defendants to make do with whatever impeachment material they can scrounge from the files via subpoena.

Some jurisdictions show no recognition that internal affairs findings have implications for *Brady*, and this lack of awareness means that prosecutors never learn of the misconduct they would be required to disclose. For example, retired police lieutenant Richard Lisko asked the head of internal affairs at an unnamed Maryland agency about the agency's *Brady* policy for misconduct records. "What's that?" the internal affairs commander asked. "You mean the gun

CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 26 n.16 (2012).

172. Lindsey, OEA No. 1601-0081-09, slip op. at 7 (D.C. Office of Employee App. Oct. 28, 2011) (quoting testimony by Robert Hildum, Deputy Attorney General for Public Safety for the D.C. Office of the Attorney General (OAG), indicating that the OAG reviews the officer's misconduct and decides whether or not to use the officer's testimony). The list is actually called the "*Lewis List*," in reference to *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979).

173. *Barker*, OEA No. 1601-0143-10, slip op. at 8; *Lindsey*, OEA No. 1601-0081-09, slip op. at 4-5. Brad Weinsheimer, chair of the District of Columbia's *Brady* committee, testified to three types of misconduct on the list: (1) an arrest, (2) an ongoing investigation (because the officer may want to "curry favor" with the prosecution), and (3) "information that we determine goes to veracity," such as "prior bad acts that relate to veracity, that relate to truth telling." *Lindsey*, OEA No. 1601-0081-09, slip op. at 4 (quoting Weinsheimer's prior testimony). Other jurisdictions around the country employ similar systems of tracking officer misconduct. *E.g.*, Plaintiffs' Response to Witness Jerome Gorman's Motion to Quash & for Protective Order at 5-6, *Callahan v. Unified Gov't*, No. 2:11-CV-02621-KHV-KMH (D. Kan. Mar. 20, 2013) (Wyandotte County, Kansas); CONVICTION INTEGRITY PROJECT, *supra* note 171, at 26 (Jefferson Parish, Louisiana); Donnie Johnston, *Culpeper Officer Pleads Not Guilty in Fatal Shooting*, FREE LANCE-STAR (June 8, 2012, 7:55 AM), http://www.fredericksburg.com/local/culpeper-officer-pleads-not-guilty/article_4959d8a6-56d4-5146-a0bd-ef6d43deae4c.html (Culpeper, Virginia).

law?”¹⁷⁴ Lisko next asked the agency’s legal director about the *Brady* policy for disclosing police misconduct. “We don’t have one,” the attorney said. “We require a subpoena, and then we challenge it in court.”¹⁷⁵

Another illustration of this lack of awareness can be seen in Michigan, where the Commission on Law Enforcement Standards encountered a question in 2007 about “what duties exist on the part of law enforcement agencies to provide personnel files of police officers in pending criminal cases under the Giglio rule.”¹⁷⁶ The Commission’s attorney researched the question and reported back a month later that no duty exists. “The Giglio case in Federal practice has not been extended to the state,” he said, so it was “not an immediate question that police or law enforcement officials need to be concerned with . . . relative to an affirmative duty to turn over personnel records.”¹⁷⁷

Even where prosecutors acknowledge *Brady*’s application to personnel files, some have been slow to institute search and disclosure practices. For example, a New York statute makes police personnel files confidential but permits prosecutors to look in the files.¹⁷⁸ This special access thus foists a *Brady* obligation on prosecutors to learn of misconduct in the files. But District Attorney Gwen Wilkinson, of upstate Tompkins County, said she has no formal system for learning of impeachment evidence in the personnel files—though she plans to implement one soon.¹⁷⁹ Indeed, her lack of a system for learning of police misconduct was an issue in a civil rights suit brought by a police officer in Tompkins County.¹⁸⁰

174. Richard Lisko, *Agency Policies Imperative to Disclose Brady v. Maryland Material to Prosecutors*, POLICE CHIEF, Mar. 2011, at 12, 12 (internal quotation marks omitted). This was a reference to the Brady Handgun Violence Prevention Act of 1993. See also Telephone Interview with Daisy Flores, *supra* note 151 (“[L]aw enforcement agencies don’t understand. You say *Brady* to them, and they think it has to do with gun control.”).

175. Lisko, *supra* note 174, at 12 (internal quotation marks omitted).

176. Mich. Comm’n on Law Enforcement Standards, Commission Meeting Minutes 11 (Mar. 14, 2007), https://www.michigan.gov/documents/mcoles/2_Minutes_3-14-2007_193332_7.pdf. As noted earlier, *Giglio* material is *Brady* material.

177. *Id.*

178. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014) (“The provisions of this section shall not apply to any district attorney or his assistants . . . or any agency of government which requires the records . . . in the furtherance of their official functions.”).

179. Telephone Interview with Gwen Wilkinson, Dist. Att’y, Tompkins Cnty., N.Y. (Apr. 2, 2014). Wilkinson said that the “[r]equirements of *Giglio* are going to be much more stringent” going forward. *Id.*

180. Examination Before Trial of Gwen Wilkinson at 30, *Miller v. City of Ithaca*, 914 F. Supp. 2d 242 (N.D.N.Y. 2012) (No. 3:10-cv-597) (reporting that no formal or informal protocol exists for informing the prosecutor of police misconduct). The officer alleged that he complained of racial discrimination in the police department and, in retaliation for this complaint, police supervisors improperly told the district attorney about his disciplinary record, even though there was no system in place to disclose this material in general. According to the officer’s suit, the district attorney then agreed to use the information to “provide a sham ‘opinion’ concerning [the officer’s] purported lack of credibility so as to allow [the police department] to exact punishment against [the officer] for his complaints of discrimination.” Amended Complaint at 11-12, *Miller*, 914 F. Supp. 2d 242 (No. 3:10-cv-597).

Similarly, prosecutors in Charleston, West Virginia, have access to police misconduct files but have only recently begun looking in these files. Charles Miller, a longtime federal prosecutor who joined the district attorney's office several years ago, said he "quickly saw that we really weren't doing anything with respect to *Giglio*" material in personnel files.¹⁸¹ This realization prompted him, with the district attorney's blessing, to ask all law enforcement agencies in the county to "review the files of all their officers and notify us if there are any substantiated allegations of misconduct."¹⁸² Not all his colleagues in the state do the same, he said.¹⁸³

Some prosecutors have argued that, as a matter of doctrine, they are not required to learn of information in police personnel files. In Oregon, in 2013, one prosecutor after another said as much in hearings before the legislature. "[I]magine the resources that would be required to go into every one of those personnel files on some periodic basis—I don't know, monthly—to see if there had been some finding of dishonesty or some kind of actionable misconduct that some defense attorney might consider impeachable," said one district attorney. "It's staggering."¹⁸⁴ The first assistant to another district attorney added: "To ask prosecutors to be aware of the contents of their personnel files, to be aware of commendations and of demerits contained within those personnel files, is simply asking too much."¹⁸⁵ Still another district attorney insisted: "How far do we have to delve into witnesses' lives, victims' lives, you know, law enforcement's lives?"¹⁸⁶ The executive director of the Oregon District Attorneys Association wrote that such a search requirement was "a demand that the government pry into everyone's life to see if there is anything there."¹⁸⁷ Notwithstanding these statements, a task force of Oregon prosecutors and law enforcement leaders is now drafting guidelines on *Brady*'s application to these files.¹⁸⁸

In many jurisdictions, personnel file material is considered more of a discovery matter than a *Brady* matter; courts discuss what a defendant must do to access the files or to trigger in camera review, but do not ask what the *prosecu-*

181. Telephone Interview with Charles Miller, *supra* note 79.

182. *Id.*

183. *Id.*

184. *Hearings on S.B. 492 Before the S. Comm. on Judiciary, 77th Leg., Reg. Sess. (Or. 2013)* (testimony of Alex Gardner, Lane County District Att'y), *video available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=2020.

185. *Id.* (testimony of Jeff Howes, First Assistant, Multnomah County District Att'y Office).

186. *Hearings on S.B. 492 Before the H. Comm. on Judiciary, 77th Leg., Reg. Sess. (Or. 2013)* (testimony of Scott Healy, Clackamas County District Att'y), *video available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=1348.

187. *Id.* (written statement of Doug Harclerod, Executive Director, Oregon District Att'ys Association) (recounting what "[o]ne experienced" district attorney said), *available at* <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/25268>.

188. E-mail from Eriks Gabliks, Dir., Or. Dep't of Pub. Safety Standards & Training, to author (Mar. 23, 2014) (on file with author).

tor must do to search the files. “There are relatively few cases involving the right of a defendant to have the prosecution review personnel files of law enforcement officers,” explained the Delaware Supreme Court, after carrying out a nationwide survey of the case law. “Nevertheless, those decisions are almost unanimous in holding that in response to a specific motion, or upon subpoena *duces tecum*, the prosecution is required to review the identified personnel files for *Brady* material.”¹⁸⁹ Unfortunately, instead of considering the prosecutor’s duty toward these files, court opinions focus on what the *defendant* must do to gain direct access or to trigger in camera review. For example, a leading New York case holds that a defendant who wants access to the personnel files should at least advance “some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.”¹⁹⁰ Other courts have adopted similar threshold requirements for the personnel files, commonly requiring the defendant to establish “a factual basis for the requested files” before he can trigger in camera review or access the file himself.¹⁹¹

The demotion of the personnel file issue from *Brady*’s constitutional status to that of a mere discovery request has a number of problematic implications. The most important implication of this discovery approach is that it shifts from the prosecutor to the defendant the difficult burden of justifying why the file’s confidentiality should be pierced. Under the discovery approach, the burden falls on the defendant to make a threshold showing about what the files contain before the court will even consider reviewing the files. The paradox is that the defendant must already know something about what is in the file before he can get help learning what is actually in the file. If he knows nothing about the file—as one might expect of such a confidential source—the defendant will get

189. *Snowden v. State*, 672 A.2d 1017, 1023 (Del. 1996). But some courts do not agree. Last summer, New York’s high court said, in dicta, “While prosecutors should not be discouraged from asking their police witnesses about potential misconduct, if they feel such a conversation would be prudent, they are not required to make this inquiry to fulfill their *Brady* obligations.” *People v. Garrett*, 18 N.E.3d 722, 732 (N.Y. 2014) (discussing, in the context of a civil rights suit, evidence known to the officer but not to the prosecutor).

190. *People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979). *But see* *March v. State*, 859 P.2d 714, 718 (Alaska Ct. App. 1993) (holding that “a good faith basis for asserting that the materials in question may lead to the disclosure of favorable evidence” is enough to trigger review).

191. *Snowden*, 672 A.2d at 1023 (citing *State v. Kaszubinski*, 425 A.2d 711, 714 (N.J. Super. Ct. Law Div. 1980)); *see* *Rodgers v. State*, 547 S.W.2d 419, 429 (Ark. 1977) (en banc) (“But, in the exercise of discretion, the necessity for a defendant’s searching confidential matter must be weighed against the public policy of confidentiality or secrecy. This, the trial court may do by an *in camera* inspection of the material sought.” (citations omitted)); *Dempsey v. State*, 615 S.E.2d 522, 525 (Ga. 2005) (ruling that the defendant has the “burden of showing that the personnel files were not the subject of a fishing expedition, but were relevant to . . . guilt, innocence or appropriate penalty”); *Patterson v. State*, 381 S.E.2d 754, 755 (Ga. Ct. App. 1989) (“When the defense seeks to discover the personnel files of an investigating law enforcement officer, some showing of need must be made.” (quoting *Cargill v. State*, 340 S.E.2d 891, 911 (Ga. 1986), *overruled in part* by *Manzano v. State*, 651 S.E.2d 661 (Ga. 2007)) (internal quotation marks omitted)). *See generally* Ghent, *supra* note 31.

no help from the court in learning more. Were this treated as a *Brady* problem rather than a discovery problem, it would at least be the prosecutor's responsibility to grapple with this catch-22, and prosecutors have shown somewhat more capacity for doing so than defendants.¹⁹²

In sum, whether they think *Brady* is a gun control law, a problem not pressing enough—or too difficult—to solve, or a matter of mere discovery, these Group 4 jurisdictions fail to acknowledge *Brady*'s application to police personnel files. In short, they treat the files as a *Brady* blind spot.

III. THE *BRADY* BATTLE WITHIN THE PROSECUTION TEAM

Beyond the access issues discussed above, there is another significant dynamic that impedes *Brady*'s application to police misconduct: the conflict within the prosecution team. Even when prosecutors learn of police misconduct, police officers spend much energy pressuring them not to disclose it. This pressure is motivated by the fear that disclosure will lead to severe employment consequences for the officers. Police officers and their unions have used litigation, legislation, and informal political pressure to mount a campaign against *Brady*'s application to their files. This conflict between prosecutors and police officers is easily overlooked, however, because prosecutors and police officers are widely seen as forming a cohesive prosecution team. Indeed, the Supreme Court's *Brady* case law is premised on the assumption that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will" by putting in place "procedures and regulations" to bring forth *Brady* material known to any member of the prosecution team, including the police.¹⁹³ But the conflict within the prosecution team undermines that assumption and constrains the prosecutor's ability to fulfill his constitutional obligations.

The battle over *Brady*'s application to personnel files has also created divisions within police departments. Police officers suspect police management of using the *Brady* process to punish officers outside of the departments' official disciplinary systems and their attendant procedural protections. For officers, *Brady* has become an issue not just of defendants' due process rights but also of their own due process rights, as officers struggle to protect themselves from the uses and abuses of the *Brady*-cop designation. This aspect of due process helps explain why police officers and their advocates take such a hard line against *Brady*'s application to these files. Indeed, the frequent failure to apply *Brady* to these personnel files cannot be understood without accounting for this conflict, which has riven the prosecution team.

192. See *supra* Part II.A.

193. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (internal quotation mark omitted).

A. *The Prosecutor's (and the Police Chief's) Brady Power*

Brady's application to law enforcement personnel files is an issue very much on the minds of the police. “[O]ne of the most important issues facing law enforcement is the one surrounding the *Brady* List,” declared Jim Parks, then-president of Arizona’s largest police association. “[W]e have been fighting this issue because there appears to be no set standard for placing an officer on the list, removing an officer from the list, or . . . defining [who] makes those decisions.”¹⁹⁴ Another officer railed against his placement on a *Brady* list, calling it “tantamount to being placed on a government blacklist, which when publicized to prospective law enforcement employers effectively excludes the blacklisted individual from his chosen occupation in law enforcement.”¹⁹⁵ Still another officer derided it as a “blacklist[]” that violates due process and goes beyond any “obligation of law.”¹⁹⁶ Prosecutors, too, have acknowledged the gravity of the *Brady* designation, ominously referring to a *Brady*-list placement as “the kiss of death.”¹⁹⁷

But what, specifically, is a *Brady* list, and why does it threaten these officers? *Brady* lists, *Giglio* lists, liars lists, asterisk lists, potential impeachment disclosure databases, and law enforcement integrity databases are all terms used to describe the mechanism by which prosecutors within an office alert each other to an officer’s credibility problems.¹⁹⁸ There is a wide range in who maintains these lists—police or prosecutors—and in how the lists are constructed, with some providing only vague warnings that a credibility problem exists and others specifying the details of the misconduct. Strictly speaking, placement on the *Brady* list does not bar an officer from testifying. Depending on the severity of the impeachment material and the value of the officer’s testimony in the case, the prosecutor may still decide to call the officer as a witness. But the *Brady*-cop designation immediately puts a question mark on the officer’s ability to testify, and that question mark has severe employment con-

194. Jim Parks, *President’s Message: Brady (“Liar’s”) List a Most Important Issue*, AZCOPS SPEAKS (Ariz. Conference of Police & Sheriffs, Local 7077, Tucson, Ariz.), Spring 2004, at 2, 2.

195. Complaint for Damages & Injunctive Relief for Violation of Individual Civil Rights & Liberties at 4, *Tillotson v. Dumanis*, No. 10CV1343WQH AJB, 2012 WL 667046 (S.D. Cal. Feb. 28, 2012); see also Parks, *supra* note 194, at 2 (“The unjustified placement of an officer on a *Brady* list is, in many cases, a career ender. An officer on the list is often barred from holding any position which might result in the officer testifying in court. Officers lose the ability to promote or transfer and are stigmatized as ‘liars.’”).

196. Complaint for Damages & Injunctive Relief for Violation of Individual Civil Rights & Liberties with Supplemental State Law Claims at 7, 9, *Nazir v. Cnty. of L.A.*, No. CV10 6546-MRP (AGR) (C.D. Cal. Sept. 1, 2010).

197. Telephone Interview with Brian Kramer, Exec. Dir., Office of the State Att’y for the 8th Judicial Dist., Fla. (Mar. 31, 2014).

198. See CAL. GOV’T CODE § 3305.5 (West 2014) (“‘*Brady* list’ means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in *Brady v. Maryland* . . .”).

sequences. An officer who cannot be counted on to testify also cannot be counted on to make arrests, investigate cases, or carry out any other police functions that might lead to the witness stand. *Brady* cops may thus find themselves fast-tracked for termination and hard-pressed to find future work.¹⁹⁹

Considering the grave employment consequences, one might expect strong substantive and procedural protections to guard against mistakenly or unfairly placing an officer on the *Brady* list. But that is not the case. Unlike in police department disciplinary proceedings, which provide many procedural protections to accused officers, prosecutors can make *Brady*-cop designations based on flimsy evidence and without giving officers an opportunity to contest the allegations beforehand or to appeal the decisions afterward.²⁰⁰ Even if, on appeal, the officer overturns the misconduct finding that landed him on the *Brady* list, the prosecutor can continue to label the officer as a *Brady* cop if he doubts the officer's credibility.²⁰¹ And forget whatever progressive discipline system might govern the traditional punishment of police misconduct²⁰²: a prosecutor can put an officer on the *Brady* list for a small, first-time offense and leave her there for life without giving her any chance to clear her name.

The sense of unfairness engendered by this process is only exacerbated by the potential for police management to misuse *Brady* in clashes with police labor. Not without justification, officers suspect prosecutors of using the *Brady*

199. Telephone Interview with Richard Lisko, Program Manager, Int'l Ass'n of Chiefs of Police (Feb. 21, 2014) ("[The] challenge for many police chiefs and sheriffs: 'I have a guy who is now prevented from testifying. What do I do with him?'"). As the president of the California Police Chiefs Association recently said, "Most departments up and down the state don't have the ability to put someone in a non-enforcement position for the rest of their career Unfortunately, they really can't stay employed in the law enforcement profession." Melody Gutierrez & Kim Minugh, *California Police Unions Fight Discipline of Officers Under Prosecutors' Lists*, MERCED SUN-STAR (Sept. 12, 2013, 12:00 AM), <http://www.mercedsunstar.com/news/state/article3278731.html>.

200. See *United States v. Olsen*, 704 F.3d 1172, 1182 (9th Cir. 2013) ("[T]his circuit . . . has held materials from ongoing investigations to be favorable under *Brady*."); Parks, *supra* note 194, at 2 (justifying his Arizona police union's fight against *Brady* lists "because there appears to be no set standard for placing an officer on the list, removing an officer from the list, or . . . defining [who] makes those decisions"); Mike Carter, *Prosecutors Keep List of Problem Officers*, SEATTLE TIMES (June 24, 2007, 12:00 AM), http://seattletimes.com/html/localnews/2003760490_bradycops24m.html (recounting the president of the Seattle Police Officers' Guild's belief that only information about a "rare disciplinary finding of dishonesty against an officer" should be turned over, and reporting that the prosecutor's office has nonetheless turned over information about officers not yet disciplined).

201. Complaint at 4-6, *Garza v. City of Yakima*, No. CV-13-3031-LRS (E.D. Wash. Mar. 22, 2013) (opposing an officer's placement on the *Brady* list while challenging disciplinary findings); Complaint at 4-5, *Neri v. Cnty. of Stanislaus Dist. Att'y Office*, No. 1:10-cv-00823-AWI-GSA (E.D. Cal. May 11, 2010) (contesting disclosure of unsustained allegations as *Brady* material); see also Complaint for Damages & Demand for Jury Trial at 8-9, *Riley v. City of Richmond*, 3:13-cv-04752-MMC (N.D. Cal. Oct. 11, 2013) (alleging that the plaintiff officer remained on the *Brady* list even after being acquitted of the charges that originally led to placement on the list).

202. *E.g.*, N.J. OFFICE OF THE ATT'Y GEN., INTERNAL AFFAIRS POLICY & PROCEDURES 8 (rev. July 2014), available at <http://www.nj.gov/oag/dcj/agguide>.

designation to aid police chiefs in punishing disfavored officers. In the District of Columbia, for example, the police department apparently asked the prosecutor's office to make *Brady*-cop determinations in order to facilitate the firing of officers who were otherwise protected from termination by the statute of limitations on their misconduct.²⁰³ In Washington State, an officer claimed he landed on the *Brady* list because the department wanted to punish him without navigating the obstacles of the formal disciplinary process.²⁰⁴ His federal civil rights suit resulted in reinstatement and an \$812,500 settlement.²⁰⁵ In Texas, police officers accused the Ellis County district attorney of labeling one of their colleagues a *Brady* cop in order to help the police chief fire the officer.²⁰⁶ The officers claimed the *Brady* label rendered their colleague "unfit for duty" and, in so doing, made him ineligible for the labor protections he would otherwise have received.²⁰⁷ In an interview, Patrick Wilson, the Ellis County district attorney, denied the allegations and called them irrelevant: "[E]ven if the chief woke up one morning and like a lightning bolt from the sky said, 'I'm going to screw with this officer today and tell the D.A. he's a liar, with no basis at all,' once the chief has said that, the bell has rung. That's how liberal my view of *Brady* [is]."²⁰⁸

The alignment between prosecutors and police chiefs may also be seen in police management organizations' endorsements of *Brady*'s application to personnel files. In 2009, the International Association of Chiefs of Police advised its members of the "affirmative duty" to seek out impeachment material, including material contained in personnel files.²⁰⁹ Another example comes from the Idaho Peace Officer Standards and Training group, led by sheriffs and prosecutors who are appointed by the governor to the board. This group has emphasized that "[l]aw enforcement agencies have the responsibility to ensure prosecutors are informed of an officer's past record of dishonesty in reports or conduct impacting truthfulness."²¹⁰ Similarly, a panel of prosecutors, police chiefs, and academics recommended more robust *Brady* policies, including

203. See Barker, OEA No. 1601-0143-10, slip op. at 13-14 (D.C. Office of Employee App. Nov. 28, 2012); Lindsey, OEA No. 1601-0081-09, slip op. at 11 (D.C. Office of Employee App. Oct. 28, 2011).

204. First Amended Complaint for Damages & Injunctive Relief at 2, *Wender v. Snohomish Cnty.*, No. CV 07-197 Z (W.D. Wash. Oct. 25, 2007), 2007 WL 5043448.

205. Press Release, MacDonald Hoague & Bayless, Fired Mountlake Terrace Police Sergeant Who Criticized Drug War Reaches \$812,500 Settlement with Municipalities (Jan. 12, 2009) (on file with author).

206. Telephone Interview with Patrick M. Wilson, Cnty. & Dist. Att'y, Ellis Cnty., Tex. (Apr. 8, 2014).

207. *Id.*

208. *Id.*; see also Telephone Interview with Timothy Donnelly, *supra* note 145 ("The same officers keep coming back. Some are hard to get rid of, to fire. Departments want to send them to us. I say this is a management issue, not a criminal [one].").

209. NAT'L LAW ENFORCEMENT POLICY CTR., INT'L ASS'N OF CHIEFS OF POLICE, *BRADY* DISCLOSURE REQUIREMENTS 4 (2009).

210. *The Need for Truth: Behind Brady & Giglio*, INTEGRITY BULL. (Idaho Peace Officer Standards & Training, Meridian, Idaho), May 2012, at 1, 1-2.

those pertaining to police misconduct records.²¹¹ Other groups representing police management have also endorsed such *Brady* lists.²¹² These examples suggest that prosecutors and police managers often share common interests in *Brady*'s application to these files—interests that conflict with those of police officers.

B. *Police Officer Pushback*

While officers can neither prevent prosecutors from deeming them *Brady* cops nor force prosecutors to reverse their *Brady* decisions, officers can pressure prosecutors to use their discretion in the officers' favor. Officers have spent a great deal of effort in such attempts, using litigation, legislation, and informal political pressure to blunt *Brady*'s application to their files, and this campaign has met with some success.

1. *Litigation*

Police officers have employed a range of causes of action to fight back against the *Brady*-cop designation. One claim is defamation, in which an officer alleges that prosecutors and their police chief collaborators damaged the officer's reputation by placing him on a *Brady* list.²¹³ Defamation claims are sometimes paired with claims of breach of contract and tortious interference with contract. In one case, an officer resigned from the police department on the condition that his *Brady* problems not be revealed to prospective employers.²¹⁴ But, on the verge of landing a new job, the officer learned that the prosecutor in his old jurisdiction was planning to share the officer's *Brady* status with the prosecutor in the officer's new jurisdiction.²¹⁵ This prompted a suit for defamation, breach of contract, invasion of privacy, false light, and tortious interference with contract—a suit that the officer promptly lost on summary

211. CONVICTION INTEGRITY PROJECT, *supra* note 171, at 26 (“DA offices should also establish a database or network for tracking *Brady* and/or *Giglio* information as it relates to key witnesses, such as police officers . . . who will potentially work with a prosecutor in the future.”).

212. See WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 159, at 3; Colo. Ass'n of Chiefs of Police et al., *supra* note 135, at 1-3.

213. See, e.g., *Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *1 (D. Ariz. Aug. 22, 2006); Giana Magnoli, *Ex-Santa Maria Police Officer Files Lawsuit Claiming Wrongful Termination*, NOOZHAWK (Aug. 19, 2012, 11:39 PM), http://www.noozhawk.com/article/081912_fired_police_officer_sues_santa_maria; Rebecca Woolington, *Cornelius Officer Files Tort Against City, Claims Officials Recommended His Placement on List Questioning Credibility*, OREGONIAN (Aug. 20, 2013, 8:18 PM), http://www.oregonlive.com/forest-grove/index.ssf/2013/08/cornelius_officer_files_tort_a.html.

214. *Lackey v. Lewis Cnty.*, No. C09-5145RJB, 2009 WL 3294848, at *4 (W.D. Wash. Oct. 9, 2009).

215. *Id.* at *5.

judgment.²¹⁶ Some officers have even sought—unsuccessfully—to enjoin prosecutors and police departments from disseminating *Brady* information about them.²¹⁷ These suits are often frivolous to begin with and made doubly and triply so by courts' reluctance to interfere with prosecutors' *Brady* decisions and courts' deference to the doctrines of absolute and qualified immunity. But the suits nonetheless illustrate the intensity of this conflict within the prosecution team.

Another common cause of action is retaliation, which requires the plaintiff to prove she suffered an adverse employment action as a result of some protected activity.²¹⁸ Officers claim to have been placed on *Brady* lists for criticizing the district attorney's policies in the local newspaper,²¹⁹ failing to support the prosecutor's reelection campaign,²²⁰ providing testimony that was truthful but unhelpful to the prosecution,²²¹ and complaining to city officials about corruption in the police department.²²² In one retaliation case in federal court, a narcotics detective alleged that the district attorney placed him on the *Brady* list for raising questions about improprieties on the part of one of the district attorney's employees.²²³ According to the disputed facts in the court's denial of summary judgment, the prosecutor threatened to put the detective on the *Brady* list unless the detective apologized and was transferred out of the narcotics unit.²²⁴ The case settled soon thereafter.²²⁵ The detective's lawyer called "the *Brady* listing . . . an abuse of the prosecutor's power."²²⁶ And it certainly is

216. *Id.* at *11-13. These suits illustrate the practical, if not legal, dilemmas facing prosecutors and police chiefs: keep quiet in the name of labor peace or speak up in the interests of *Brady*. In this case, the sheriff's office chose the former, while the prosecutor chose the latter. *Id.* at *5.

217. *Doyle v. Lee*, 272 P.3d 256, 258-59 (Wash. Ct. App. 2012).

218. Robert Roy, Annotation, *Right to Jury Trial in Action for Retaliatory Discharge from Employment*, 52 A.L.R.4TH 1141, § 1[a] (West 2015).

219. First Amended Complaint at 5, *Barnett v. Marquis*, 16 F. Supp. 3d 1218 (D. Or. 2014) (No. 3:13-cv-01588-HZ).

220. *Doyle*, 272 P.3d at 258.

221. Telephone Interview with Chris Bugbee, Att'y (Mar. 18, 2014) (explaining that federal prosecutors "basically implor[ed]" county prosecutors to create a *Brady* list and place his police officer client on it because of unhelpful testimony).

222. Complaint for Damages at 7, *Monico v. City of Cornelius*, No. 3:13-cv-02129-HZ (D. Or. Dec. 2, 2013); *see also* *Rodriguez v. District of Columbia*, No. 2011 CA 7096 B (D.C. Super. Ct. Feb. 1, 2012) (discussing retaliation). In another case, a governmental review board in Arizona found indications in 2013 that a police chief used *Brady* to retaliate against officers who sued him, but it discontinued its review because of a lack of evidence and a policy of "encourag[ing] police leaders to contribute information to the *Brady* Lists." Arizona Peace Officer Standards & Training Board, Minutes of Special Complaint Subcommittee 1-2 (Nov. 20, 2013) (on file with author).

223. *Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX NVW, 2006 WL 2456173, at *3-4 (D. Ariz. Aug. 22, 2006).

224. *Id.* at *4.

225. Notice of Settlement, *Walters*, No. CV 04-1920-PHX NVW.

226. E-mail from Robert Kavanagh, Att'y, to author (Mar. 6, 2014) (on file with author).

troubling to think that placement on the list could hinge on an apology or a transfer, neither of which seems connected to the officer's credibility. Indeed, one *Brady* list swept so broadly that a judge was placed on the list for his handling of a search warrant application.²²⁷ That a judge could land on a *Brady* list raises questions about how far the *Brady* lists have drifted from their original purpose.

In addition to these damages suits, police litigation has taken aim at the mechanics of *Brady* tracking. In one case, a police department succeeded in overturning a trial court's order that three officers provide their birthdates to the prosecution so that the prosecution could check the officers' criminal histories.²²⁸ Other litigation has targeted public defenders who assemble databases of officer credibility problems gleaned not only from criminal proceedings and internal affairs investigations but also from newspapers, social media, civil suits, and divorce proceedings.²²⁹

Still another strand of this litigation campaign targets the employment consequences of the *Brady* designation, rather than the *Brady* designation itself. Even if the officers cannot shake the *Brady* label, they can sometimes stave off termination. This can create a difficult situation for police management, which may find itself stuck with an officer who cannot testify because the prosecutor does not trust her, but who also cannot be terminated because the officer fought off her termination through arbitration.²³⁰ In Washington State, for example, a deputy fired for twenty-nine instances of misconduct, including some involving dishonesty, appealed his termination.²³¹ The arbitrator declared the termination excessive and reversed it.²³² The trial court affirmed the arbitrator, but the

227. Gary Grado, *Tempe Judge's Credibility Questioned*, E. VALLEY TRIB. (Oct. 6, 2011, 6:01 AM), http://www.eastvalleytribune.com/news/article_3724d038-4963-536a-9f02-25ff0f1a6e7fe.html (reporting that the judge's comments about the warrant application caused the prosecutor to question the judge's credibility).

228. *Garden Grove Police Dep't v. Superior Court*, 107 Cal. Rptr. 2d 642, 642-43 (Ct. App. 2001).

229. *Coronado Police Officers Ass'n v. Carroll*, 131 Cal. Rptr. 2d 553, 556 (Ct. App. 2003); see *San Diego Public Defender's Office "Police Practices Program" to Receive Defender Program of the Year Award*, BUS. WIRE, May 4, 2001, available at <http://www.thefreelibrary.com/San+Diego+Public+Defender%27s+Office+%60%60Police+Practices+Program%27%27+to...-a074093934>; see also Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 67 (2004) (discussing the Los Angeles Public Defender's database).

230. Telephone Interview with Robert W. Hood, Dir., Cnty. Prosecution & Violent Crime Div., Ass'n of Prosecuting Att'ys (Mar. 14, 2014) (noting the complications that occur when a *Brady* cop is reinstated by order of a court). "What does the prosecutor now do with that officer?" Hood asked. "I don't know that it is the prosecutor's place to tell the police department what to do with its assignments." *Id.*

231. *Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.*, 165 P.3d 1266, 1267, 1271 (Wash. Ct. App. 2007), *rev'd*, 219 P.3d 675 (Wash. 2009) (en banc); see Elliot Spector, *Should Police Officers Who Lie Be Terminated as a Matter of Public Policy?*, POLICE CHIEF, (Apr. 2008), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=1458&issue_id=42008.

232. *Kitsap Cnty. Deputy Sheriff's Guild*, 219 P.3d at 677.

Court of Appeals reversed on the grounds that it was against public policy to force a department to employ a dishonest cop.²³³ Ultimately, however, the state supreme court reinstated the officer, holding that the legislature had not articulated an explicit public policy in favor of making honesty a job requirement for officers.²³⁴ A year later, the legislature fixed that omission by statute, but the episode reveals the breadth and complexity of *Brady*'s implications for employment law, even when all parties act in good faith.²³⁵

2. Legislation

The next form of pushback involves legislation. While statutes in many states already protect the confidentiality of police personnel files, officers and unions have pushed for legislation that would specifically address the employment consequences of *Brady*'s application to their files.²³⁶ Effective the first day of 2014, a California statute provides that adverse employment action "shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a Brady list, or [because] the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*."²³⁷ The legislation still allows police departments to discipline officers for the misconduct underlying a *Brady* designation, but the mere fact that the prosecutor or the police chief said the officer has a *Brady* problem cannot be used to support any adverse employment action.²³⁸

California's new law helps prevent *Brady* from being used to punish officers outside of a department's formal disciplinary channels. The law shifts the costs of misusing the *Brady* designation from the police officer to the police department. If the prosecutor declares an officer to be a *Brady* cop but has no grounds to support that designation, police management will not be able to discipline the officer because it will not be able to prove the misconduct and, according to the new legislation, the prosecutor's *Brady* decision is no longer grounds to support a disciplinary action. Instead, police management will find itself in the uncomfortable position of having to employ an officer who can neither testify nor be terminated.²³⁹ Meanwhile, the officer will hold on to his job.

233. *Id.* at 677.

234. *Id.* at 680-81.

235. WASH. REV. CODE § 43.101.021 (2014); see NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 209, at 5 n.22; Reimund, *supra* note 159, at 3.

236. See *supra* Part II.A.

237. CAL. GOV'T CODE § 3305.5 (West 2014).

238. *Id.* ("This section shall not prohibit a public agency from taking punitive action . . . against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on a *Brady* list . . .").

239. See *supra* notes 230-35 and accompanying text; see also Gutierrez & Minugh, *supra* note 199 ("Bill proponents say under the current system, an officer may be suspended for 30 days following an internal investigation into misconduct, but subsequently fired when placed on the *Brady* list. Proponents argue that essentially puts employment decisions in the hands of the district attorney's office. Police union officials say the bill requires agencies to

Not surprisingly, lobbying associations representing local government and police management fought against this legislation, describing it as a “dangerous public safety precedent”²⁴⁰ that would place “unnecessary restrictions on a public agency’s ability to discipline a public safety officer.”²⁴¹

In Maryland, a similar law went into effect in October 2014.²⁴² The legislation was initially opposed by police management groups, including the Maryland Association of Counties, which saw it as an attempt to limit the prerogative of “Chiefs and Sheriffs . . . to transfer or reassign an officer if testimony integrity issues arise.”²⁴³ However, police management agreed to support a revised version of the bill that explicitly permitted the use of *Brady* lists, while prohibiting agencies from taking punitive action based solely on an officer’s inclusion on the list.²⁴⁴ More such legislation is sure to follow in other states.

3. *Political pressure*

Beyond litigation and legislation, police officers have tried to blunt the consequences of *Brady* by exerting informal political pressure on prosecutors and police chiefs. While prosecutors may use the *Brady* power to exert much influence over officers’ careers, prosecutors are also dependent on officers to bring in new cases, conduct follow-up investigations, and carry out various other tasks required for successful prosecutions.²⁴⁵ For elected prosecutors, the reliance on the police is even greater because officers make up an important electoral constituency. A district attorney who alienates the police rank and file may find herself out of a job. These factors give the police some leverage against prosecutors’ misuse of *Brady*.

introduce placement on Brady lists into a disciplinary hearing only after a decision on ‘guilt’ has been made, akin to introducing evidence at the sentencing phase of a criminal trial.”).

240. Press Release, League of Cal. Cities, Brady List Bill Now on Governor’s Desk, Veto Request Letters Needed (Aug. 30, 2013), <http://www.cacities.org/Top/News/News-Articles/2013/August/Brady-List-Bill-Now-on-Governor%E2%80%99s-Desk,-Veto-Request>.

241. Letter from Eraina Ortega, Cal. State Ass’n of Cntys., Natasha Karl, League of Cal. Cities, & Julianne Broyles, Cal. Ass’n of Joint Powers Auths., to Loni Hancock, Chair, Cal. Senate Pub. Safety Comm. (Mar. 27, 2013), *available at* <http://blob.capitoltrack.com/13blobs/dbd19c31-1031-48cc-b0e0-733b60e1ac07>.

242. MD. CODE. ANN., PUB. SAFETY § 3-106.1 (LexisNexis 2014).

243. Memorandum from Natasha Mehu, Md. Ass’n of Cntys., to Appropriations Comm. (Feb. 18, 2014), *available at* <http://www.ciclt.net/ul/mdcounties/SB0686JPR.pdf>.

244. Natasha Mehu, *2014 End of Session Wrap-Up: Public Safety & Corrections*, MD. ASS’N COUNTIES (Apr. 9, 2014), <http://conduitstreet.mdcounties.org/2014/04/09/2014-end-of-session-wrap-up-public-safety-corrections>.

245. Telephone Interview with Jerry Coleman, *supra* note 20; Telephone Interview with Rick Dusterhoft, *supra* note 148 (“The courts . . . put us between a rock and [a] hard place [with] all these protections for the unions and the officers and all these disclosure requirements.”); Telephone Interview with Joshua Marquis, Dist. Att’y, Clatsop Cnty., Or. (Feb. 25, 2014) (“We really are in an extraordinarily difficult situation We’re often put in an adversarial position with the very people we have to rely on to develop our cases . . .”).

The signs of the officers' influence can be seen in the willingness of some prosecutors to inject due process protections into the *Brady* process. Prosecutors' due process concessions include giving officers an opportunity to provide their side of the story before a *Brady* decision is made, allowing officers a chance to appeal the *Brady* decision within the district attorney's office, pledging to reconsider a *Brady* designation if the disciplinary action upon which it is based is reversed on appeal, and even providing for the sunseting of an officer's *Brady* status, pegged to the police department's records retention schedule.²⁴⁶ In other cases, concessions to due process may consist of the prosecutor's promise to rely only on sustained complaints rather than mere speculation, or to limit what information the prosecutor will disclose, such as summaries of the misconduct versus the underlying documents themselves.²⁴⁷ It is worth emphasizing, however, that these concessions are entirely voluntary, and the prosecutor can violate any of them in the name of *Brady* compliance.

Police officers and their unions also exert much pressure on police chiefs and thus indirectly on the *Brady* process.²⁴⁸ Observers claim that the stronger the union, the weaker *Brady*'s application to personnel files. Bill Amato, who led Maricopa County's development of a *Brady* system and now serves as counsel for the Tempe Police Department, said East Coast colleagues are often "reluctant to become more aggressive in this area" because of the strength of their police unions.²⁴⁹ He recalled a debate with an attorney at one such department, where prosecutors were not allowed access to the personnel files.

246. Press Release, League of Cal. Cities, *supra* note 240; *see also* MARICOPA CNTY. ATT'Y OFFICE, *supra* note 154, § 6.4; Telephone Interview with Bill Amato, *supra* note 157; Memorandum from Peter W. Heed, *supra* note 115; Gutierrez & Minugh, *supra* note 199; Andrew Scott & Nuno Tavares, *How the Placer County DSA Negotiated a Brady Protocol*, PORAC LEGAL DEF. FUND (May 1, 2011, 12:00 PM), <http://poracldf.org/news/detail/29> ("The District Attorney also agreed to review the Brady Database at least once a year and to entertain requests by an officer to be removed from the list based on new information. The protocol also adopted [the union's] language, making the lawful destruction of a peace officer's records—pursuant to the five-year destruction rule—a basis for requesting the officer's removal from the list.").

247. This concession regarding summaries gives the officer a chance to fight off defense subpoenas for the more detailed, raw documentation. WASH. ASS'N OF PROSECUTING ATT'YS, *supra* note 159, at 5; Parks, *supra* note 194 (citing a candidate for district attorney's pledge to work with officers to create statewide standards for *Brady* lists, under which the decision to place an officer on the *Brady* list "would not be the County Attorney's decision alone" but rather would be made by "[a] panel, upon hearing all the evidence"); Memorandum from Benjamin R. David, *supra* note 164, at 4; Thadeus Greenon, *Kalis Arrest Shines Spotlight on DA's Brady Policy; DA's Office Has Written Policy for Dealing with Officers with Character Issues*, TIMES-STANDARD (Apr. 22, 2011, 12:01 AM PDT), http://www.times-standard.com/ci_17907205 (disclosing that the policy in Humboldt County, California, provides that "officers and departments shall . . . be given 15 days to respond in writing or during an in-person meeting with the district attorney to discuss the allegations or supporting materials").

248. Telephone Interview with Scott Durfee, *supra* note 147 ("The police chief is between a rock and a hard place. Totally. I don't envy him in that spot.").

249. Telephone Interview with Bill Amato, *supra* note 152.

“Her entire defense was, ‘My chief would not survive this,’” Amato said.²⁵⁰ David O’Neil, a captain with the Brentwood Police Department in Tennessee, also connected union power to the *Brady* issue. The “at-will status of employees in southern states makes it a lot easier for officers to be fired,” he said. “When we have a bad officer, it doesn’t linger on. . . . We’re not going to tolerate it.”²⁵¹ Such observations suggest the influence police officers and unions can have, not just on the employment consequences of *Brady* but also on the application of the doctrine itself.

* * *

The *Brady* battle within the prosecution team is not something cases or scholarship have taken into account, perhaps because it often simmers below the level of reported decisions. But the competing interests of prosecutors, police chiefs, and police officers—interests both legitimate and illegitimate—take on constitutional significance insofar as they affect *Brady*. This conflict within the prosecution team helps explain why there is so much resistance to *Brady*’s application to police personnel files. Is it any wonder that officers have mobilized against *Brady*, given the unreviewable prosecutorial discretion, the motives and opportunities for abuse, and the severe employment consequences of the *Brady*-designation process? This battle within the prosecution team suggests why officers might think the best way to protect themselves is on the front end: by denying prosecutors access to the files.

IV. PROTECTIONS FOR POLICE PERSONNEL FILES VIOLATE *BRADY*

Given the importance of the misconduct information to defendants and the potential abuses of the *Brady* system that threaten officers, it might be tempting to employ some type of balancing system that would keep the personnel records confidential unless a court orders them disclosed. But such balancing systems wind up violating core aspects of the *Brady* doctrine. Worse still, the balancing systems inflict this damage on *Brady* in furtherance of policy goals that are not really in the public interest.

This Part argues that records of police misconduct do not deserve the confidentiality protections afforded to child abuse records and other sensitive documents, regardless of courts’ analogies to those sensitive records. Officers are public officials serving in positions of great public trust. Official documenta-

250. *Id.*

251. Interview with David O’Neil, Captain, Brentwood Police Dept., Tenn. (Apr. 29, 2014). The collective bargaining agreement with one New Mexico union permits *Brady* access to the otherwise confidential personnel files. Agreement Between the State of New Mexico and New Mexico Motor Transportation Employee’s Association: August 12, 2009 Through December 31, 2011, at 33-36 (2009), available at http://www.spo.state.nm.us/nmmtea_contract_2009final.pdf.

tion of their misconduct should be accessible to the public, or at least to prosecutors. This Part further argues that, even if police misconduct deserves some protected status, the traditional methods of balancing *Brady* against evidentiary privileges do not work in the personnel file context. This failure results both from the officer's special status as a witness and a prosecution team member and from specific procedural flaws in systems that purport to balance *Brady* against police privacy.

A. *Brady Versus Other Evidentiary Privileges*

State courts have struggled, in a variety of criminal cases, to balance *Brady* against evidentiary privileges, including those protecting child abuse, rape crisis counseling, medical, psychiatric, social services, juvenile delinquency, educational, and executively privileged records.²⁵² In balancing the disclosure mandated by *Brady* against the protections provided by these privileges, courts frequently turn to the Supreme Court's 1987 decision in *Pennsylvania v. Ritchie*.²⁵³ In *Ritchie*, a defendant charged with sexually abusing his daughter subpoenaed records from the county's Department of Children and Youth Services, hoping the records would contain information that could be used to impeach the victim's testimony.²⁵⁴ The government refused to release the records because they were made confidential by statute.²⁵⁵ When the case made it to the Supreme Court, the defendant claimed he was entitled, under *Brady*, to exculpatory and impeachment evidence in the files, regardless of any state statutory protections.²⁵⁶ The Supreme Court agreed that *Brady* reached information in these files and remanded the case for the trial court to look for any

252. *State v. Peseti*, 65 P.3d 119, 134 (Haw. 2003); *People v. Foggy*, 521 N.E.2d 86, 91 (Ill. 1988); *State v. Robertson*, 134 So. 3d 610, 611 (La. Ct. App. 2013); *Zaal v. State*, 602 A.2d 1247, 1261-62 (Md. 1992); *People v. Stanaway*, 521 N.W.2d 557, 561 (Mich. 1994); *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987); *People v. Davis*, 637 N.Y.S.2d 297, 301 (Nassau Cnty. Ct. 1995); *City of Dayton v. Turner*, 471 N.E.2d 162, 163 (Ohio Ct. App. 1984); *State v. Fleischman*, 495 P.2d 277, 282 (Or. Ct. App. 1972) ("Nor can the state invoke the privilege claim . . . which it attempted to make in the trial court. When the state chooses to prosecute an individual for crime, it is not free to deny him access to evidence that is relevant to guilt or innocence, even when otherwise such evidence is or might be privileged against disclosure." (footnote omitted)); *cf. Berry v. State*, 581 So. 2d 1269, 1275 (Ala. Crim. App. 1991) (describing the privilege protecting the identity of an informant); *Thornton v. State*, 231 S.E.2d 729, 733 (Ga. 1977) ("When such an informer's identity is required under the standards set forth in *Brady*, the trial court must go further and weigh the materiality of the informer's identity to the defense against the State's privilege not to disclose his name . . ."); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 800 (Ind. 2011) (discussing the victim advocate privilege); *Goldsmith v. State*, 651 A.2d 866, 873 (Md. 1995) (discussing the psychotherapist-patient privilege).

253. 480 U.S. 39 (1987); *see Peseti*, 65 P.3d at 134; *Foggy*, 521 N.E.2d at 91; *State v. Brossette*, 634 So. 2d 1309, 1317 (La. Ct. App. 1994); *State v. Little*, 861 P.2d 154, 158 (Mont. 1993); *see also Kirby v. State*, 581 So. 2d 1136, 1140 (Ala. Crim. App. 1990).

254. *Ritchie*, 480 U.S. at 43-44.

255. *Id.* at 43.

256. *Id.* at 42-43. He also raised confrontation and compulsory-process claims.

Brady material.²⁵⁷ But the Court noted that defendants could not force courts into such in camera reviews simply by requesting review; rather, the party requesting review of the file would have to “establish[] a basis for his claim that it contains material evidence.”²⁵⁸ In short, the Court endorsed threshold requirements for triggering in camera review.

The extent of the showing required to trigger in camera review becomes quite important in *Brady* balancing regimes, but courts have not reached consensus on how high that threshold should be. Different states and different privileges require anything from the showing of a “good faith basis” for the request to the showing, by “some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.”²⁵⁹ The benefit of high thresholds, proponents note, is that they make the files’ confidentiality protections meaningful. Without such threshold showings, “in every case a trial judge could become privy to all counseling records of a sexual assault victim . . . in the absence of any demonstrated need that would justify such an intrusion.”²⁶⁰ The downside of these high thresholds, however, is that they prevent routine review of the files because the person requesting review must already know something about what the files contain before she can get the court to help find out more. The trouble with not being able to carry out routine review of the files is that it interferes with the due process requirement that *Brady* information be disclosed in all criminal cases.²⁶¹

This general problem with *Brady*’s application to privileged and confidential information becomes worse in the police personnel file context, for reasons discussed below.

257. *Id.* at 61. On remand, the trial court could also instruct defense counsel to review the files subject to a protective order.

258. *Id.* at 58 n.15.

259. *People v. Stanaway*, 521 N.W.2d 557, 570-71 (Mich. 1994) (“Many [jurisdictions] require the defendant to make a preliminary showing that the privileged information is likely to contain evidence useful to his defense.”); *see, e.g.*, MONT. CODE ANN. § 41-3-205(2) (2014) (“Records may be disclosed to a court for in camera inspection if relevant to an issue before it.”); *March v. State*, 859 P.2d 714, 717-18 (Alaska Ct. App. 1993) (“The proper procedure to be followed when a party requests discovery of confidential materials is for the court to conduct an *in camera* inspection of those materials and then determine which, if any, are discoverable. . . . As long as the party seeking discovery has a good faith basis for asserting that the materials in question may lead to the disclosure of favorable evidence, the trial court should conduct an *in camera* review before ruling on a request for discovery.”); *State ex rel. Romley v. Superior Court (Roper)*, 836 P.2d 445, 452 (Ariz. Ct. App. 1992) (holding that a victim’s medical records statutory privilege is pierced if the trial court finds the records are “exculpatory and are essential to presentation of the defendant’s theory of the case, or necessary for impeachment of the victim relevant to the defense theory”); *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 134 (Cal. 2002); *State v. Hutchinson*, 597 A.2d 1344, 1347 (Me. 1991) (allowing in camera review upon a showing that “access . . . may be necessary for the determination of any issue before [the court]” (first alteration in original)).

260. *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988).

261. *See infra* Part IV.C.2.

B. *Why Police Personnel Files Are Different*

Police officers are not like other privilege-holding witnesses, and records of their misconduct do not deserve the same level of protection afforded to more archetypal privilege holders. This Subpart argues that privacy protections are not justified for records of police misconduct and that, even if they were, there would be significant hazards in applying these protections in the context of *Brady*, given police officers' special status in the criminal justice system.²⁶²

1. *Justifications for the privilege*

By their nature, evidentiary privileges exclude truthful, relevant information that might otherwise aid the court in its truth-seeking efforts. This exclusion is justified in terms of other societal interests. The leading justifications for the privileges that protect crime victim and crime witness information are the desire to prevent victims and witnesses from being harmed in the trial process by humiliating inquests into sensitive details of their lives and the desire to encourage future victims and witnesses to participate in the reporting, investigation, and prosecution of crimes.²⁶³ These rationales are often employed to justify the protections for police misconduct records,²⁶⁴ but they are ultimately

262. In terms of Wigmore's four requirements for a valid communication privilege, this Subpart can be seen to attack requirements two and four: that the confidentiality is "essential to the full and satisfactory maintenance of the relation" between the communicating parties, and that "[t]he injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation." 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285, at 527 (John T. McNaughton ed., 1961) (emphases omitted).

263. *E.g.*, *Ritchie*, 480 U.S. at 60 ("If [child abuse] records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. . . . Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected."); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) ("The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression."); Euphemia B. Warren, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 *CARDOZO L. REV.* 141, 159-60 (1995) ("Without the critical support counselors provide, many victims would be unable to report the crime to law enforcement officials, thus perpetuating the low reporting rate of rape." (footnote omitted)).

264. *E.g.*, *Martinelli v. Dist. Court*, 612 P.2d 1083, 1090 (Colo. 1980) (en banc) (noting the police concern about "the possible chilling effect of disclosure on the process of procuring such information from citizen-complainants and the possible adverse impact on the complainants of disclosure of their identities," and noting the further police concern that "knowledge on the part of individual police officers that the information they provide to S.I.B. investigators will later be subject to disclosure in civil litigation will have a detrimental effect on frank and open communication between the officers and the investigators"); *State v. Renneke*, 563 N.W.2d 335, 339 (Minn. Ct. App. 1997) ("For a police officer to face the continual resurrection of old personnel complaints, no matter how unfounded, every time he or she makes an arrest leading to criminal charges, is more than a minor embarrassment.

unpersuasive, especially when used to justify why *prosecutors* should not have access to the personnel files.

It is not hard to see why crime victims and witnesses have greater interests in protecting sensitive aspects of their lives than police officers do in concealing their official misconduct. The officer is a public official, invested with great public trust, and that trust comes with the expectation that the officer will carry out her duties according to the law and to police department rules. An officer disciplined for breaking these rules has no right to demand that this discipline remain private. Indeed, there is a strong societal interest in allowing members of the public to stay informed of such official misconduct. And that interest is even stronger when buttressed by a defendant's constitutional rights under *Brady*. Of course police officers will be embarrassed by disclosure of their misconduct. But unlike victims and witnesses who are thrust into the spotlight of the criminal justice system, officers enter this arena voluntarily, and their misconduct—documented by their public employers—does not merit the protection given to child abuse records or rape crisis counseling communications.

A second rationale for protecting police misconduct is geared more to the interests of the police department than to those of the particular officer. The claim is that internal affairs systems would not be able to function if the results of internal affairs investigations were disclosed. The theory is that citizens would be afraid to come forward with complaints if they knew their complaints would not be kept confidential, and officers would be unwilling to report on their colleagues if they could not be guaranteed confidentiality.²⁶⁵ As one court explained, the fear is that disclosing internal affairs reports “will have a detrimental effect on frank and open communication between the officers and the investigators.”²⁶⁶

Over time, it could become a considerable deterrent to an officer's vigorous enforcement of the law.”), *abrogated on other grounds by* State v. Underdahl, 767 N.W.2d 677 (Minn. 2009); State *ex rel.* St. Louis Cnty. v. Block, 622 S.W.2d 367, 370-71 (Mo. Ct. App. 1981) (“Here we are faced with a strong need to maintain the confidentiality of the Bureau of Internal Affairs' investigatory files. This confidentiality is essential to protect the integrity of the police department and to maintain an effective disciplinary system. . . . Witnesses have been told their interviews were confidential. Systematic disclosure would inhibit officers and citizens from divulging information in the future.”); State v. Kaszubinski, 425 A.2d 711, 712-13 (N.J. Super. Ct. Law Div. 1980) (“Persons charged with the responsibility of conducting the affairs of the police department must be able to rely on confidential information prepared for internal use. The integrity of this information would be eroded if public exposure were threatened.”); People v. Gissendanner, 399 N.E.2d 924, 927 (N.Y. 1979) (“Among other values the [police disciplinary privilege] is said to serve are the maintenance of police morale and the encouragement of both citizens and officers to co-operate fully without fear of reprisal or disclosure in internal investigations into misconduct.”).

265. See *supra* note 264.

266. *Martinelli*, 612 P.2d at 1090; see *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 437 (10th Cir. 1981) (“The [Policemen's Protective] Association asserts that the government interest in confidentiality is of paramount importance because if they cannot guarantee confidentiality, citizens and police officers alike will be reluctant to make statements or likely fail to be completely candid in their statements. They further assert that

This claim is unavailing for several reasons. First, it overlooks the fact that many states do make this discipline available, not only to prosecutors and defendants but also to the public.²⁶⁷ And there is no evidence that internal affairs investigations in those jurisdictions have suffered as a result. Second, *Ritchie* made clear that, even when it is contained in confidential child abuse files, *Brady* material must be disclosed if it can be located.²⁶⁸ As a result, internal affairs investigations cannot guarantee that *Brady* material will be kept confidential if it is found. The only question is whether the confidentiality should prevent prosecutors or judges from searching the files without first making some showing of what the files will contain. Third, as one court noted, officers who participate in internal affairs investigations must realize that if the investigation finds criminal wrongdoing, the prosecutor will be notified.²⁶⁹ Thus, it makes little sense to claim that allowing prosecutors to search the files for *Brady* material will deter cooperation with internal affairs investigations, because the participants in these investigations should already know that their statements could find their way to the ears of a prosecutor.

Two other arguments about disclosure's effects on internal affairs are worth addressing. First, there may be a fear that greater openness about police misconduct will invite an avalanche of frivolous complaints, transforming *Brady* into an engine for harassing the police. But this fear is overstated. If the complaints truly are frivolous, they will not result in misconduct findings and will have vanishingly little effect on an officer's ability to testify. Second, there is a concern that more liberal disclosure of misconduct will cause departments to pull back on their internal affairs investigations in order to avoid implicating an officer's credibility.²⁷⁰ For example, departments might avoid the charge of "falsifying a police report," choosing instead to call it "failure to follow report-writing protocols." This type of gamesmanship is certainly possible—and worrisome—especially given the benefits to the police department of not losing an officer to the *Brady* list. But police departments also have reasons to maintain vigorous internal affairs systems, both as a means of protecting the integrity of the police force and as a way of pursuing the Machiavellian management strategies addressed in Part III.²⁷¹ While some departments might rein in their internal affairs investigations, others would resist doing so, and the possibility of

lack of such statements will impede future investigations and ultimately interfere with the proper functioning of the police department.”).

267. See *supra* Part II.B.

268. See *supra* notes 253-58 and accompanying text. The Court even stated that the “obligation to disclose exculpatory material does not depend on the presence of a specific request.” *Ritchie*, 480 U.S. at 58 n.15.

269. *Martinelli*, 612 P.2d at 1090.

270. Telephone Interview with Richard Lisko, *supra* note 199; Telephone Interview with Darrel Stephens, Exec. Dir., Major Cities Chiefs Police Ass’n (Feb. 27, 2014).

271. See, e.g., *supra* notes 203-08 and accompanying text.

such a negative effect does not seem significant enough to justify the privilege for police misconduct.²⁷²

In the end, the supposed benefits of making these misconduct findings confidential just do not justify the toll inflicted on defendants' *Brady* rights.

2. *The police officer's special status*

The protected status of police personnel files is further complicated by the police officer's special status as a witness. First, unlike other privilege holders, officers are both witnesses *and* members of the prosecution team. The significance of the officer's being a member of the prosecution team results from the prosecutor's duty to learn of favorable information known by others on the team, including the police.²⁷³ Because the officer is part of the team, her knowledge of the misconduct in these files should be imputed to the prosecutor, just as the officer's knowledge of any other prosecution witness's credibility problems would be. No such argument can be made of other privilege holders who may be victims or witnesses—and may even be friendly to the prosecution—but are not part of the prosecution team.

Another difference between the officer and the archetypal privilege holder is the officer's status as a serial witness. The child abuse victim, for example, is likely to testify in only a single case. Whatever humiliation accrues to him from the release of privileged information and whatever chilling effect this disclosure has on future child abuse investigations, the disclosure of the information benefits only the particular defendant in the case. But police officers, as serial witnesses, may testify in hundreds of cases. If their personnel records are revealed in one case, the disclosure could benefit defendants in hundreds of other cases. This is one positive externality of disclosing misconduct in a particular case. The other is that the threat of exposing an officer's misconduct in case after case will keep prosecutors from using dishonest officers and will help usher these officers out of the profession.

A final characteristic that makes officer witnesses different from other privilege-holding witnesses is more basic, albeit harder to prove. Judges and juries may be predisposed to trust an officer by dint of her position, especially when her credibility is pitted against the credibility of a criminal defendant.²⁷⁴ If the officer takes the stand with an enhanced reputation for truthfulness, it would seem perverse to give that credibility an additional boost by allowing the officer to conceal the type of misconduct that would ordinarily be used to im-

272. Indeed, another incentives story is that disclosing police misconduct will deter misbehavior within the police force, lessening the load on internal affairs investigators and allowing them to do more thorough investigations.

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

274. *E.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472-73 (1999); RGK, *Why Does Kopf Believe Cops Most of the Time?*, HERCULES & UMPIRE (Apr. 18, 2014), <http://herculesandtheumpire.com/2014/04/18/why-does-kopf-believe-cops-most-of-the-time>.

peach other witnesses. In a well-reasoned dissent, one California Supreme Court justice complained about this very double standard. “Ironically, jurors are routinely asked before a trial whether they can judge the credibility of police officer witnesses the same as any other witness who testifies,” the justice wrote. “Yet the Legislature has enacted a scheme . . . that exalts police officers over all other witnesses who have committed misconduct.”²⁷⁵

The special status of the police officer witness thus makes it doctrinally and normatively problematic to protect police misconduct from disclosure.

C. *Procedural Problems with Brady Balancing Systems*

The discussion above suggests why records of police misconduct should not receive confidentiality protections. But even if police misconduct deserved the protected status it currently receives in some jurisdictions, the procedures used to balance *Brady* against police privacy are deeply flawed.

Four procedural aspects of these balancing systems are particularly disturbing. First, *Brady* decisions are made in the abstract by people who lack sufficient knowledge of the facts and the theories of the case to know whether evidence is favorable and material—two of *Brady*'s requirements. Second, systems that protect the files until judges order them disclosed typically require threshold showings to trigger in camera review. But these threshold requirements prevent *Brady*'s routine application to police personnel files by requiring prosecutors to know something about what the files contain before the court will take a look. Third, the process of in camera review exacerbates the conflict of interest within the prosecution team by allowing officers to make ex parte communications with the court about the files and by inviting officers into court to argue against the disclosure of their files—to argue against *Brady* compliance. Fourth, even when judges do disclose records of police misconduct after in camera review, they often do so subject to strict protective orders that prevent prosecutors from sharing the information with each other or from using it in future cases involving the officer. These restrictions conflict with *Brady*'s assumption that a prosecutor has constructive knowledge of anything known by any other prosecutor in the office. In the end, these procedural flaws lead *Brady* balancing systems to shortchange *Brady* in favor of police confidentiality.

1. *Brady decisions made in the abstract*

A number of jurisdictions require *Brady* decisions to be made by people who have access to the personnel files but lack knowledge of the facts or theories of the particular criminal case. The problem, doctrinally, is that case-specific knowledge is required to determine what is and is not *Brady* material. Without knowledge of the case, it is impossible to tell what information is *fa-*

275. *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 149 (Cal. 2002) (Moreno, J., dissenting).

avorable and material—two of *Brady*'s three requirements.²⁷⁶ To assess whether the evidence is favorable, there has to be some comprehension of how the defendant would use the evidence in the particular case. To know whether the evidence is material, there has to be some knowledge of how close the case is.²⁷⁷ What is favorable and material in one case may be neither in the next case.²⁷⁸

The *Brady*-in-the-abstract problem occurs in regimes in which prosecutors are not allowed to view the personnel records.²⁷⁹ In those jurisdictions, police bureaucrats review the files for potential *Brady* information and then flag the files so courts can decide whether the information is, in fact, *Brady* material, provided the court actually grants in camera review.²⁸⁰ The police bureaucrat, however, will struggle to assess favorability and materiality because he knows nothing of the particular case. In fact, his review of the files takes place long before there is any case at all.²⁸¹ And the police reviewer may not have the legal training required to identify what might or might not be useful to the defendant.²⁸² Perhaps it goes without saying, but this behind-the-scenes review also takes place without any opportunity for defense counsel to argue how the information—which she does not even know about—would be useful to her client.²⁸³ All of these factors raise questions about how the police reviewer can know what qualifies as *Brady* material.

The *Brady*-in-the-abstract problem also arises when judges make the *Brady* determinations, albeit in an attenuated form. Even though the judge is making this determination in the context of an actual case, she is not particularly well placed to say what is and what is not *Brady* material. That is because the in camera review takes place significantly before the trial; thus, the specific theories of the case and the weight of the evidence may not be apparent. Indeed, in

276. See *supra* Part I.A.

277. *United States v. Agurs*, 427 U.S. 97, 112 & n.21, 113 (1976).

278. The special prosecutor who investigated the Justice Department's misconduct in the Senator Ted Stevens case noted the *Brady*-in-the-abstract problem: "The review of the government's files for *Brady* information was conducted by FBI and IRS agents, some of whom were unfamiliar with the facts or with *Brady*/*Giglio* requirements, unassisted and unsupervised by the prosecutors." Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), 2012 WL 858523.

279. See *supra* Part II.A.

280. See *supra* Parts II.A, II.C.

281. Order Re *Brady* Motions at 7, *People v. Johnson*, No. 12029482 (Cal. Super. Ct. Jan. 7, 2014) ("[W]hile the [Police] Department knows what the officers' personnel files contain, it lacks knowledge of the facts, circumstances and legal theories of [defendant's] particular case. Not being trial counsel, the Department cannot ascertain what 'could determine the trial's outcome.'" (quoting *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 138 (Cal. 2002))); Telephone Interview with Daisy Flores, *supra* note 151 ("Police agencies typically aren't having an attorney look at the file. It's some clerk . . ."); Carter, *supra* note 200 ("[N]obody in law enforcement knows what sort of misconduct should trigger the addition of an officer's name to the prosecutor's list.").

282. See Telephone Interview with Daisy Flores, *supra* note 151.

283. SFPD Disclosure Order, *supra* note 104.

some jurisdictions, the judge who makes the *Brady* decision is a motions judge who is not even assigned to try the case.²⁸⁴ The *Brady*-in-the-abstract issue also rears up in jurisdictions in which prosecutors can access the misconduct directly but instead ask the police to make the first pass through the files to narrow the search.²⁸⁵

These *Brady*-in-the-abstract concerns raise questions about whether balancing systems that rely on such determinations can comply with Supreme Court doctrine. Granted, the abstract nature of these determinations is not an insurmountable problem. On the favorability side of the analysis, anything that undermines the officer's credibility might be deemed favorable.²⁸⁶ And on the materiality side, the police or court reviewer could just disclose anything even marginally favorable, thus embracing the Supreme Court's command that prosecutors err on the side of disclosure.²⁸⁷ But that is not the route these reviewers have taken, nor would we expect such a liberal approach to disclosure in jurisdictions in which police confidentiality is so valued.

The irony of the *Brady*-in-the-abstract problem is that there already exists someone within the government who is familiar with the facts and the theories of the case: the prosecutor. It is no coincidence that the prosecutor is the one the Supreme Court charges with the duty of *Brady* compliance.²⁸⁸ While the prosecutor may lack knowledge of some defense evidence or theory, and while she may be inclined to shirk her *Brady* duties, she is at least familiar enough with the state's case to make an intelligent *Brady* determination, if she chooses.²⁸⁹ But *Brady*'s application to these files is so politically sensitive that jurisdictions have elected to send the prosecutor to the sidelines, instead devising ways to obey *Brady* without relying on the prosecutor. The problem, as we will see throughout the following discussion, is that sidelining the prosecutor tampers with the internal logic of *Brady*, resulting in serious doctrinal problems.²⁹⁰

2. *Threshold requirements for triggering in camera review*

The second procedural problem is that the threshold showings required for in camera review prevent *Brady* from being routinely applied. In camera review is an element of three disclosure systems: those in which prosecutors have no

284. *E.g.*, Order Re *Brady* Motions, *supra* note 281, at 11.

285. *E.g.*, *supra* notes 154, 159, 164.

286. This determination would not be easy for exculpatory information, however.

287. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

288. *Id.*

289. Whether one trusts her to make these determinations responsibly is a legitimate question, but nonetheless a question distinct from whether she is, doctrinally, the best-placed person to do so.

290. There is also the fear that the police might not do the review conscientiously.

access to personnel files,²⁹¹ those in which prosecutors have access but prefer to get a court ruling before making disclosure,²⁹² and those in which defendants must seek out *Brady* information on their own via subpoena.²⁹³ In all these systems, the question of what showing is required to trigger in camera review is critically important because it threatens *Brady*'s routine application. In California, prosecutors cannot trigger in camera review of the files “without first establishing a basis for [the] claim that it contains material evidence,’ that is evidence that could determine the trial’s outcome, thus satisfying the materiality standard of *Brady*.”²⁹⁴ In Colorado, prosecutors must “show how the information requested is relevant to the case at issue,” and this showing must exceed “bare allegations that the requested documents would relate to the officer’s credibility.”²⁹⁵ These threshold requirements mean the person asking the court to look for *Brady* material must already know something about what the file contains, thus creating a catch-22.²⁹⁶ The higher the required showing, the less routinely the search will be performed, and the further *Brady* drifts from the Supreme Court’s vision of *Brady* as a self-executing, affirmative obligation that governs all criminal cases.²⁹⁷

Further, the threshold requirements create a scaling problem for in camera review. Police officer testimony is a ubiquitous feature of criminal prosecutions, and any time an officer’s testimony is significant to the outcome of the case, his credibility can become a critical issue. That means courts potentially face an enormous demand for in camera review of police personnel files. Courts have some flexibility to raise or lower the bar for triggering in camera review given that the threshold requirements are defined rather vaguely. But, while they can get away with lowering the threshold for less common privileges, such as those protecting the child abuse records in *Pennsylvania v. Ritchie*, they face significant institutional pressure not to lower the bar when it comes to police personnel files. That is because even a modest lowering of the threshold could lead to a dramatic increase in the number of reviews the courts are required to conduct. For example, the California Judges Association recently estimated that relaxing the standards for reviewing police personnel files would cost “tens of thousands of judicial hours” each year in Los Angeles alone.²⁹⁸

291. See *supra* Part II.A.

292. E.g., MARICOPA CNTY. ATT’Y OFFICE, *supra* note 154, § 6.13; WASH. ASS’N OF PROSECUTING ATT’YS, *supra* note 159, at 6-7 (explaining that while prosecutors can reveal information at their discretion, they will generally opt for in camera review first).

293. See, e.g., *supra* notes 190-91 and accompanying text.

294. City of L.A. v. Superior Court (*Brandon*), 52 P.3d 129, 138 (Cal. 2002) (emphasis omitted) (citation omitted) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

295. *People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000).

296. See *supra* notes 133-34, 192 and accompanying text.

297. See *supra* notes 39, 134 and accompanying text.

298. Letter from Robert A. Glusman, Cal. Judges Ass’n, to Barbara J.R. Jones, Presiding Justice, Cal. Court of Appeal 1 (Feb. 26, 2014) (on file with author).

And it is not just the increased workload that irks the judiciary. There is an institutional resentment on the part of judges toward carrying out a duty that they think should belong to the prosecutor. As the California Judges Association wrote:

[J]udges should be available to review specific files and make *Brady* materiality determinations when close questions are presented But it is an entirely different matter to newly require the trials courts to review every police personnel file and make every materiality determination—a constitutional obligation that rests with the prosecution.²⁹⁹

Indeed, in a recent case, a San Francisco trial judge complained that the frequent demands for in camera *Brady* review were turning judges into “glorified paralegals routinely pawing through mounds of documents that could never ‘determine the trial’s outcome.’”³⁰⁰

In sum, these threshold requirements, which are staples of *Brady* balancing systems, pose significant problems for *Brady* compliance because they prevent the files from being searched in run-of-the-mill cases. To the extent these thresholds can be lowered or eliminated, that would ease the doctrinal problems they pose. But at the same time, these threshold requirements are an essential safeguard against the judiciary’s being crushed by the demand for in camera review. If courts granted in camera review every time there was a request by the prosecutor or the defendant, they would be forced either to spend an inordinate amount of time reviewing the files or else to carry out the review so perfunctorily as to make the review worthless. In that sense, the problem is more profound than just lowering or eliminating the threshold requirements for in camera review. The problem is that in camera review cannot be carried out on a large enough scale to ensure that *Brady* routinely applies to police personnel files—to ensure that the critical information in these files is located and disclosed.³⁰¹

299. *Id.* (emphasis added).

300. Order Re *Brady* Motions, *supra* note 281, at 11 (quoting *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 138 (Cal. 2002)). This was the case that led to the recent California Court of Appeal decision and subsequent California Supreme Court grant of review discussed in Part II.A. At one point, Judge Richard B. Ulmer remarked that “they used to trundle these in, in big long carts and just dump it up like a dump cart, and sometimes it would lap up against the edge of the desk.” Reporter’s Transcript of Proceedings at 19, *People v. Johnson*, No. 12029482 (Cal. Super. Ct. Jan. 6, 2014). The Court of Appeal similarly disapproved of “routinely shifting the responsibility for performing the initial *Brady* review from the prosecution to the court.” *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340, 363 n.20 (Ct. App.) (“That allocation of responsibility has long been a fundamental aspect of modern constitutional criminal procedure, and it is not to be altered lightly.”), *depublished and review granted by* 336 P.3d 159 (Cal. 2014). However, that Court of Appeal decision is no longer citable because of the California Supreme Court’s grant of review. *See supra* note 112.

301. *See* Telephone Interview with Scott Durfee, *supra* note 147 (“[T]he tricky part about being *Brady*-qualifying information is that you have to know it exists. You can’t make a representation to the court that this officer has a *Brady*-qualifying [piece of evidence] in his file that deserves in camera review without knowing that it’s in there. And the only way to know what’s in there is by looking at it.”).

3. *Conflicts of interest and ex parte communication*

In camera review creates a further procedural problem: it exacerbates the conflict of interest within the prosecution team over *Brady*'s application to personnel files. This issue potentially arises in any of the *Brady* regimes that employ in camera review. While the prosecutor's constitutional *Brady* duty is clear—to disclose favorable, material evidence—the police officer's duty is more conflicted. As a member of the prosecution team, the officer has a duty to help the prosecutor comply with *Brady*. But the officer also has a personal interest in shielding his misconduct from disclosure. In camera review legitimizes and empowers this personal interest by inviting the officer into court to explain why his file should not be reviewed by the court and why anything the review turns up should not be disclosed. By making the officer a party to the case, the in camera procedure encourages the officer to pursue his own interests in non-disclosure, even if they conflict with his and the prosecutor's *Brady* duties. Further complicating this procedure is the fact that the officer will typically be represented in these proceedings by a city attorney whose duty is to pursue the confidentiality interests of the officer, rather than to ensure *Brady* compliance.³⁰²

This conflict of interest is even more unseemly in light of some of the special prerogatives afforded officers and their attorneys. In California, after an in camera review has been ordered, but before the judge receives the file, the police officer and her attorney are allowed to remove from the file anything they deem irrelevant, though they are supposed to be “prepared to state in chambers and for the record” what they have removed.³⁰³ This means that the judge does not review the entire file to make sure *Brady* information has not been overlooked or suppressed; she reviews only what the officer and the city attorney deem relevant. Moreover, California statute permits officers and their designees to be present in chambers as the court reviews the file, even though prosecutors, defendants, and defense counsel are excluded.³⁰⁴ The in camera process even allows the officer to carry out ex parte communication with the court. A practice advisory published by the League of California Cities, titled *Pitchess Motions and Brady Disclosures: How Hard Can You/Should You Push Back?*, urges police attorneys, “during the in camera review,” to “argue the relevance of certain complaints and investigation materials contained in the officer's

302. JULI CHRISTINE SCOTT, *PITCHESS MOTIONS AND BRADY DISCLOSURES: HOW HARD CAN YOU/SHOULD YOU PUSH BACK?* 12 (2005) (“It is the city attorney's role in these proceedings to protect the officers' privacy interests by making sure that the trial courts are well educated about the law in this area.”).

303. *People v. Mooc*, 36 P.3d 21, 30 (Cal. 2001); SCOTT, *supra* note 302, at 7 (“Defense attorneys would of course like a general fishing expedition. Limit the Catch!” (italics omitted)).

304. SCOTT, *supra* note 302, at 7 (“Mooc is a great case for several reasons It also reaffirms that neither the defense attorney nor the district attorney are allowed in the in camera proceedings.” (italics omitted)).

file,” despite the fact that the other affected parties are not present to dispute the argument.³⁰⁵

To be sure, the officer’s conflict of interest would exist independently of the in camera process, but in camera review makes it worse by granting it legitimacy. This conflict raises further concerns about whether balancing systems that rely on such review are compatible with *Brady*.

4. *Protective orders interfere with constructive knowledge*

The final problem with these balancing systems is their use of protective orders. In California, New Hampshire, Maryland, and elsewhere, protective orders have been used routinely—and to devastating effect—to limit what prosecutors and defense attorneys can do with the *Brady* information that courts do release from the personnel files.³⁰⁶ After courts have reviewed the files in camera and disclosed misconduct pursuant to *Brady*, they often subject these disclosures to strict protective orders that prevent prosecutors and defense attorneys from alerting their colleagues to an officer’s misconduct or using their own knowledge of the misconduct in future cases involving the officer. These protective orders undermine *Brady*’s assumption that prosecutors will have constructive knowledge of and disclose any favorable, material evidence known to others in the prosecutor’s office or on the prosecution team.³⁰⁷

But the information sharing demanded by *Brady* is precisely what the protective orders prevent. The problem is pointed enough when protective orders prevent one prosecutor from telling another prosecutor in the office about an officer’s credibility problems. But the problem borders on the absurd when protective orders prevent a prosecutor who learns about an officer’s credibility problems in one case from disclosing that information in future cases involving

305. *Id.* at 9-10; see also JULI C. SCOTT, FUNDAMENTALS OF OPPOSING MOTIONS FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS (PITCHESS *MOTIONS*) 12 (2012) (“[B]e prepared to argue the relevance of the materials you do bring at the in camera, although some judges are uncomfortable with this.” (italics omitted)).

306. Memorandum from Peter W. Heed, *supra* note 115; see also Reply in Support of Request to Stay & Order Trial at 3, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768) (“Case law makes clear that the protective order should specify that disclosure is limited to the present case”); SCOTT, *supra* note 305, at 14 (“Your protective order should of course . . . require the destruction of any copies and return of originals upon conclusion of the case.” (italics omitted)); Kevin Heade, *Are Brady Materials Limited by Protective Orders?*, FOR THE DEFENSE (Maricopa Cnty. Pub. Defender’s Office, Phx., Ariz.), Nov. 2011-Jan. 2012, at 7, 7 (reproducing the text of a protective order); Telephone Interview with Edie Cimino, Felony Trial Att’y, Office of the Pub. Defender, Balt., Md. (May 19, 2014).

307. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (“[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that ‘procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.’” (alteration in original) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972))).

the same officer. In such a situation, the prosecutor has actual knowledge of misconduct that the Constitution requires her to disclose, but the trial court's protective order requires her to keep the information secret. It is not just a matter of having the prosecutor take her knowledge from the earlier case and present it to the judge as good cause justifying in camera review. The prosecutor is not even permitted to use the protected information to make the good cause showing in the new case.³⁰⁸ And, as noted above, the threshold showing for in camera review can be quite challenging. If the judge refuses to order in camera review in the new case, the prosecutor will have actual knowledge of what the file contains and a certainty that it qualifies as *Brady* material, but will have no ability to alert the defense.³⁰⁹

This is not just a hypothetical problem.³¹⁰ In the San Francisco *Brady* case discussed earlier, prosecutors had actual knowledge that the "key" police officer witnesses had more than 500 pages of *Brady* material in their personnel files.³¹¹ Prosecutors knew this, according to their appellate brief, because "they received that material after in camera review in prior cases. But they are forbidden by protective orders in those cases from using that information in any subsequent case."³¹² Despite this knowledge on the part of the prosecutors, the judge refused to order in camera review because the prosecutors, hampered by the protective order, could not specify how the information in the personnel files would satisfy *Brady*'s materiality standard.³¹³

This San Francisco case, with prosecutors who knew of the misconduct but were bound to silence, illustrates the conflict between these protective orders and *Brady*. But even where the prosecutor does not have actual knowledge of the officer's misconduct, the protective orders are problematic because they prevent prosecutors in the same office from sharing *Brady* information, despite the doctrine's demands that they do so.³¹⁴

308. See *supra* Part IV.B.

309. Of course, the prosecutor could avoid the problem by dropping the charges.

310. See *supra* notes 107-08, 300 and accompanying text. In addition, Baltimore public defenders are challenging protective orders that prevent *Brady* sharing. "[The protective order] says I'm not supposed to be able to talk about the disclosure with anybody who does not have a direct functional responsibility on this case," said Edie Cimino, a public defender in Baltimore. "I can't be Chinese-walled away from my supervisory chain and my trial team who don't have direct functional responsibility" in the case. Telephone Interview with Edie Cimino, *supra* note 306. "How are we supposed to forget the information after one case, and let the agent go on to the next investigation without informing those prosecutors?" one federal prosecutor asked. "If the agent is removed from this district because of a *Henthorn* problem and is transferred to Nevada, do we have an obligation to inform Nevada? It's not *Brady* yet, but it may be if the prosecutor there gets a *Henthorn* request." Wiehl, *supra* note 71, at 118.

311. SFPD Brief, *supra* note 104, at 19, 23, 36 n.4.

312. *Id.* at 36 n.4 (citation omitted).

313. Order Re *Brady* Motions, *supra* note 281, at 6-7.

314. See *supra* note 307 and accompanying text.

* * *

Beyond the particular procedural faults, the overarching problem with these balancing systems is the negligence they endorse toward *Brady*'s application to police personnel files. Prosecutors, judges, and defendants remain in the dark about what these files contain, and the balancing systems are all too willing to let the ignorance persist, despite the great potential of these files to contain *Brady* material. The problem is that the courts are made the gatekeepers of the *Brady* material in the files, but prosecutors or defendants must know something about what the files contain before the courts will help ensure *Brady* material is not being suppressed. The requirements for intervention by the courts are little help in discovering impeachment material hidden in the many confidential files about which nothing happens to be known. The impeachment evidence contained in those files is thus allowed to go unexamined and undisclosed.

Indeed, when it comes to police personnel files, the systematic failure of these *Brady* balancing systems is their failure to be systematic—their failure to allow for the routine search of these files for critical impeachment evidence. This failure to learn of impeachment evidence is all the more troubling because it is the product of an effort to accommodate an interest—police officer confidentiality—that does not make sense as a matter of policy. These privacy protections allow dishonest officers to continue to testify and, as a result, to hold on to their jobs.

In the end, the problem is that police officers do not deserve confidentiality protections for their misconduct, and even if they do, the systems that purport to balance *Brady* against these privacy protections are incompatible with core tenets of the *Brady* doctrine.

V. SOLUTIONS

The root causes of *Brady* violations stretch far beyond prosecutors, at least when it comes to evidence of police misconduct. In jurisdictions where police departments withhold information from prosecutors, where courts refuse to look in the personnel files, or where prosecutors have access to impeachment material but do not disclose it, *Brady* violations result from an undeserved solicitude for police confidentiality. Whether by statute, by policy, or by political pressure, police personnel files have taken on a protected status that allows those who are inclined to suppress evidence of police misconduct to do so, not as rogue actors, but with the imprimatur of the state. This broad-based responsibility for *Brady* violations undermines the standard account of such violations as creatures of prosecutorial cheating. It also suggests that the standard *Brady* solutions—increasing punishment for prosecutors, increasing court oversight of the *Brady* disclosure process, and mandating “open file” policies—may have

little effect on the suppression of personnel file evidence because prosecutors are often not the ones in control.³¹⁵

Because the causes of *Brady* violations go beyond prosecutors, so must the solutions. The most elegant solution to the *Brady* problems discussed in this Article would be to make records of police misconduct accessible to the public. Public access would both facilitate defendants' access to the information and relieve prosecutors of the hassle of learning of and disclosing the information. If the information were public, a reasonably diligent defendant would be able to access it and the information would thus fall outside the sweep of *Brady*.³¹⁶ Despite its virtues, however, this public-access solution is unlikely to succeed because it would face enormous political resistance from those who support police officer confidentiality and because it goes beyond what is needed to address the *Brady* problem. As far as *Brady* is concerned, police officers can keep their files secret from the public, so long as this confidentiality does not impede prosecutors' access.

Short of making police misconduct records public, there are a number of potential solutions. First, and most importantly, jurisdictions should acknowledge that the personnel files must be searched in every case in which an officer's testimony could prove significant to the trial's outcome, even if the defendant fails to request such a search. *Brady* imposes a self-executing, affirmative obligation on the prosecution to seek out any favorable information known to other members of the prosecution team, and the officers on the prosecution team certainly know about the misconduct contained in these files.³¹⁷ This knowledge should be imputed to the prosecutor, just as officers' knowledge of an informant's credibility problems would be.

While there is debate about how far this constructive knowledge extends—whether it includes credibility evidence contained in divorce proceedings or high school report cards, for example³¹⁸—it is not necessary to establish the outer limit of the prosecutor's duty to learn in order to see that the personnel files fall within it.³¹⁹ An explicit holding by the courts—the higher, the better—that these personnel files must be searched in all federal and state prosecutions would help clarify the law on this point.

However, even if a defense request is required to trigger a prosecutor's search obligations, state laws and local policies should not impede the prosecutor from looking at the file herself. The systems that create such impediments wind up undermining the *Brady* doctrine. As argued throughout the Article, the

315. See *supra* note 19; see also CONVICTION INTEGRITY PROJECT, *supra* note 171, at 23; Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007).

316. See *supra* Part II.B.

317. See *supra* notes 39, 134 and accompanying text.

318. See *United States v. Robinson*, 627 F.3d 941, 946 (4th Cir. 2010); *Breedlove v. Moore*, 279 F.3d 952, 956 (11th Cir. 2002); *People v. Garrett*, 18 N.E.3d 722, 731-32 (N.Y. 2014).

319. See *supra* Part I.B.

prosecutor is the only one, other than the defendant, who knows enough about the facts and theories of the case to make the *Brady* determinations. Jurisdictions that sideline the prosecutor by denying him access to the files end up foisting the *Brady* duty on police bureaucrats and judges, neither of whom are institutionally capable of carrying out this obligation on the scale required to routinely apply *Brady* to personnel files.

While prosecutors may delegate the initial search of the files to police reviewers, they should provide clear guidance to ensure that these reviewers flag all favorable credibility evidence, regardless of its perceived materiality, given that the materiality determinations cannot be made in the abstract.³²⁰ In addition, prosecutors should sometimes review the files directly, even if they delegate the bulk of the searching to the police. This threat of direct review, though rarely carried out, would help deter police reviewers from suppressing *Brady* information. As it currently stands, police reviewers in some jurisdictions can withhold information from the files without fear that prosecutors will ever find out, because prosecutors have no ability to check the reviewers' work.

For jurisdictions that insist on delegating the search of the files to judges, despite the judiciary's institutional inadequacies, the procedural problems discussed in Part IV must be taken into account. Courts should lower or eliminate the threshold showings required to trigger in camera review. Whatever additional work is created could be partially offset by reducing the use of protective orders. This reduction would allow prosecutors to share *Brady* material with other prosecutors and with defense counsel, without requiring a fresh in camera review each time a *Brady* officer appears as a witness. In general, courts should be very leery of issuing protective orders for misconduct evidence that will likely be significant in future cases involving the officer. Where courts insist on protective orders, these orders should at least permit prosecutors to share this information with others in their office, thus aligning protective-order practices with *Brady*'s constructive knowledge doctrine.

Beyond the systemic changes discussed above, there are ways that defendants, prosecutors, and individual judges can attack this problem on a case-by-case basis. Defendants could file motions asking courts to require prosecutors to certify that they have checked police witnesses' personnel files for *Brady* material.³²¹ Or prosecutors who were so inclined could refuse to use the testimony of any officer who does not make her personnel file available, thus pressuring the officer into waiving any privilege she has over the records.³²² Simi-

320. *E.g.*, *United States v. Herring*, 83 F.3d 1120, 1121 (9th Cir. 1996).

321. In North Carolina, in the wake of a junk-science scandal at the state crime lab, defense attorneys have demanded prosecutors certify that they checked the lab technicians' files for anything that would undermine their testimony. *See* Sample Motion to Disclose Results of Certification Exam (n.d.) (on file with author); *see also* Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47 (2014), http://www.stanfordlawreview.org/sites/default/files/online/articles/67_Stan_L_Rev_Online_47_Kreag.pdf.

322. Obviously, though, this would add friction to the relationship between prosecutors and officers. *See* *Becerrada v. Superior Court*, 31 Cal. Rptr. 3d 735, 739 (Ct. App. 2005)

larly, a trial judge who is frustrated with routinely reviewing personnel files could opt for a jury instruction explaining to the jury that the officer would not provide prosecutors with access to the officer's personnel file and that the jury is free to draw whatever inferences it chooses from that refusal.³²³

Many variations on the above solutions are possible, but the core problem remains. *Brady's* application to these personnel files threatens the interests of the police, a powerful and influential constituency. There are systems that could be employed to mollify police concerns on the margins. For instance, states could enact statutes like those in California and Maryland that would prevent police departments from basing disciplinary action on a prosecutor's decision to put an officer on the *Brady* list.³²⁴ This would not address the problem that prosecutors can add officers to the *Brady* list for inappropriate reasons, but it would at least prevent the officers from suffering employment consequences as a result.

Nonetheless, even with such employment protections, there are many reasons to believe that officers and their advocates will continue to resist *Brady's* application to these files and, thus, little reason to expect a lessening in the tensions between *Brady* and police officer confidentiality provisions. What is ultimately required to address the core problem is for prosecutors, courts, legislators, and the electorate to prioritize the demands of *Brady* over the interests of the police. And that is a lot to ask.

CONCLUSION

Systems that balance officers' confidentiality interests against *Brady's* constitutional requirements get it completely wrong. These protections benefit dishonest cops by allowing them to testify and, thus, to continue to work the streets. Meanwhile, these protections harm defendants, who are denied critical impeachment evidence to which they are entitled under *Brady*. And they harm society by undermining due process and by allowing dishonest officers to stay on the job. More liberal rules for disclosing records of misconduct would improve *Brady* compliance and help cleanse police departments of tainted officers.

("The recognition by the Supreme Court that an officer remains free to discuss with the prosecution any material in his files, in preparation for trial, means that the officer practically may give to the prosecution that which it could not get directly."); Application of the Appellate Committee of the California District Attorneys Association for Leave to File Amicus Curiae Brief in Support of Petitioner at 9, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768).

323. Cf. Jones, *supra* note 19, at 450-52 (urging a *Brady* jury instruction for intentionally withheld evidence); Robert Weisberg, Note, Defendant v. Witness: *Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 983 (1978) (proposing a jury instruction for cases in which an evidentiary privilege is used to exclude potentially exculpatory or impeaching material).

324. See *supra* Part III.B.2.

This Article has sought to explain how *Brady* developed a blind spot when it comes to evidence in police personnel files. The story involves a combination of decisions at all levels of government and the courts. The Supreme Court's case law set up a far-ranging but ill-defined obligation to seek out and disclose *Brady* material. By its terms, this obligation encompasses information known to members of the prosecution team but unrelated to the case, such as the contents of the personnel files. But this doctrinal requirement was, just as surely, not created with such unrelated-case material in mind. For their part, the lower federal courts have not clearly articulated how *Brady* should apply to evidence of misconduct contained in police personnel files. That is largely because they have not been required to, in light of the Justice Department's *Brady* policy and the effects of AEDPA.

In the absence of federal case law, states have been left alone to navigate between the statutes, policies, and institutional pressures opposing disclosure, on the one hand, and *Brady*'s doctrinal demands for disclosure, on the other. This has resulted in a wide variety of *Brady* practices around the country and has led to defendants' losing the protections of *Brady* simply by virtue of where they happen to be tried.

From state to state and county to county, the excuses for failing to search the personnel files are varied, persistent, and unpersuasive. There is little practical justification for this failure. Nor is there a doctrinal justification. The analogies to *Pennsylvania v. Ritchie* and other cases balancing *Brady* against evidentiary privileges do not stand up to scrutiny because police officers are not like other privilege holders. Systems that purport to balance officers' privacy rights with defendants' *Brady* rights wind up giving short shrift to *Brady*. The division within the prosecution team has only added to the difficulty in applying *Brady* to these files, with officers claiming *Brady* threatens their own due process rights.

The cumulative effect of all these impediments is that personnel files and all the impeachment material they contain are often ignored with impunity. In too many places, the belief persists that these files can go unexamined without violating *Brady*—that these files are somehow beyond the reach of the *Brady* doctrine. This view lacks firm footing in good law or good policy, and the sooner it is discarded, the better.

Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material

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NOTE

STRUCTURING THE PROSECUTOR'S DUTY TO SEARCH THE INTELLIGENCE COMMUNITY FOR *BRADY* MATERIAL

Mark D. Villaverde[†]

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INTRODUCTION

As terrorism directed at the United States, its citizens, and its foreign interests has increased,¹ so has the United States's effort to enforce its laws criminalizing terrorist activities² planned and conducted primarily outside the United States.³ Thus far, however, the federal government has been unable to see most terrorism investigations

¹ The United States is the world's leading target of international terrorism, and government officials expect the use of terrorism against the United States, its citizens, and its interests to continue both domestically and abroad. See NAT'L COMM'N ON TERRORISM, 105TH CONG., COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM iii (2000); PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 57 (2001); Roger Medd & Frank Goldstein, *International Terrorism on the Eve of a New Millennium*, 20 STUD. CONFLICT & TERRORISM 281, 289 (1997). In 2001, of the 348 total international terrorist attacks around the world, see U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2001 app. 1, at 171 (2002) [hereinafter PATTERNS OF GLOBAL TERRORISM], available at <http://www.state.gov/s/ct/rls/pgtrpt/2001/pdf>, 219 were directed at U.S. targets, see *id.* app. 1, at 176.

² Federal law defines international terrorism to include activities that: (1) "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State"; (2) "appear to be intended to intimidate or coerce a civilian population; . . . influence the policy of a government by intimidation or coercion; or . . . affect the conduct of a government by assassination or kidnapping"; and (3) "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." 18 U.S.C. § 2331(1) (2000). With regard to international terrorist conspiracies perpetrated within the United States, federal law provides that any person, within or without the United States, who threatens, attempts, or conspires to kill, kidnap, maim, commit an assault resulting in serious bodily injury, or assault with a dangerous weapon any person within the United States is subject to criminal sanction. *Id.* § 2332b(a)(1)(A), (a)(2). The same sanctions apply to any person who threatens, attempts, or conspires to create a substantial risk of serious bodily injury to any other person by destroying or damaging, or by attempting or conspiring to destroy or damage, any structure, conveyance, or other real or personal property within the United States. *Id.* § 2332b(a)(1)(B), (a)(2). Federal law extends to federal law enforcement officials extra-territorial jurisdiction over international terrorist conspiracies and grants the Attorney General primary investigative responsibility for all federal crimes of terrorism. See *id.* § 2332b(e)-(f).

³ Between 1993 and 1999, the number of Federal Bureau of Investigation (FBI) agents working on terrorism investigations rose from 550 to 1,400. See PILLAR, *supra* note 1, at 80. Between 1993 and 2000, the percentage of the FBI's budget devoted to combating terrorism rose from 4% to 10%. See *id.*

through to criminal prosecution, a reality that undermines its efforts to prevent international terrorism through criminalization.⁴ Between 1997 and 2001, the Federal Bureau of Investigation (FBI) opened nearly 40,000 international terrorism investigations,⁵ of which only 385 were referred to federal prosecutors.⁶ Of these referrals, only 115 led to prosecutions⁷—mostly post-attack prosecutions.⁸ And of these prosecutions, only twenty-four produced convictions,⁹ half of which resulted in the imposition of jail sentences of ten months or less.¹⁰ Syracuse University researchers concluded from this information that

⁴ Successful criminal prosecution should, theoretically, reduce incidences of terrorism by (1) leading to the incarceration of terrorists who might otherwise commit further acts of terrorism, (2) deterring future terrorists from acting at all, (3) making it logistically more difficult for terrorists to carry out acts of terrorism, and (4) encouraging other governments to help prevent terrorism. *See id.* at 81.

⁵ *See* Transactional Records Access Clearing House, FBI Efforts in Combating Terrorism, at http://trac.syr.edu/tracreports/terrorism/011203/fbi_invest.html (last visited Apr. 9, 2003).

⁶ *See* Transactional Records Access Clearing House, International Terrorism Referrals for Criminal Prosecution, at http://trac.syr.edu/tracreports/terrorism/011203/intter_ref.html (last visited Apr. 9, 2003). The number of referrals has increased since September 11, 2001. *See* Transactional Records Access Clearing House, Criminal Enforcement Against Terrorists: A TRAC Special Report Supplement, at <http://trac.syr.edu/tracreports/terrorism/supp.html> (June 17, 2002).

⁷ *See* Transactional Records Access Clearing House, International Terrorism Lead Charge on Prosecutions Filed, at http://trac.syr.edu/tracreports/terrorism/011203/intter_fil.html (last visited Apr. 9, 2003). The prosecution rate has not increased since September 11, 2001. The “declination rate”—the rate at which federal prosecutors decline to prosecute terrorism referrals from law enforcement—increased from 37% in 2001 to 55% in the first six months of 2002. *See* Transactional Records Access Clearing House, International Terrorism Referrals Acted Upon: Prosecuted or Declined Fiscal Years 1997–2002, at http://trac.syr.edu/tracreports/terrorism/supp/intter_pctdec9702.html (last visited Apr. 9, 2003).

⁸ *See* Transactional Records Access Clearing House, International Terrorism Lead Charge on Prosecutions Filed, *supra* note 7. The government apprehends and prosecutes very few international terrorists during the conspiracy stage—before they pose a real danger to the United States, its citizens, and its interests abroad. Between 1997 and 2001, conspiracy was the lead charge in only 1 of the 115 prosecutions for international terrorism. *See id.* The greatest number of prosecutions (36) involved foreign murder of U.S. nationals and kidnapping or hostage taking. *See id.* In those cases in which a federal offense was evident, prosecutors most often cited the “lack of evidence of criminal intent” or “weak or insufficient admissible evidence” for their failure to prosecute more suspected international terrorists. Transactional Records Access Clearing House, International Terrorism Referrals Declined by Declination Reason Fiscal Years 2001–2002, at http://trac.syr.edu/tracreports/terrorism/supp/intter_pctdec.html (last visited Apr. 9, 2003).

⁹ *See* Transactional Records Access Clearing House, Domestic and International Terrorism Disposed of 1997–2001, at http://trac.syr.edu/tracreports/terrorism/011203/intdomter_dis.html (last visited Apr. 9, 2003). The recent arrest of terrorist conspirators in Singapore suspected of having links with al-Qaeda provides one example of the few successful efforts to apprehend terrorists before they attack. *See* Rajiv Chandrasekaran, *Al Qaeda's Southeast Asian Reach: Group Operating in 4 Nations Believed Tied to Sept. 11 Hijackers*, WASH. POST, Feb. 3, 2002, at A1.

¹⁰ *See* Transactional Records Access Clearing House, Length of Prison Sentences: Fiscal Years 1997–2001, at <http://trac.syr.edu/tracreports/terrorism/011203/sentence.html> (last visited Apr. 9, 2003).

"[t]he gap between the reported investigations and referrals for prosecution would appear to document a major challenge facing law enforcement in its attempts to prevent terrorism and punish terrorists."¹¹

The government's inability to pursue more international terrorism prosecution referrals flows directly from federal law enforcement's inability to investigate acts of international terrorism effectively. Although the federal government is increasing its efforts to investigate, apprehend, and prosecute suspected international terrorists,¹² the paucity of international assistance prevents law enforcement from effectively monitoring international terrorist networks.¹³ This reality has prompted renewed demands from analysts,¹⁴ policy-makers,¹⁵ and Congress¹⁶ for greater cooperation between the intelligence community and law enforcement in the war on terrorism.

¹¹ Transactional Records Access Clearing House, *Criminal Enforcement Against Terrorists*, at <http://trac.syr.edu/tracreports/terrorism/report011203.html> (last visited Apr. 9, 2003).

¹² See PILLAR, *supra* note 1, at 80.

¹³ See *infra* Part III.A.

¹⁴ See, e.g., Joseph S. Nye, *How to Protect the Homeland*, N.Y. TIMES, Sept. 25 2001, at A29 (stating that "the [CIA] and [FBI] must improve their ability to work together on detection and must reconcile their different authorities and programs in intelligence and law enforcement"). Several commentators recently observed that "spies collect information; law enforcement agents collect evidence. This cultural difference affects the use and effectiveness of information," and "[t]he gaps separating the two communities cannot be closed entirely, but they can, and must, be bridged." Frank J. Cilluffo et al., *Tools to Combat Terrorism: The Use and Limits of U.S. Intelligence*, WASH. Q., Winter 2002, at 61, 73.

¹⁵ In a 1996 speech at Georgetown University on international terrorism, former Director of Central Intelligence John Deutch described communication between CIA station chiefs and FBI legal attachés abroad as essential in dealing with the foreign terrorist threat. See John Deutch, *Address at Georgetown University, Fighting Foreign Terrorism*, (Sept. 5, 1996), http://www.cia.gov/cia/public_affairs/speeches/archives/1996/dci_speech_090596.htm. In October of 1995, CIA General Counsel Jeffrey H. Smith told the Senate Select Intelligence Committee that effectively combating transnational threats requires "effective, extensive and routine cooperation between intelligence and law enforcement." John Buntin, *Cops and Spies: Federal Law Enforcement and Intelligence Agencies, Tired of Bumping into Each Other Overseas, Are Trying to Work Together*, GOV'T EXECUTIVE, April 1996, at 40, 41. The Director of Homeland Security, Tom Ridge, is seeking to improve cooperation between the CIA and FBI in investigating international terrorism. See David Jackson, *Ridge Seeks to Boost Nation's Security Budget*, DALLAS MORNING NEWS, Jan. 25, 2002, at 27A. The FBI, aware of the limitations on its ability to conduct effective foreign investigations of international terrorism, has announced that it must improve relations and intelligence sharing with the intelligence community. See Press Release, Federal Bureau of Investigation, *Reorganization of Federal Bureau of Investigation Headquarters* (Dec. 3, 2001), <http://www.fbi.gov/pressrel/pressrel01/reorg120301.htm>.

¹⁶ Congress amended Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure to authorize the Department of Justice to share information it uses in criminal prosecutions with intelligence agencies. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278 (to be codified at 50 U.S.C. § 401(a)). In addition, Congress has directed the Director of Central Intelligence to ensure that foreign intelligence relating to terrorists' plans is broadly disseminated within the government. See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 403, 115 Stat. 1394, 1403.

Despite its necessity, greater cooperation between law enforcement and the intelligence community may undermine the government's ability to pursue prosecution referrals of international terrorists because of the threat that such prosecutions pose to the disclosure of classified information. Recognition of the disclosure threat is evidenced by Department of Justice (DOJ) procedures. Before deciding whether to prosecute a violation of federal law in cases in which there is a possibility that classified information will be revealed, DOJ attorneys must consider "the likelihood that classified information will be revealed if the case is prosecuted" and "the damage to the national security that might result if classified information is revealed."¹⁷ Moreover, if the government does bring a prosecution, federal prosecutors are obligated to take every step possible to minimize their reliance on classified information.¹⁸ Recognizing the prominent role of the intelligence community in the investigation of international terrorism and the disclosure threat posed by criminal prosecutions of suspected international terrorists in federal courts, President George W. Bush, shortly after the September 11, 2001 terrorist attacks, authorized the creation of military tribunals to prosecute non-U.S. citizens suspected of engaging in international terrorist activities.¹⁹ This action drew sharp criticism from both liberals and conservatives alike.²⁰

¹⁷ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES FOR PROSECUTION INVOLVING CLASSIFIED INFORMATION 4-6 (1981).

¹⁸ See U. S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2052 (2002), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm. The Manual provides:

[Searching intelligence community files] will be done (1) to assist the prosecutor in drafting his/her case to avoid implicating classified sources and methods, (2) when legally necessary to ensure that the prosecution team has met its legal obligations to an indicted defendant, or (3) under certain circumstances, to provide investigative leads to law enforcement for use in obtaining *other* admissible evidence.

Id.

¹⁹ See Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The President's military order stated that dangers to the safety of the United States and the nature of international terrorism make it impracticable to apply in military tribunals the principles of law and the rules of evidence generally recognized in criminal cases tried in federal courts. See *id.* § 1(f). Supporters of the tribunals have articulated various justifications, including the need to deprive suspected terrorists of a public stage from which to spew propaganda, the need to protect federal judges and juries from retaliation, and the need to protect classified information from disclosure. See, e.g., Verne Gay, *A World-Class Headache: Bringing bin Laden to Trial? Bring Aspirin*, NEWSDAY, Nov. 29, 2001, at B35; Laura Ingraham, *Military Tribunals Provide Streamlined Justice*, USA TODAY, Nov. 26, 2001, at 15A; Charles Krauthammer, *In Defense of Secret Tribunals*, TIME, Nov. 26, 2001, at 104. Some even argue that a secret trial would be the least prejudicial way of trying well-known terrorists such as Osama bin Laden. See, e.g., *Terrorist Trials Best Handled by Military Commissions*, TAMPA TRIB., Nov. 24, 2001, at 18 (quoting an article by Douglas M. Kmiec, Dean of Catholic University of America, appearing in the *Wall Street Journal*).

²⁰ Columnist William Safire of the *New York Times* has commented that "we are letting George W. Bush get away with the replacement of the American rule of law with military

Some members of Congress have recognized the disclosure threat posed by federal court prosecutions. For example, Senator Orrin Hatch of Utah, who compared the need to prevent disclosure of classified information in the war on terrorism to the need for secrecy during World War II, expressed his support for military tribunals:

It is of the utmost importance that no information be permitted to reach the enemy on any of these matters. How the terrorists were so swiftly apprehended; how our intelligence services are equipped to work against them; what sources of information we have inside al Qaeda; who are the witnesses against the terrorists; how much we have learned about al Qaeda terrorist methods, plans, programs and the identity of other terrorists who might be or have been sent to this country; how much we have learned about al Qaeda weapons, intelligence methods, munitions plants and morale.

All of the testimony given at trial bears, to some degree, upon these matters. There is no satisfactory way of censoring and editing this testimony for the press without revealing, by statement or significant omission, the answers to many of the questions which may now be puzzling our enemies. We do not propose to tell our enemies the answers to the questions which are puzzling them. The only way not to tell them is not to tell them. The American people will not insist on acquiring information which by the mere telling would confer an untold advantage upon the enemy.²¹

The government's recent decision to prosecute suspected international terrorist Zacarias Moussaoui in federal court illustrates the effect that the threat of disclosure has on the government's choice of forum. Remarking on the government's decision not to prosecute Moussaoui in a military tribunal, Vice President Cheney told a *Washington Times* reporter that the forum decision was "primarily based on an assessment [that] the case against Moussaoui . . . [could] be handled through the normal criminal justice system without compromising sources or methods of intelligence."²²

kangaroo courts." William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31. Harvard Law School professor Alan Dershowitz has lamented the "specter of kangaroo courts" trying suspected terrorists "in the face of President Bush's tyrannical order." Alan M. Dershowitz, *Military Justice Is to Justice as Military Music Is to Music*, VILLAGE VOICE, Nov. 27, 2001, at 34. Trial attorney Gerry Spence has said that military tribunals "would be an absolute charade." See William Glaberson, *Lawyers Say Public Trial Would Make Convicting bin Laden More Difficult*, N.Y. TIMES, Dec. 12, 2001, at B9.

²¹ Department of Justice Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 363-64 (2001) (statement of Sen. Orrin G. Hatch) (quoting remarks by Franklin Roosevelt's Attorney General, Francis Biddle).

²² Joseph I. Lieberman, *No Excuse for Second-Class Justice*, WASH. POST, Jan. 2, 2002, at A13 (quoting Vice President Dick Cheney).

Shortly after the President issued the order authorizing military tribunals, more than three hundred law professors sent an open letter to him expressing their opposition to the tribunals and disputing the order's implicit assumption that federal courts are unable to handle criminal prosecutions of suspected international terrorists.²³ Indeed, the United States traditionally has prosecuted violations of its criminal laws in federal courts. However, in light of the apparent necessity of extensive interagency (particularly, intelligence community) cooperation for the effective investigation of international terrorism, one must ask whether critics of President Bush's attempt to remove criminal prosecutions of suspected international terrorists to an alternative forum have adequately considered whether federal courts are capable of entertaining such prosecutions without revealing to the world (and specifically to international terrorist organizations) the intelligence community's ability to spy on international terrorist networks. Although federal laws²⁴ and procedures²⁵ attempt to protect classified

²³ See Katharine Q. Seelye, *In Letter, 300 Law Professors Oppose Tribunals Plan*, N.Y. TIMES, Dec. 8, 2001, at B7. David Scheffer, a senior fellow at the U.S. Institute for Peace, criticized the President's decision to create the military tribunals on the grounds that "[the United States has] a good track record of successfully prosecuting terrorists in court while successfully protecting classified information." *'Our Credibility Is on the Line Here'*, NEWSWEEK, Nov. 28, 2001, at <http://www.msnbc.com/news/664569.asp>. However, the statistical evidence showing that international terrorists are underprosecuted undermines the force of this assertion. See *supra* notes 5–10 and accompanying text.

²⁴ Although neither defines what constitutes a source or method, both Executive Order 12,958 and the National Security Act of 1947 provide for the protection of intelligence sources and methods. See Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995); National Security Act of 1947 § 103(c)(6), 50 U.S.C. § 403-3(c)(6) (2000). Executive Order 12,958, which lays out the rules governing the classification of information, authorizes the President, agency heads, and other presidentially designated officials, as well as officials who have been delegated authority by agency heads, to classify information. See Exec. Order No. 12,958 § 1.4, 60 Fed. Reg. at 19,827. These officials may categorize information as top secret, secret, or confidential, depending on whether its unauthorized disclosure could be expected to cause exceptionally grave damage, serious damage, or damage, respectively, to national security. See *id.* § 1.3, 60 Fed. Reg. at 19,826. The National Security Act exempts the CIA from any law that would require the publication or disclosure of the functions, names, official titles, salaries, or numbers of its personnel. See 50 U.S.C. § 403g.

²⁵ The discovery of classified information by defendants is regulated in part by the Classified Information Procedures Act (CIPA). See 18 U.S.C. app. 3 §§ 1–16 (2000). Section 4 of CIPA, titled "Discovery of classified information by defendants," provides that "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure . . ." *Id.* app. 3 § 4. This provision has been construed not to create "new rights of or limits on discovery of a specific area of classified information." *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989). Rather, the D.C. Circuit has stated, CIPA "contemplates an application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information." *Id.* Although one could imagine a situation in which § 4 of CIPA might provide a measure of protection to a prosecutor seeking to protect classified information in the face of a discovery request for all *Brady* material in the government's possession, it is important to note that a § 4 substitution issue will not arise until after the issue with which this Note is concerned—whether a

information from unnecessary disclosure, and federal courts traditionally have been sensitive to the necessity of protecting classified information from disclosure to defendants,²⁶ the Supreme Court has imposed on prosecutors a duty, known as *Brady* obligations, to disclose to criminal defendants all exculpatory²⁷ and impeachment²⁸ material in the government's possession. In addition, the Supreme Court recently imposed on prosecutors the duty to *search* for exculpatory or impeachment evidence not known to or possessed by the prosecution, but known to others acting on the government's behalf in a particular case.²⁹ Some courts of appeals have gone so far as to require that prosecutors search for exculpatory and impeachment material in any agency with a *potential* connection to the prosecution's case.³⁰ Because disclosure of intelligence community files could reveal the methods and sources that the government uses to monitor international terrorist networks, compelled disclosure of intelligence community files relating to targets of criminal investigations could eviscerate the government's already limited ability to investigate international terrorism effectively. In light of prosecutors' *Brady* obligations and of the unique interagency investigative burden imposed by international terrorism, it is questionable whether the federal courts are the appropriate forum in which to try suspected international terrorists.

This Note argues that federal courts can and must adopt a construction of the Supreme Court's line of *Brady* cases that limits the prosecutor's duty to search the intelligence community for exculpatory or impeachment material if the courts are to serve as a viable

prosecutor must search for *Brady* material possessed by other government entities for which he might later seek substitution or deletion—is resolved. Therefore, because CIPA does not bear on the issue of a prosecutor's duty to search for *Brady* material in the possession of other arms of the federal government, this Note does not discuss the various procedural requirements that the statute imposes on the discovery and introduction of classified information in criminal prosecutions. For a more detailed discussion of the mechanics of CIPA, see Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 AM. CRIM. L. REV. 191 (1994); Jeff Jarvis, Note, *Protecting the Nation's National Security: The Classified Information Procedures Act*, 20 T. MARSHALL L. REV. 319 (1995); Timothy J. Shea, Note, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657 (1990).

²⁶ Cf. *United States v. Smith*, 780 F.2d 1102, 1108 (4th Cir. 1985) (observing that “[r]evealing [classified] information absent an essential need by a defendant would . . . result in the drying up of a primary source of information to our intelligence community”).

²⁷ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁸ See *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

²⁹ See *Kyles v. Whitley*, 514 U.S. 419, 438–39 (1995). Stanley Fisher argues that the Supreme Court's line of *Brady* cases should be codified in ethical rules so that prosecutors have an ethical, as well as a constitutional, obligation “to learn of and disclose exculpatory evidence known to other members of the prosecution team, including law enforcement agents.” Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1422–23 (2000).

³⁰ See *infra* Part II.

forum for the prosecution of international terrorists.³¹ Any standard regarding the proper scope of the prosecutor's duty to search the government for *Brady* material must be faithful to the policies underlying prosecutorial disclosure. Therefore, Part I discusses the doctrinal basis for the prosecutor's duty to discover and disclose *Brady* material within the government's possession and identifies the policies that prosecutorial disclosure aims to serve. Because the Supreme Court has not ruled on whether prosecutors must search for *Brady* material within government entities that have not engaged in law enforcement activity under a prosecutor's direction and control, Part II of this Note reviews the major circuit courts of appeals cases ruling on the prosecutor's duty to search for *Brady* material not known to or possessed by him. Part III explains the significance of the government's interest in preventing disclosure of classified information relating to its investigation of international terrorism by describing the source of the discovery problem at issue in this Note—namely, the need for extensive interagency cooperation in the government's investigation of international terrorism. This Part also explains why, in the context of a prosecution of an international terrorist, the various circuit approaches place inadequate limits on the prosecutor's duty to search for *Brady* material in the possession of any branch of the federal government. Part IV of this Note proposes a standard for applying a limited prosecutorial duty to search other government agencies for *Brady* material. This proposed standard better serves the government's interests in protecting classified information regarding its investigation of international terrorism than do the current circuit approaches. This Part also explains how the proposed standard conforms to existing Supreme Court case law, and how the standard implements all of the policies that prosecutorial disclosure is intended to serve.

³¹ Two commentators appear to disagree, expressly or implicitly, with the assertion that a prosecutor's duty can be so limited. Jonathan Fredman has argued that a prosecutor's duty to search for *Brady* material would reach the intelligence community if an intelligence agency were to become aligned with a specific prosecution or if a prosecutor were to have "reason to believe that a particular intelligence agency [had] any information relating to a specific defendant or the subject matter of a particular prosecution." See Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 370 (1998). Robert Hochman has argued that "[a]nyone who plays a part in bringing the power of the state to bear on the individual in the form of punishment must share the responsibility to uncover the truth that comes with that power." Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1692 (1996). This Note seeks to demonstrate that neither of these broad approaches is compelled by case law.

1

SUPREME COURT JURISPRUDENCE ON THE PROSECUTOR'S
DUTY TO DISCOVER AND DISCLOSE
BRADY MATERIAL

Discovery in federal criminal proceedings has both constitutional and statutory dimensions. Although defendants have no general constitutional right to discovery in criminal proceedings,³² Congress has established rules providing for "the minimum amount of discovery to which the parties are entitled,"³³ and the Supreme Court has fashioned "what might loosely be called the area of constitutionally guaranteed access to evidence" designed to ensure that criminal prosecutions comport with due process.³⁴ This Part discusses the prosecutor's constitutional discovery obligations under *Brady v. Maryland* and its progeny,³⁵ paying particular attention to the Court's reasons for imposing the discovery and disclosure obligation and to *Brady's* power to compel a prosecutor to search other branches of the government for exculpatory or impeachment evidence not known to or possessed by the prosecutor.³⁶ In doing so, this Part establishes

³² *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

³³ FED. R. CRIM. P. 16 advisory committee's note (1975 Amendment). The criminal defendant's main statutory discovery devices are Rules 16 and 26.2. See FED. R. CRIM. P. 16, 26.2.

³⁴ *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

³⁵ One might wonder why the disclosure problem associated with federal prosecutions of international terrorists is limited to the scope of a prosecutor's obligation to search other arms of government for *Brady* material, considering that Federal Rule of Criminal Procedure 17 permits a defendant to obtain a subpoena to "command each person to whom it is directed to attend and give testimony at the time and place specified therein," FED. R. CRIM. P. 17(a), or to "command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein," FED. R. CRIM. P. 17(c). In other words, if a defendant can simply subpoena elements of the intelligence community to discover any exculpatory or impeachment material he believes it might have, why is not the disclosure problem broader than the scope of *Brady's* search obligation? The answer is that a defendant cannot use his power of subpoena in a federal criminal proceeding as a discovery device. As the Supreme Court stated in *Bowman Dairy Co. v. United States*:

It was intended by the rules to give some measure of discovery. Rule 16 was adopted for that purpose. . . .

Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. . . . Rule 16 provides the only way the defendant can reach such materials so as to inform himself. . . .

. . . Rule 17(c) was not intended to provide an additional means of discovery.

341 U.S. 214, 218-20 (1951).

³⁶ Discussion of a federal prosecutor's duty to search other branches of the federal government for Rule 16 or Jencks Act (Rule 26.2) material is outside the scope of this Note. However, cases discussing a prosecutor's duty to search for Rule 16 and Jencks Act materials that he neither has in his possession nor knows that courts impose the same search obligation in those contexts as they do in the *Brady* context. See, e.g., *United States v. Hall*, 171 F.3d 1133, 1144-45 (8th Cir. 1998) (holding that a prosecutor was not obligated to disclose medical and psychiatric records relating to a government witness's

that the prosecutor's duty to discover and disclose *Brady* material is intended to implement several policies, including the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (*i.e.*, preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions. These are the policies to be implemented by any standard regarding the prosecution's duty to search for *Brady* material that is not within his knowledge or possession.

A. The Policies Underlying Prosecutorial Disclosure

Because the government has vastly superior investigative resources with which to discover information concerning alleged crimes,³⁷ and because in most cases exculpatory information in the

testimony in response to a request for Jencks Act material because the government did not possess or control the records); *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (holding that Rule 16 requires disclosure of inmate files if a prosecutor has knowledge of and access to them, regardless of whether the controlling agency participated in the prosecution's investigation); *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (relying on Ninth Circuit *Brady* cases for the proposition that Rule 16 does not require a federal prosecutor to disclose personnel files of state law enforcement witnesses); *United States v. Durham*, 941 F.2d 858, 860–61 (9th Cir. 1991) (holding that a federal prosecutor had no obligation under the Jencks Act to disclose notes taken by a state investigator during an interview of a witness because the government did not possess the notes); *United States v. Cagnina*, 697 F.2d 915, 922 (11th Cir. 1983) (“A statement is ‘in the possession of the United States’ for Jencks Act purposes if it is in the possession of a federal prosecutorial agency.”); *Thor v. United States*, 574 F.2d 215, 220–21 (5th Cir. 1978) (holding that the prosecution was not obligated to disclose certain evidence because the evidence was in the possession of county police, not the federal prosecutor). Because the statutes requiring the prosecution to produce Rule 16 and Jencks Act material “in the government's possession” do not define what it means for these materials to be in the government's possession, *see* FED. R. CRIM. P. 16, 26, this Note's proposal regarding the proper scope of a prosecutor's duty to search other arms of the government for *Brady* material should be equally applicable in the Rule 16 and Jencks Act contexts. *But see* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecution*, 15 GA. ST. U. L. REV. 601, 616–17 (1999) (arguing that “government” should not mean the same thing under *Brady* as it does under Rule 16(a)(1)(C), even though courts often treat these two references as having equivalent meaning, because (1) disclosure required under Rule 16 is broader than what is required under *Brady*; (2) *Brady*'s concern is with prosecutorial suppression, “so it is logical to focus on what the prosecutor knows or should know that might impact on the fairness of the trial”; and (3) compelling a prosecutor to search the government for exculpatory or impeachment material imposes an unfair burden on government).

³⁷ *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 76 (1991) (observing that “[p]rosecutors' offices rarely have manpower advantages that would undermine adversarial equality” but that “they do have material resources unavailable to the defense,” such as “[t]he ability to employ police as investigators, use grand jury subpoena power to force cooperation of witnesses, time indictments, consult the government's vast forensic services and computer records, and appeal to jurors' natural fear of crime[, of which] all contribute to prosecutorial effectiveness”). Federal agencies employed almost 90,000 full-time investigative personnel authorized to make arrests and carry firearms as of 2000. Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Law Enforcement Statistics, at <http://www.ojp.usdoj.gov/bjs/fedle.htm>

prosecution's possession will be unknown to defense counsel,³⁸ one of the most valuable rights that a criminal defendant enjoys is his constitutional right to all evidence in the government's possession that is material either to his guilt or punishment.³⁹ The Court in *Brady v. Maryland*⁴⁰ imposed on prosecutors the duty to disclose exculpatory evidence. The prosecution charged the defendant in that case, Brady, with first degree murder.⁴¹ Brady defended on the theory that, although he had participated in the crime, he had not killed the victim.⁴² Prior to trial, Brady requested that the prosecution permit his counsel to examine the extrajudicial statements of his alleged accomplice, Boblit.⁴³ The prosecution complied by making some of Boblit's statements available to Brady's attorney, but it withheld one statement it possessed—and of which it was aware—in which Boblit admitted to committing the homicide.⁴⁴ Brady learned of the statement after he had been tried, convicted, and sentenced to death for first-degree murder.⁴⁵ The Supreme Court held that the suppression of Boblit's statement was a violation of Brady's due process rights, stating that, irrespective of the good faith or bad faith of the prosecution, "the suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."⁴⁶

The Court's minimal discussion of its rationale left much to be inferred. It stated generally that due process requires the disclosure

(last revised July 17, 2001). All state and local law enforcement agencies combined employed over 1,000,000 full-time investigative personnel. See Bureau of Justice Statistics, U.S. Dep't of Justice, State and Local Law Enforcement Statistics, at <http://www.ojp.usdoj.gov/bjs/sandle.htm> (last revised Jan. 29, 2003).

³⁸ See *United States v. Agurs*, 427 U.S. 97, 106 (1976).

³⁹ A detailed discussion of all the nuances of prosecutors' *Brady* obligations is unnecessary for the purposes of this Note. For such a discussion, see 25 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 616.06 (3d ed. 1997) and Christopher P. DeRosso & Samuel F. Ernst, *Discovery, Thirteenth Annual Review of Criminal Procedure*, 89 GEO. L.J. 1343, 1343–56 (2001). For a succinct discussion of *Brady* and its doctrinal basis, see Victor Bass, Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 112–15 (1972) and Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

⁴⁰ See 373 U.S. 83, 87 (1963).

⁴¹ See *id.* at 84.

⁴² See *id.*

⁴³ *Id.*

⁴⁴ *Id.* The Supreme Court's opinion states that the prosecution's suppression of the statement was not done with "guile." See *id.* at 84, 88.

⁴⁵ See *id.* at 84.

⁴⁶ *Id.* at 87. In *Giglio v. United States*, the Court subsequently ruled that impeachment evidence is covered by the *Brady* disclosure obligation, stating that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)); see also *infra* notes 83–89 and accompanying text (discussing the *Giglio* case).

obligation, and that non-disclosure violates due process because it produces unjust and unfair trials.⁴⁷ Speaking to its decision's doctrinal basis, the *Brady* Court stated that its holding was an extension of its prior decision in *Mooney v. Holohan*, a case involving deliberate prosecutorial suppression of impeachment evidence in which the Court stated that a conviction contrived through "the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . is . . . inconsistent with the rudimentary demands of justice."⁴⁸ Justifying its extension of *Mooney* to cases of inadvertent suppression,⁴⁹ such as the suppression at issue in *Brady*, Justice Douglas, writing for the majority, observed that:

The principle of *Mooney* . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.⁵⁰

Because the *Brady* obligation is designed to ensure that defendants receive fair trials, a prosecutor's good or bad faith in suppressing evidence is, as the Court observed, irrelevant.⁵¹

Despite its repeated references to fairness and justice, the *Brady* opinion did not state clearly why prosecutorial nondisclosure is unfair to defendants. Does unfairness arise because of prosecutorial misconduct? In other words, does it stem from a prosecutor's failure to observe a procedural rule or from his engagement in arbitrary conduct? Does the unfairness stem from some evidentiary advantage that nondisclosure gives to a prosecutor? Does the unfairness derive from some fraud committed upon the court or upon the defendant? Although the Court answered none of these questions directly, its opinion suggests that it understood a "fair trial" to be a trial in which a court is not deceived by a prosecutor, the prosecutor engages in no misconduct, and the resulting conviction is accurate. For example, the Court's reliance on *Mooney*, a misconduct case, indicates that it

⁴⁷ See *Brady*, 373 U.S. at 87.

⁴⁸ See *id.* at 86 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). In *Mooney*, the prosecuting state attorney intentionally suppressed evidence concerning the credibility of every government witness. See 294 U.S. at 110, 112–13. *Mooney*, a radical labor leader and accused anarchist, claimed that the prosecutor fabricated his entire case and alleged that his conviction was based on perjured testimony "which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." *Id.* at 110. The *Brady* Court also relied on *Pyle v. Kansas*, 317 U.S. 213 (1942), another case involving deliberate suppression. See *Brady*, 373 U.S. at 86.

⁴⁹ See *supra* note 44.

⁵⁰ *Brady*, 373 U.S. at 87.

⁵¹ See *id.*

was concerned partially with preventing prosecutorial misconduct.⁵² In addition, the language it used suggests that the Court was concerned also with public perceptions of trial fairness: the Court observed that the disclosure rule sought to prevent a prosecutor from being cast in the "role of an architect of a proceeding that does not comport with standards of justice."⁵³ Moreover, the irrelevance of a prosecutor's good or bad faith under *Brady* and the requirement that the suppressed evidence be material of guilt or punishment suggest that the Court understood fairness in terms of the accuracy of the trial outcome. Why else would the Court limit a prosecutor's disclosure obligation to evidence material to guilt or punishment if clearly, one may assume, a defendant would be harmed if he were denied the opportunity to exploit every piece of favorable (though not *material*) evidence in the prosecution's possession?

In subsequent decisions, the Supreme Court has infrequently and only briefly spoken to *Brady's* purpose. Nevertheless, its subsequent *Brady* cases indicate that disclosure is designed to implement a variety of policies. In its 1976 *United States v. Agurs* decision, a case involving a prosecutor's deliberate failure to disclose *Brady* material in his actual possession,⁵⁴ the Court characterized *Brady* as a mechanism for preventing harm to defendants: "Although in *Mooney* [upon which *Brady* relied] the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure."⁵⁵ Although this statement emphasizes the policy of preventing harm to defendants, the opinion's discussion of prosecutorial integrity suggests that the *Agurs* Court understood fairness also in terms of preventing prosecutorial misconduct:

For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."⁵⁶

⁵² See *supra* text accompanying note 48.

⁵³ *Brady*, 373 U.S. at 88. The Court quoted a portion of an address by former Solicitor General Simon E. Sobeloff:

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

Id. at 87 n.2.

⁵⁴ 427 U.S. 97, 100-01, 106-07 (1976).

⁵⁵ *Id.* at 104 n.10.

⁵⁶ *Id.* at 110-111 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Moreover, the Court's desire to implement the policy of ensuring the accuracy of convictions presumably served as the basis for *Agurs's* conclusion that there is no difference between cases in which the defense has made merely a general request for exculpatory evidence and cases in which the defense has made no request for exculpatory evidence.⁵⁷

The Supreme Court expressed its understanding that disclosure functions also to ensure the accuracy of criminal convictions in its 1985 *United States v. Bagley* decision, a case in which the Court discussed the materiality limitation on the prosecutor's duty to disclose *Brady* material.⁵⁸ Although *Bagley* recognized that justice requires disclosure,⁵⁹ the Court nevertheless pointed out that the disclosure obligation has its limits: "[T]he prosecutor is not required to deliver his entire file to defense counsel"⁶⁰ because "[*Brady's*] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."⁶¹ Thus, fairness to defendants, as understood by the *Bagley* Court, does not require that the prosecution turn over to the defendant every possible piece of evidence that might assist him in preparing his defense. Rather, a prosecutor need turn over only material evidence,⁶² and "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁶³ The Court's belief that a defendant can receive a fair trial even if a prosecutor were to suppress non-outcome-determinative evidence suggests that

⁵⁷ See *id.* at 106–07. The Court noted that if there is a duty to respond to a general request . . . , it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

Id. at 107.

⁵⁸ 473 U.S. 667, 678–684 (1985). As it had in prior opinions, the Court also focused on the prosecutorial role that *Brady* envisions, observing that "the *Brady* rule represents a limited departure from a pure adversary model" and that "the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* at 675 n.6 (alterations in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The prosecutor in *Bagley* failed to disclose impeachment evidence to the defense following a specific request. See *id.* at 669–70, 676.

⁵⁹ See *id.* at 674–75.

⁶⁰ *Id.* at 675.

⁶¹ *Id.* The Court reaffirmed the prosecutor's sole authority to make disclosure determinations under *Brady* in its 1987 *Pennsylvania v. Ritchie* decision, in which it stated that "[d]efense counsel has no constitutional right to conduct his own search of the State's files [for *Brady* material]" because "it is the State that decides which information must be disclosed" and "the prosecutor's decision on disclosure is final." 480 U.S. 39, 59 (1987).

⁶² See *Bagley*, 473 U.S. at 678.

⁶³ *Id.* at 682. The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

the purpose of disclosure is served so long as convictions are administered accurately.⁶⁴

The Supreme Court's recent *Kyles v. Whitley* decision spoke of *Brady* disclosure as a method of both ensuring public confidence in criminal convictions and promoting the accuracy of criminal convictions.⁶⁵ The Court expressed its concern for promoting public confidence in criminal convictions through disclosure by stating that "[*Brady*] disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"⁶⁶ The *Kyles* Court added that:

[u]nless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.⁶⁷

Moreover, *Kyles*'s observation that "[*Brady* disclosure] will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"⁶⁸ expressed the Court's understanding that *Brady* disclosure is also designed to serve the policy of assuring the accurate administration of convictions.

The Court's concern for implementing *Brady* in a way that preserves the adversarial system of justice is not a subject of great discussion in its *Brady* opinions, but it is nonetheless present throughout its opinions. For example, the Court stated in *Kyles* that "[w]e have never held that the Constitution demands an open file policy,"⁶⁹ in *Pennsylvania v. Ritchie* that "[a] defendant's right to discover exculpatory

⁶⁴ Justice Marshall's dissenting opinion recognized the limitation that the majority's materiality requirement placed on the defendant's constitutional right to a fair trial, observing that

the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case.

Id. at 695-96 (Marshall, J., dissenting).

⁶⁵ See 514 U.S. 419, 454 (1995).

⁶⁶ *Kyles*, 514 U.S. at 439 (alteration in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The three significant Supreme Court opinions preceding *Kyles* that relied on *Brady*—*Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972), and *Giglio v. United States*, 405 U.S. 150, 154 (1972)—provide little or no discussion of *Brady*'s purpose.

⁶⁷ *Kyles*, 514 U.S. at 439.

⁶⁸ *Id.* at 440.

⁶⁹ *Id.* at 437.

evidence does not include the unsupervised authority to search through the Commonwealth's files,"⁷⁰ and in *Agurs* that "we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel."⁷¹ Why this limitation? In part, as the Court observed in *Bagley*, because it serves to preserve the adversarial system of justice: "[*Brady's*] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel" ⁷²

In summary, this subpart's discussion indicates that, taken together, the *Brady* line of opinions reflects the Court's understanding that disclosure of exculpatory and impeachment evidence is intended to implement several policies, including the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (*i.e.*, preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions.

B. The Doctrinal Basis for the Prosecutor's Duty to Search for *Brady* Material

As the previous subpart indicates, *Brady* forbids a prosecutor from suppressing evidence favorable to the accused.⁷³ Subsequent Supreme Court cases recast the prosecutor's obligation as the duty to turn over evidence in the government's possession that is both favorable to the accused and material to guilt or punishment.⁷⁴ Under either formulation, possession and notice of *Brady* material are implicit preconditions to the disclosure duty. In *Brady*, the prosecution withheld from the defendant exculpatory material in its possession of which it was aware.⁷⁵ However, does a prosecutor commit a *Brady* violation if she fails to disclose exculpatory material in her possession but of which she is unaware? Does a prosecutor commit a violation if she fails to disclose exculpatory material not in her possession but of which she is aware? What if a prosecutor fails to disclose exculpatory information that is within neither her possession nor knowledge? Subsequent Supreme Court opinions construing *Brady*, discussed in this subpart, provide some guidance regarding the degree of prosecutorial knowledge and possession of exculpatory mate-

⁷⁰ *Ritchie*, 480 U.S. at 59.

⁷¹ *United States v. Agurs*, 427 U.S. 97, 111 (1976).

⁷² *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnotes omitted).

⁷³ See *supra* note 46 and accompanying text.

⁷⁴ See *Ritchie*, 480 U.S. at 57; *Bagley*, 473 U.S. at 674-76.

⁷⁵ See *supra* note 44 and accompanying text.

rial necessary for the imposition of a prosecutorial disclosure obligation. Because these cases describe the circumstances under which the courts will impute knowledge or possession of *Brady* material to a prosecutor, they implicitly set out the scope of the prosecutor's duty to search for *Brady* material.

The simplest *Brady* violation one can imagine involves a prosecutor's intentional failure to disclose exculpatory material to the defendant that is within the prosecutor's actual possession and knowledge.⁷⁶ In fact, the exculpatory or impeachment materials suppressed in *Agurs*, *Moore v. Illinois*, and *Brady* all were within the actual possession of a prosecutor.⁷⁷ Thus, none of those opinions went so far as to hold that the prosecution has a duty to disclose any exculpatory or impeachment material not within its possession but nevertheless possessed by some arm of the government.⁷⁸ However, although an implicit precondition to any duty to disclose under *Brady* is that the prosecution have notice of its possession of evidence materially favorable to the defendant, a prosecutor's disclosure obligations are not limited to materials close to her or well known to her—that is, to materials within her actual possession or knowledge. Instead, as the Supreme Court has held in a line of cases, including *Giglio v. United States*,⁷⁹ *Bagley*,⁸⁰ *Ritchie*,⁸¹ and *Kyles*,⁸² a prosecutor's disclosure obligations extend also to exculpatory material not known to or possessed by her but possessed by other members of a prosecutor's office or by the law enforcement entity that investigated the particular crime on the prosecutor's behalf.

The imputed knowledge doctrine finds its basis in *Giglio*, a case in which the defendant was convicted of passing forged money orders

⁷⁶ The paradigmatic situation occurs where a prosecutor intentionally withholds information supporting a defendant's sole defense simply because the defendant did not specifically request *Brady* material. See *Agurs*, 427 U.S. at 100–01.

⁷⁷ See *id.* at 100–01, 106–07; *Moore v. Illinois*, 408 U.S. 786, 791–95 (1972); *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

⁷⁸ In fact, the entire *Agurs* opinion refers to exculpatory information in the hands of the prosecutor. The *Agurs* Court began its discussion of *Brady* by stating that “[t]he rule of *Brady v. Maryland* arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.” *Agurs*, 427 U.S. at 103 (citation omitted). The *Agurs* Court couched in the following language its holding that the *Brady* analysis does not vary depending on whether the defense's request is general or whether there is a request at all: “[A general] request . . . gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request . . . , it must derive from the obviously exculpatory character of certain evidence *in the hands of the prosecutor*.” *Id.* at 106–07 (emphasis added).

⁷⁹ 405 U.S. 150 (1972).

⁸⁰ 473 U.S. 667 (1985).

⁸¹ 480 U.S. 39 (1987).

⁸² 514 U.S. 419 (1995).

and sentenced to five years in prison.⁸³ At trial, Taliento, Giglio's alleged but unindicted co-conspirator, testified that Giglio instigated the criminal scheme.⁸⁴ Taliento was the federal government's only witness linking Giglio to the charged offense.⁸⁵ During cross-examination, defense counsel unsuccessfully sought to discredit Taliento's testimony by attempting to reveal possible agreements with the government for prosecutorial leniency.⁸⁶ While the appeal was pending, defense counsel discovered that the prosecutor had failed to disclose impeachment evidence to the defense—specifically, a promise to Taliento, recorded in an affidavit by an Assistant U.S. Attorney, DiPaola, that if Taliento testified before the grand jury and at trial he would not be prosecuted for his participation in the scheme.⁸⁷ DiPaola had presented the government's case to the grand jury, but the case was tried by another Assistant U.S. Attorney who had filed an affidavit with the court and stated in his summation that the government had made no promise of immunity to Taliento.⁸⁸ Although the Assistant U.S. Attorney who actually tried the case and who presumably would have been responsible for *Brady* disclosure apparently had no knowledge of the impeachment material, the Court nevertheless found a *Brady* violation: "A promise made by one attorney must be attributed, for . . . [*Brady*] purposes, to the Government."⁸⁹ Thus was born the doctrine of imputed knowledge of *Brady* material.

In *United States v. Bagley*, the Court applied this constructive knowledge/possession doctrine to evidence known only to and possessed by the investigative arm of a prosecutor's office.⁹⁰ In that case, the federal government convicted the defendant, Bagley, of narcotics offenses principally on the testimony of two witnesses.⁹¹ Prior to trial, Bagley requested that the prosecutor disclose materials relating to "any deals, promises, or inducements made to witnesses in exchange for their testimony."⁹² The prosecution disclosed no material relating to any such promises.⁹³ Three years after his conviction, Bagley made a request for information under the Freedom of Information Act of 1974, in response to which he received copies of form contracts between the government's two witnesses and the Bureau of Alcohol, Tobacco and Firearms (ATF)—the law enforcement entity that

⁸³ *Giglio*, 405 U.S. at 150.

⁸⁴ *Id.* at 151.

⁸⁵ *Id.*

⁸⁶ *See id.* at 151–52.

⁸⁷ *Id.* at 150–51.

⁸⁸ *Id.* at 151–52.

⁸⁹ *Id.* at 154.

⁹⁰ *See* 473 U.S. 667 (1985).

⁹¹ *See id.* at 669–71, 673.

⁹² *Id.* at 669–70.

⁹³ *See id.* at 669–71.

apparently investigated Bagley on behalf of the prosecution⁹⁴—for the purchase of information related to Bagley’s violations.⁹⁵ In the suit to vacate his sentence, the Assistant U.S. Attorney who prosecuted Bagley stated that he had not known that the contracts existed and that he would have disclosed them to Bagley had he know of them.⁹⁶ Although the Court did not discuss the reasons for its implicit extension of *Brady* to materials outside the prosecutor’s possession, the Court, relying on *Brady*, *Agurs*, and *Moore*⁹⁷—three cases involving suppression of exculpatory or impeachment material within the actual possession of a prosecutor⁹⁸—found error in the nondisclosure because “the prosecutor failed to disclose evidence that the defense might have used to impeach the Government’s witnesses,”⁹⁹ even though the Court appears to have acknowledged that the prosecution was unaware of and never possessed the suppressed evidence.¹⁰⁰ The *Bagley* Court thus construed *Brady* to extend a prosecutor’s disclosure obligation to materials possessed by other branches of the government—specifically, a prosecutor’s investigative arm.

In *Pennsylvania v. Ritchie*, the Supreme Court implicitly extended the scope of the prosecution’s *Brady* disclosure obligation to material possessed by a non-law-enforcement investigative branch of government.¹⁰¹ In *Ritchie*, the government charged the defendant, Ritchie, with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor.¹⁰² Prior to trial, Ritchie subpoenaed the Pennsylvania Children and Youth Services (CYS), a non-law-enforcement protective service agency responsible under Pennsylvania law for investigating cases of suspected mistreatment and neglect,¹⁰³ for files related to his

⁹⁴ See *id.* at 670–71.

⁹⁵ See *id.*

⁹⁶ *Id.* at 671 n.4.

⁹⁷ See *id.* at 674–78.

⁹⁸ See *supra* note 77 and accompanying text.

⁹⁹ *Bagley*, 473 U.S. at 676. The Court’s understanding of the broad scope of the *Brady* obligation is further reflected in Justice White’s concurring opinion, in which he referred to suppression *by the government* rather than specifically to suppression by the prosecution. Justice White stated that “[Bagley] is not entitled to have his conviction overturned unless he can show that the evidence withheld *by the government* was ‘material.’” *Id.* at 685 (White, J., concurring) (emphasis added).

¹⁰⁰ *Id.* at 671 n.4. The Court remanded the case for consideration of whether the trial would have been different had the prosecution disclosed the *Brady* material. *Id.* at 684. The Ninth Circuit Court of Appeals held that the prosecutor’s failure to disclose the contracts between the witnesses and the ATF required reversal of Bagley’s narcotics conviction. See *Bagley v. Lumpkin*, 798 F.2d 1297, 1298, 1302 (9th Cir. 1986). Bagley nonetheless served time for the firearms conviction that the two witnesses helped secure. See *United States v. Bagley*, 659 F. Supp. 223, 229 (W.D. Wash. 1987).

¹⁰¹ See 480 U.S. 39, 58 (1987).

¹⁰² *Id.* at 43.

¹⁰³ *Id.* The police apparently did not conduct such investigations but instead referred child mistreatment and neglect matters to CYS for investigation. See *id.*

prosecution.¹⁰⁴ Ritchie believed that the files contained names of favorable witnesses as well as other unspecified exculpatory information, including a medical report.¹⁰⁵ CYS refused to provide the files,¹⁰⁶ and Ritchie was convicted and sentenced to three to ten years in prison.¹⁰⁷ Although the Court acknowledged that the prosecutor neither had access to the files nor was aware of their contents,¹⁰⁸ the Court ordered the files turned over to the trial judge for *in camera* review on the ground that Ritchie was entitled to any *Brady* information contained in them.¹⁰⁹ Relying on *Brady* and *Agurs*, the Supreme Court stated broadly that “[i]t is well settled that *the government* has the obligation to turn over evidence in *its* possession that is both favorable to the accused and material to guilt or punishment.”¹¹⁰ The *Ritchie* Court, without discussing the relationship between CYS and the prosecutor in this particular case, thus appeared to implicitly extend a prosecutor’s duty to search for *Brady* material to reach exculpatory or impeachment material not known to him, possessed by him, or even possessed by law enforcement agencies assisting in a particular prosecution.

Implicit in the Supreme Court’s constructive knowledge and possession cases is the belief that due process is offended if a prosecutor fails to search for *Brady* material not known to him but possibly possessed by some arm of the government involved in the investigation of a defendant’s allegedly unlawful conduct.¹¹¹ In its 1995 *Kyles v. Whitley* decision, the Supreme Court finally expressly imposed on prosecutors a limited duty to search for *Brady* material not known to or possessed by them.¹¹² The defendant in that case, Kyles, was convicted of first-degree murder and sentenced to death primarily on the testimony of four witnesses.¹¹³ In his defense, Kyles argued that the government’s informant had framed him.¹¹⁴ Prior to trial, defense counsel filed a lengthy motion for *Brady* material, to which the state prosecutor responded that he neither possessed nor had knowledge of any exculpa-

¹⁰⁴ *Id.* Pennsylvania law provided for the confidentiality of all reports and other information obtained in the course of a CYS investigation, subject to a certain number of exceptions. *Id.* One of those exceptions permitted CYS records to be revealed to law enforcement officials for use in criminal investigations. *Id.* at 43 n.2.

¹⁰⁵ *Id.* at 44.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 45.

¹⁰⁸ *Id.* at 44 n.4.

¹⁰⁹ *Id.* at 61.

¹¹⁰ *Id.* at 57 (emphases added).

¹¹¹ In *Ritchie* and *Bagley*, the Court implicitly imposed a disclosure obligation on material of which the prosecution has constructive possession. *See supra* notes 90–110 and accompanying text.

¹¹² 514 U.S. 419, 437–38 (1995).

¹¹³ *Id.* at 423, 429–31.

¹¹⁴ *Id.* at 429.

tory evidence.¹¹⁵ During the appeal, it was discovered that the prosecutor failed to turn over impeachment evidence to the defense, including the witnesses' contemporaneous statements to the police, records of police conversations with the government's informant, and information linking the government's informant to other crimes.¹¹⁶ The prosecution argued on appeal that it had no knowledge of the *Brady* material held by the police—the prosecutor's investigative arm in the case—and that it should not be held accountable for evidence known only to police investigators.¹¹⁷ The Court acknowledged that “police investigators sometimes fail to inform a prosecutor of all they know,” but nevertheless refused to accommodate the State's position, which the Court understood as “a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials,” because to do so would “amount to a serious change of course from the *Brady* line of cases.”¹¹⁸ Relying solely on *Brady*, the Court held that the “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.”¹¹⁹

¹¹⁵ *Id.* at 428.

¹¹⁶ *Id.* at 428–29, 431.

¹¹⁷ *Id.* at 437–38. At oral argument before the Supreme Court, however, the state “retreated from this suggestion . . . , conceding that the State is ‘held to a disclosure standard based on what all State officers at the time knew.’” *Id.* at 438 n.11 (quoting Tr. of Oral Arg. at 40).

¹¹⁸ *Id.* at 438.

¹¹⁹ *Id.* at 437. Remarking on the administrative burden imposed by such a search duty, the Court, relying on *Giglio*, observed that “‘procedures and regulations can be established to carry [the prosecutor's] burden.’” *Id.* at 438 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

The Court subsequently applied *Kyles* in *Strickler v. Greene*, a case in which the defendant, Strickler, was convicted of abduction, robbery, and murder, and was sentenced to death. See 527 U.S. 263, 266, 276–77 (1999). Prior to trial, the prosecutor gave defense counsel full access to his case files, *id.* at 276 n.13, so Strickler made no pretrial motion for *Brady* material. *Id.* at 276. At trial, the State's only witness to the abduction was a woman named Stoltzfus. See *id.* at 273. During federal habeas proceedings following Strickler's conviction, the federal district court permitted Strickler to examine all police and prosecution files, in which he discovered eight exhibits (documents prepared by Stoltzfus and notes of police interviews with her) that impeached significant portions of Stoltzfus's testimony. *Id.* at 273–75, 278. The Court accepted the state attorney's concession that five of the exhibits were not in his files, which the Court attributed to the fact that Strickler was tried in Augusta County, Virginia, where the victim's body was found, though the criminal investigation was conducted by authorities in Rockingham County, Virginia, where the victim was abducted. *Id.* at 266–69, 275 n.12. However, the Court refused to accept the prosecutor's lack of knowledge regarding the five exhibits as an excuse and, relying on *Brady* and *Kyles*, held that “the prosecutor is responsible for ‘any favorable evidence known to the others acting on the government's behalf in the case, including the police.’ Thus, the [government], through its prosecutor, is charged with knowledge of the Stoltzfus materials for purposes of *Brady v. Maryland*.” *Id.* at 275 n.12 (citations omitted) (quoting *Kyles*, 514 U.S. at 437).

II

THE CIRCUIT APPROACHES TO THE PROSECUTOR'S DUTY TO
SEARCH THE GOVERNMENT FOR *BRADY* MATERIAL

As discussed in Part I, the Supreme Court decision in *Kyles* expressly stated that the prosecution has a duty to search for *Brady* materials known to others acting on the government's behalf in a particular case.¹²⁰ However, the *Kyles* Court, which had before it prosecutorial failure to discover *Brady* material known to and possessed by a police department that conducted the prosecutor's investigation, did not explain what kinds of relationships with the prosecution rise to the level of "acting on the government's behalf." This Part describes the different standards that the federal courts of appeals have applied—both before and after *Kyles*—when evaluating a prosecutor's duty to search for *Brady* material, several of which could be applied to determine the scope of a federal prosecutor's duty to search the intelligence community for exculpatory or impeachment material in prosecutions of international terrorists. As this Part indicates, the most government friendly approach—a pre-*Kyles* approach—has held that prosecutors have no duty to seek information not in their actual possession or knowledge,¹²¹ while the most liberal approach could be construed to impose on prosecutors a duty to make a thorough inquiry of all enforcement agencies that have a *potential* connection with the prosecution's case.¹²² Although the circuit courts generally provide little or no rationale in these cases for the extension of *Brady* to evidence not known to or possessed by a prosecutor, this Part discusses any explanation that they do provide. The scant reasoning provided by the circuits indicate that the courts of appeals share no common understanding regarding the policies that the *Brady* disclosure obligation is designed to serve, a conclusion which this Note discusses in Part IV.

A. The "Prosecution Team" Standard

The approach most commonly applied by the circuits to determine the scope of a prosecutor's duty to search for *Brady* material not within his actual possession or knowledge is the "prosecution team" standard. As this subpart demonstrates, the circuits that have applied the prosecution team standard have not, however, consistently resolved various issues that the standard raises. For example, the circuits do not agree as to whether a prosecutor's duty to search for *Brady* material extends to entities that have no interest in the prosecu-

¹²⁰ See *supra* note 111 and accompanying text.

¹²¹ See *infra* notes 222–29 and accompanying text.

¹²² See *infra* note 186.

tion, whether the duty extends only to law enforcement entities, whether it extends only to persons acting under the direction or control of the prosecutor, and whether the duty extends to *Brady* material outside of a prosecutor's jurisdiction.

The prosecution team standard finds its roots in the Fifth Circuit's decision in *United States v. Antone*.¹²³ The criminal prosecutions and convictions in *Antone* were the end product of a joint investigation undertaken by federal and state law enforcement officials to solve the murder of a Florida police officer.¹²⁴ While appeals from the convictions were pending, the defendants learned that the federal prosecutor had failed to discover and disclose the fact that a state law enforcement agency had paid for the principal government witness's attorney.¹²⁵ The federal government argued on appeal that the prosecutor's nondisclosure was not a *Brady* violation because the two investigative teams in the case represented entirely separate sovereigns, and because the knowledge of the state investigators should not be imputed to the federal prosecutor.¹²⁶ Although the Fifth Circuit held that the suppressed evidence was not material enough to permit it to find a *Brady* violation, the court nonetheless imputed the state investigators' knowledge to the federal prosecutor, stating that "extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [the government witness's] lawyer was paid from state funds must be imputed to the federal team."¹²⁷ In response to the government's separate-sovereign arguments, the court remarked that "[i]mposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process."¹²⁸ The Fifth Circuit relied on the fact that "the two governments, state and federal, pooled their investigative energies to a considerable extent"¹²⁹ and that "[t]he entire [investigative] effort was marked by this spirit of cooperation[,] and state officers were important witnesses in the federal prosecution."¹³⁰ *Antone* thus held that a prosecutor's duty to search for *Brady* material

¹²³ 603 F.2d 566 (5th Cir. 1979).

¹²⁴ *Id.* at 568.

¹²⁵ *Id.* at 567-68. Because the joint investigative team was concerned that someone might attempt to hire counsel for the indigent witness in an attempt to hamper the investigation, state law enforcement officials secretly obtained and paid for the witness's attorney. *Id.* at 568.

¹²⁶ *Id.* at 569. The same-sovereign approach advocated by the prosecutor has been applied in the First, Eighth, and Ninth Circuits. See *infra* notes 210-21 and accompanying text.

¹²⁷ *Antone*, 603 F.2d at 570.

¹²⁸ *Id.*

¹²⁹ *Id.* at 569.

¹³⁰ *Id.*

extends to material that might be held by members of the “prosecution team,” a term which, in light of the facts of the case, encompasses (1) law enforcement personnel or entities (2) that provide investigative and, possibly, trial assistance (3) as a result of having cooperated extensively and intimately with the prosecutor (4) from the outset (5) of a particular criminal investigation.¹³¹

The Seventh Circuit applied the prosecution team standard in *United States ex rel. Smith v. Fairman*, a case in which the defendant, convicted of attempted murder and attempted armed robbery, challenged the prosecution’s failure to discover and disclose exculpatory material held by the prosecutor’s law enforcement investigative arm—the police—that could have been used to impeach the credibility of one of the government’s two key witnesses.¹³² The prosecution argued on appeal that no *Brady* violation had occurred because the prosecutor had no knowledge or possession of the material.¹³³ Finding that the prosecution had indeed suppressed evidence, the Seventh Circuit observed that suppression may occur “when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution, such as the police.”¹³⁴ The Seventh Circuit justified its prosecution team approach by recalling *Brady*’s purpose, stating that “*Brady* was aimed at ensuring that an accused receives a fair trial rather than punishing the prosecutor for failing to disclose exculpatory evidence,”¹³⁵ and that “the purposes of *Brady* would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure.”¹³⁶

¹³¹ *Antone* framed the issue in terms of the scope of the prosecutor’s imputed knowledge of, rather than the scope of the prosecutor’s duty to search for, *Brady* material. However, implicit in a ruling that places certain *Brady* material within a prosecutor’s imputed knowledge is the imposition of an obligation to search for that material.

The Fifth Circuit subsequently relied on the prosecution team standard in *Freeman v. Georgia*, in which it found a *Brady* violation when a prosecutor failed to disclose that a police officer had deliberately concealed a key witness. 599 F.2d 65, 69–70 (5th Cir. 1979). The *Freeman* court reasoned that “when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman’s conduct must be imputed to the state as part of the prosecution team.” *Id.* at 69. However, the Fifth Circuit has not consistently applied the prosecution team standard in *Brady* cases following *Antone*. See *infra* notes 193–200 and accompanying text.

¹³² 769 F.2d 386, 389, 391 (7th Cir. 1985).

¹³³ See *id.* at 391.

¹³⁴ *Id.* The prosecution’s law enforcement investigative arm—the police—appears to have provided the prosecutor’s sole investigative and trial assistance in the criminal investigation of the defendant, Smith. Though the opinion does not explicitly address the point, there is no reason to doubt that the police cooperated extensively and intimately with the prosecutor from the outset of the investigation. See *id.* at 388–89.

¹³⁵ *Id.* at 392.

¹³⁶ *Id.* at 391–92.

The Seventh Circuit again applied the prosecution team standard in its post-*Kyles* *United States v. Morris* decision.¹³⁷ *Morris* involved evidence possessed not by the police but by federal agencies investigating the defendants' alleged unlawful conduct in an unrelated investigation.¹³⁸ The defendants in *Morris* were charged and convicted of various counts of mail and wire fraud, based mostly on the testimony of a former bank officer who had pled guilty to involvement in the unlawful scheme and had agreed to cooperate with the government.¹³⁹ Apparently unbeknownst to the prosecution, three federal agencies—the Office of Thrift Supervision (OTS), the Securities Exchange Commission (SEC), and the Internal Revenue Service (IRS)—had conducted their own investigations separate and apart from the Department of Justice's criminal investigation.¹⁴⁰ After their convictions, the defendants alleged that the prosecutor had committed a *Brady* violation by failing to disclose materials possessed by the three separate federal agencies, specifically an OTS deposition of the government's key witness, SEC questionnaires of purchasers defrauded under the unlawful scheme, and IRS documents relating to the tax implications of transactions used to implement the unlawful scheme.¹⁴¹ The Seventh Circuit refused to rule that a *Brady* violation had occurred, holding that the prosecutor had no duty to seek out *Brady* material from the OTS, SEC, or IRS because "those agencies were [not] part of the team that investigated this case or participated in its prosecution."¹⁴² Characterizing its decision in *Fairman* and the Supreme Court's decision in *Kyles* as "prosecution team" cases, the Seventh Circuit observed that "neither *Kyles* nor *Fairman* can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."¹⁴³

The Ninth Circuit also has applied the prosecution team standard to determine the scope of a prosecutor's duty to search for *Brady* material, though its decisions appear to relax the requirement that

¹³⁷ 80 F.3d 1151 (7th Cir. 1996).

¹³⁸ See *id.* at 1169.

¹³⁹ *Id.* at 1154–55.

¹⁴⁰ *Id.* at 1169–70.

¹⁴¹ See *id.* at 1168–69 & 1169 n.14.

¹⁴² *Id.* at 1169–70 (emphasis added).

¹⁴³ *Id.* The court cited *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984), as support for this proposition, see *Morris*, 80 F.3d at 1169, a case oft cited for its dictum that a prosecutor cannot evade his *Brady* obligations by keeping himself in ignorance or "compartmentalizing information about different aspects of a case." *Carey*, 738 F.2d at 878. In dictum, the *Carey* court stated that it did "not need to decide whether DEA, the police, and the state prosecutor can all be charged with constructive knowledge of each other's arrangements," but nonetheless stated that "joint state-federal drug investigations are quite common" and that prosecutors, therefore, "should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team." *Id.* at 878.

the outside government entity be a law enforcement entity. In *United States v. Wood*, in which the defendants were charged and convicted of conspiring to defraud the FDA,¹⁴⁴ Circuit Judge Noonan found that the government had suppressed evidence by failing to disclose certain FDA documents of which the prosecution was aware but which only the FDA possessed, stating that “[f]or *Brady* purposes, the FDA and the prosecutor were one.”¹⁴⁵ Applying and perhaps expanding the prosecution team standard, the court held that “under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.”¹⁴⁶ The decision did not discuss the prosecution team standard so much as it appealed to notions of basic fairness and the fact that the FDA had an institutional interest in prosecuting the defendants: “The government in the form of the prosecutor cannot tell the court that there is nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant.”¹⁴⁷ Similarly, in *United States v. Hsieh Hui Mei Chen*, the Ninth Circuit declined to reverse a district court’s refusal to compel the prosecution to discover and disclose *Brady* material beyond what was contained in its files, stating that “[w]hile the prosecution must disclose any information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess or of which it is unaware.”¹⁴⁸

The Second Circuit decisions applying the prosecution team standard emphasize the limits on the scope of a prosecutor’s duty to search for *Brady* material. In *United States v. Payne*, for example, the

¹⁴⁴ 57 F.3d 733, 735 (9th Cir. 1995).

¹⁴⁵ *Id.* at 737.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The FDA materials at the center of the controversy were requested under Rule 16. *See id.* at 736. The fact that the court looked to *Brady* to find the scope of the prosecutor’s duty to disclose exculpatory or impeachment evidence in response to the defendant’s motion supports the conclusion that any parameters set on the scope of a prosecutor’s duty to seek *Brady* material in the possession of other arms of the government will apply equally in the statutory discovery context. *See supra* note 35.

¹⁴⁸ 754 F.2d 817, 824 (9th Cir. 1985) (citations omitted). The case that the Ninth Circuit cited for this proposition involved a prosecutor’s failure to disclose evidence possessed by the prosecution’s investigative arm—in that case, the police. *See id.* (citing *Imbler v. Craven*, 298 F. Supp. 795, 806 (C.D. Cal. 1969)). One may presume, then, that the *Hsieh Hui Mei Chen* court meant only that the prosecution must disclose information within the possession or control of law enforcement personnel *involved in the investigation of the charged conduct*. Moreover, the court in the same opinion declined to reverse the trial court’s refusal to compel the prosecution to hand over an internal Border Patrol investigative report regarding the government official that the defendant allegedly bribed on the basis of the immateriality of the evidence, not the government’s lack of control or possession of the evidence. *See id.* at 824.

Second Circuit, relying on the Supreme Court's *Kyles* decision, found that a federal prosecutor had suppressed evidence when he failed to disclose to the defendant impeachment evidence known to him but filed with another trial court as part of a related action.¹⁴⁹ The *Payne* court stated that "[t]he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation."¹⁵⁰ In *Payne*, the government's key witness, as a result of the same DEA investigation that gave rise to the charges against the defendant, had been charged for her involvement in the defendant's scheme before agreeing to cooperate with authorities.¹⁵¹ An affidavit the witness had submitted in her separate trial, before agreeing to cooperate with the government, contained statements that contradicted her trial testimony inculcating the defendant.¹⁵² The Second Circuit followed *Payne* in *United States v. Avellino*.¹⁵³ The *Avellino* court did not reach the issue of the scope of a prosecutor's duty to search for *Brady* material but, relying on its prior decisions in *United States v. Quinn*¹⁵⁴ and *United States v. Locascio*¹⁵⁵ as well as the Eastern District of New York's decision in *United States v. Gambino*,¹⁵⁶ nevertheless stated that

knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt "a monolithic view of government" that would "condemn the prosecution of criminal cases to a state of paralysis."¹⁵⁷

¹⁴⁹ 63 F.3d 1200, 1208 (2d Cir. 1995).

¹⁵⁰ *Id.* The prosecution argued on appeal that because the material was in public records, the defendant's failure to obtain the documents was due to lack of diligence on the part of defense counsel. *See id.* Thus, the more specific ground for the court's holding was that public availability does not obviate a prosecutor's duty to search for *Brady* material if defense counsel lacks notice that a particular branch of the government possesses such material. *See id.* at 1209. Nevertheless, the court would not have reached the issue of public availability if it had not first implicitly ruled that the material was in the government's possession. Its reliance on *Kyles* suggests that the court construed the prosecution's duty to search for *Brady* material to be limited to material in the possession of some arm of the prosecution. Because the witness's and the defendant's separate prosecutions arose out of the same criminal investigation, the court concluded that any documents relating to any single prosecution were to be treated as part of the other prosecution as well. *See id.* at 1208-09.

¹⁵¹ *See id.* at 1203-05.

¹⁵² *See id.* at 1204-05.

¹⁵³ 136 F.3d 249 (2d Cir. 1998).

¹⁵⁴ 445 F.2d 940 (2d Cir. 1971).

¹⁵⁵ 6 F.3d 924 (2d Cir. 1993).

¹⁵⁶ 835 F. Supp. 74 (E.D.N.Y. 1993).

¹⁵⁷ 136 F.3d at 255 (quoting *Gambino*, 835 F. Supp. at 95). In *Gambino*, the district court refused to impute to the federal prosecutor knowledge of *Brady* material that a state

The Second Circuit thus recognizes that the courts, in seeking to ensure that criminal convictions are accurate, must not impose too great an administrative burden on a prosecutor's office when requiring the prosecution to search other arms of the government.

The Tenth Circuit applies a version of the prosecution team standard that deviates from *Antone* in that it does not require the outside government entity to have been directed by a prosecutor's office or to have cooperated with a prosecutor's office in its investigation. In *Smith v. Secretary of New Mexico Department of Corrections*, the Tenth Circuit found that a state prosecutor had suppressed evidence when he failed to disclose impeachment material of which he was unaware but which was held by state law enforcement—county police investigators—known to be conducting a separate investigation of the defendant's alleged crime.¹⁵⁸ Relying on *Giglio* and the Fifth Circuit's

attorney and an FBI agent had gained in an unrelated criminal investigation four years earlier, on the grounds that such a holding would impose too burdensome a search duty. See 835 F. Supp. at 94–95. Other than the alleged *Brady* material's lack of relation to the prosecution's investigation and the extent of the administrative burden imposed by a broad duty to search, see *id.* at 95, *Gambino* did not suggest any other basis for limiting the prosecutor's duty to search for *Brady* material.

The *Avellino* court relied also on *Quinn* in applying the prosecution team standard. See 136 F.3d at 255–56. In *Quinn*, the Second Circuit declined to find a *Brady* violation where a federal prosecutor in New York failed to disclose to the defense a government witness's criminal records not known to the prosecutor but known to and possessed by a (presumably federal) prosecutor in Florida. See 445 F.2d at 944. The court concluded that the defendants had taken “the completely untenable position that ‘knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor’ and that ‘he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence.’” *Id.* (quoting Appellants' Brief). In addition to the implicit jurisdictional limitation imposed by the court, *Quinn* pointed also to the administrative burden as a basis for limiting the prosecutor's duty to search for *Brady* material: “The Department of Justice alone has thousands of employees in the fifty States of the Union. Add to these many more thousands of employees of ‘any part of the government.’ [Defendants'] argument can be disposed of on a ‘reductio ad absurdum’ basis.” *Id.*

Finally, the *Avellino* court relied also on *Locascio* in applying the prosecution team standard. See 136 F.3d at 255. In *Locascio*, the Second Circuit declined to find a *Brady* violation where a federal prosecutor in New York failed to disclose impeachment evidence that was not known to the prosecution but was held by the FBI. See 6 F.3d at 949–50. The report had been prepared by agents who were not involved in the defendants' investigation or prosecution. See *id.* at 948. The court applied the prosecution team standard: “Even assuming the reports' materiality, there is no evidence that the prosecution team in the instant case was aware of the reports that have subsequently come to light. We will not infer the prosecutors' knowledge simply because some other government agents knew about the report.” *Id.* at 949.

¹⁵⁸ 50 F.3d 801, 824–25, 830–31 (10th Cir. 1995). The prosecutor apparently relied solely on investigative work done by authorities in Bernalillo County, New Mexico, but he apparently knew that authorities in Tarrant County were conducting a separate investigation into the same crime. See *id.* at 825 n.36. “Clearly,” the court observed, “if the prosecution had actual knowledge that several arms of the State were involved in the investigation of a particular case, then the knowledge of those arms is imputed to the prosecution.” *Id.* The court recognized, however, that there is no settled approach regarding imputation in cases in which the prosecution is unaware of the separate investigation. See *id.*

decision in *Martinez v. Wainwright*,¹⁵⁹ Circuit Judge Brorby stated that “the ‘prosecution’ for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor’s entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture.”¹⁶⁰ In a statement that contemplates an even broader prosecutorial duty to search for *Brady* material, the Tenth Circuit in *United States v. Beers*,¹⁶¹ relying on both its prior prosecution team decision in *Smith* and the Ninth Circuit’s same-sovereign availability/accessibility decision in *United States v. Aichele*,¹⁶² asserted that “[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case.”¹⁶³ However, Circuit Judge Tacha “decline[d] to extend this principle for federal prosecutors to exculpatory materials in the possession of the state government,”¹⁶⁴ holding that a New Mexico federal prosecutor did not suppress evidence when he failed to disclose impeachment material not known to him but possessed by the state of New Mexico.¹⁶⁵ Elsewhere in its opinion, the *Beers* court implicitly limited the apparently broad scope of a prosecutor’s duty to search for *Brady* material by basing its holding on the fact that New Mexico state officials were not a part of the prosecution team, observing that “there is no indication that the investigation was a joint effort between the state and federal government.”¹⁶⁶ Commenting on the administrative burden imposed by an any-sovereign approach to determining a prosecutor’s duty to search for *Brady* material, the court remarked that “[i]t is unrealistic to expect federal prosecutors to know all information possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation.”¹⁶⁷

The Eleventh Circuit, which was a part of the Fifth Circuit until 1981, adds a jurisdictional limitation to *Antone*’s prosecution team standard. In *United States v. Meros*, for example, the Eleventh Circuit declined to find that a Florida federal prosecutor suppressed evidence when he failed to turn over impeachment material not known to him but possessed by Georgia and Pennsylvania federal prosecutors in-

¹⁵⁹ 621 F.2d 184 (5th Cir. 1980). For a discussion of *Wainwright*, see *infra* notes 197–200 and accompanying text.

¹⁶⁰ *Smith*, 50 F.3d at 824 (internal quotation marks omitted) (footnote and citation omitted).

¹⁶¹ See 189 F.3d 1297 (10th Cir. 1999).

¹⁶² 941 F.2d 761 (9th Cir. 1991).

¹⁶³ *Beers*, 189 F.3d at 1304.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 1303–04.

¹⁶⁶ *Id.* at 1303.

¹⁶⁷ *Id.* at 1304.

volved in separate investigations.¹⁶⁸ The trial court denied the defendant's motion to compel the Florida federal prosecutor to disclose information about a government witness's plea agreements with federal prosecutors in Pennsylvania and Georgia. The trial court held that the material was not in the government's possession for *Brady* purposes.¹⁶⁹ Relying on the Fifth Circuit's prosecution team decision in *Antone* and emphasizing a jurisdictional limitation on a prosecutor's duty, the Eleventh Circuit refused to disturb the ruling, stating that "*Brady* and its progeny apply to evidence possessed by a "district's prosecution" team, which includes both investigative and prosecutorial personnel.'" *Brady*, then, applies only to information possessed by the prosecutor or anyone over whom he has authority.¹⁷⁰ Similarly, in *Moon v. Head*, the Eleventh Circuit declined to find that a Georgia state prosecutor had suppressed evidence when he failed to disclose to the defense impeachment material not known to him but possessed by Tennessee law enforcement officials, some of whom participated in the Georgia prosecution.¹⁷¹ Relying on the court's prior *Meros* decision and the Fifth and Second Circuits' prosecution team decisions in *Antone* and *Avellino*, Circuit Judge Tjoflat stated that the defendant was required to show that the Georgia state prosecutor had authority over the Tennessee law enforcement officials, that the Georgia prosecutor pooled his investigative energies with Tennessee law enforcement to prosecute the defendant, and that Tennessee law enforcement worked with the Georgia prosecutor's office on the defendant's case.¹⁷² The court found that none of these factors was present, stating that "[a]s the Georgia Supreme Court held, we find no evidence that Tennessee law enforcement officials and Georgia prosecutors engaged in a joint investigation of the [defendant's crime]."¹⁷³

¹⁶⁸ 866 F.2d 1304, 1309 (11th Cir. 1989).

¹⁶⁹ See *id.* at 1307-08.

¹⁷⁰ *Id.* at 1309 (citation and footnote omitted) (quoting *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979)). Because the court's decision stated that "[a] prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a *Brady* request," *id.*, *Meros* seemed to apply the same-jurisdiction limitation applied in the Second and Eighth Circuits in *United States v. Quinn* and *United States v. Hawkins* to determine the scope of a prosecutor's duty to search for *Brady* material not in his possession. See *supra* note 154 and accompanying text; *infra* notes 220-21 and accompanying text. However, this jurisdictional limitation was unnecessary to the court's application of the prosecution team standard.

¹⁷¹ 285 F.3d 1301, 1308-10 (11th Cir. 2002).

¹⁷² See *id.* at 1309-10.

¹⁷³ *Id.* at 1310 (internal quotation marks omitted). The Eleventh Circuit has applied the prosecution team standard in a number of other cases. See, e.g., *McMillian v. Johnson*, 88 F.3d 1554, 1568-69 (11th Cir. 1996) (finding that a prosecutor violated his *Brady* obligations by failing to disclose *Brady* material discovered by investigators during a separate but related contemporaneous investigation); *Stano v. Butterworth*, 51 F.3d 942, 945-46 (11th

The D.C. Circuit Court of Appeals also applies a prosecution team standard similar to that applied in *Antone* when evaluating the scope of a prosecutor's duty to search for *Brady* material, but requires that the search duty be triggered by a likelihood of a successful search. In *United States v. Brooks*, for example, Circuit Judge Williams ordered a federal prosecutor to search state law enforcement files for *Brady* material.¹⁷⁴ Relying on the fact that "cases finding a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution,'" the court held that because of the "close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts), a relationship obviously at work in this prosecution," any prosecutorial duty to search for *Brady* material extended to the police department's records.¹⁷⁵ However, although the court found that the prosecutor's duty theoretically extended to the files, it held that the duty to search the files is triggered only if there is a sufficient likelihood that the files contain *Brady* material.¹⁷⁶ Thus, if it should be clear to a prosecutor that its investigative arm might possess *Brady* material, or if defense counsel makes an explicit request pinpointing certain files that can be searched without difficulty and that have more than a trivial probability of containing *Brady* material, the D.C. Circuit will not find that a discovery request is too speculative to require a search.¹⁷⁷

Cir. 1995) (upholding a trial court's alternative holding denying a *Brady* claim because the alleged *Brady* material was held by a state law enforcement official not jointly involved in the prosecution's investigation); *Ross v. Hopper*, 716 F.2d 1528, 1533-34 (11th Cir. 1983) (relying on the Fifth Circuit's decision in *Freeman v. Georgia* to hold that "[a]ny promises offered . . . by law enforcement officers, or any information obtained by them in the course of their investigation, must be attributed to the prosecutor"). The Eleventh Circuit has deviated from its prosecution team standard at least once and applied a standard reminiscent of the First, Eighth, Ninth, and Tenth Circuits' same-sovereign limitation on the availability/accessibility standard. See *supra* notes 168-72 and accompanying text. In *United States v. Walker*, for example, a federal prosecutor failed to disclose to the defense that the government's chief witness, an informant, stood to gain financially from an arrangement with state law enforcement officials. 720 F.2d 1527, 1535 (11th Cir. 1983). Although the state law enforcement officials appeared to have been the federal prosecution's investigatory arm (or at least to have jointly investigated the alleged crime with federal law enforcement), Circuit Judge Vance declined to find that the prosecutor suppressed this information because he did "not believe that knowledge of any deal between state officials and [the government's chief witness] can be imputed to the federal prosecutor." *Id.* Thus, *Walker* appeared to impose a same-sovereign limitation on the prosecution team standard.

¹⁷⁴ 966 F.2d 1500, 1502-05 (D.C. Cir. 1992).

¹⁷⁵ *Id.* at 1503 (citation omitted).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at 1504.

B. The “Availability/Accessibility” Standard

Another approach commonly applied by the circuits to determine the scope of a prosecutor’s duty to search for *Brady* material not within his actual possession or knowledge is the “availability/accessibility” standard. As this subpart demonstrates, however, the circuits that have applied the availability/accessibility standard, like the courts applying the prosecution team standard, have not consistently resolved various issues that it raises, including whether the standard imposes a same-sovereign requirement, whether there is a good faith search exception to the standard, and whether the standard imposes a same-jurisdiction requirement.

The leading case is *United States v. Perdomo*, in which the defendant was convicted in a federal district court in the Virgin Islands of various felony drug offenses, primarily on the testimony of a paid government informant who testified about having purchased drugs from the defendant.¹⁷⁸ Prior to trial, the defendant, Perdomo, submitted written requests for any information relating to the criminal background of any prosecution witness.¹⁷⁹ After running a National Crime Information Center (NCIC) computer check, the prosecution responded that its key witness, the paid informant, had no criminal record.¹⁸⁰ One day after Perdomo was convicted, it was discovered that the paid informant indeed had a prior arrest and conviction record that the prosecutor did not disclose because local Virgin Island arrests and convictions were not recorded in the NCIC database.¹⁸¹ Without discussing local law enforcement’s apparent lack of participation in or connection with the federal prosecutor’s criminal investigation of Perdomo,¹⁸² the Third Circuit found that the federal prosecutor had committed a *Brady* violation by failing to discover and disclose the government witness’s local criminal record.¹⁸³ The court held that “the prosecution is obligated to produce [*Brady* material] actually or constructively in its possession *or accessible to it*”¹⁸⁴ and that “such informa-

¹⁷⁸ 929 F.2d 967, 968–69 (3d Cir. 1991).

¹⁷⁹ *Id.* at 968.

¹⁸⁰ *Id.* at 968–69.

¹⁸¹ *Id.* at 968–70.

¹⁸² The court failed to discuss the lack of an investigative relationship between the prosecutor and local law enforcement, even though it appeared to rely on the Fifth Circuit’s decision in *United States v. Antone*. The court acknowledged, however, that *Antone* applied the prosecution team theory to the issue of the scope of the prosecution’s duty to search for *Brady* material: “In considering a potential *Brady* violation and considering whether the prosecution is responsible, the Fifth Circuit has refused ‘to draw a distinction between different agencies under the same government, focusing instead upon the “prosecution team” which includes both investigative and prosecutorial personnel.’” *Id.* at 970 (quoting *United States v. Antone*, 603 F.2d 566, 569 (1979)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (emphasis added).

tion was available to [the prosecutor].”¹⁸⁵ Elaborating on the meaning of the availability standard, the *Perdomo* court stated that “the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.”¹⁸⁶ Thus, under *Perdomo*, the scope of a prosecutor’s duty to search for *Brady* material depends on the availability/accessibility of the material within some arm of the state.¹⁸⁷

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 971. As discussed in this subpart, the Ninth Circuit has implicitly construed this standard to impose a same-sovereign limitation on the availability/accessibility standard. See *infra* notes 210–14 and accompanying text. Because *Perdomo* involved a federal prosecutor who failed to discover and disclose a criminal record not possessed by some arm of the federal government, see *Perdomo*, 929 F.2d at 968–69, the decision does not appear to have imposed such a limitation.

¹⁸⁷ The Third Circuit must have understood the “state” to include both the federal and state governments within a jurisdiction, as the case involved a federal prosecutor’s failure to search local law enforcement for *Brady* material. See *Perdomo*, 929 F.2d at 970–71.

The Third Circuit has not uniformly applied *Perdomo*’s availability/accessibility standard. For example, in *United States v. Joseph*, a prosecutor failed to turn over to the defense impeachment evidence available on file in the prosecutor’s office from an unrelated case. See 996 F.2d 36, 37–38 (3d Cir. 1993). Although the case appeared to be controlled by *Perdomo* (because the file was readily available to the prosecution), the Third Circuit declined to find a *Brady* violation. *Id.* at 41. After stating that it “construe[s] the term ‘constructive possession’ to mean that although a prosecutor has no actual knowledge, he should nevertheless have known that the [*Brady*] material at issue was in existence,” *id.* at 39, the Third Circuit recast its *Perdomo* decision as a holding based not on an availability/accessibility standard but rather as one based on a constructive knowledge standard, see *id.* The court stated that, in *Perdomo*, it was “unwilling to allow the prosecution to avoid its *Brady* obligations by failing to take the minimal steps necessary to acquire the requested information. Thus, [it] implicitly held that the prosecutor’s actions were objectively unreasonable in that the *Perdomo* prosecutor should have known of the requested information.” *Id.* at 40. Thus, the search standard applied in the Third Circuit may be a broader “the prosecutor should have known of the *Brady* material” standard, rather than the already broad availability/accessibility standard.

In addition to applying this broad constructive knowledge standard, the Third Circuit has also applied a good faith exception to a prosecutor’s duty to search for *Brady* material. In *Hollman v. Wilson*, the Third Circuit declined to find a *Brady* violation where a prosecutor failed to turn over impeachment evidence it possessed due to a clerical error because, as the court stated, “where the government has diligently searched, no *Brady* violation will be found.” 158 F.3d 177, 181 (3d Cir. 1998).

In addition to the good faith exception it has recognized, the Third Circuit has also applied a “potential connection with the case” search standard that imposes no practical limits on a prosecutor’s duty to search the government for *Brady* material. In a 1993 case, *United States v. Thorton*, a prosecutor failed to discover and disclose, in response to a *Brady* request, information about DEA payments to two cooperating government witnesses. 1 F.3d 149, 157 (3d Cir. 1993). The Third Circuit construed *Perdomo* as imposing on prosecutors “an obligation to make a thorough inquiry of all enforcement agencies that [have] a potential connection with the witnesses.” *Id.* at 158 (emphasis added). Thus, as articulated in *Thorton*, *Brady* requires a prosecutor to search for exculpatory or impeachment materials possessed by any branch of government that has a potential connection with the case.

The Third Circuit's *Perdomo* decision relied on various Fifth Circuit decisions, including *United States v. Deutsch*,¹⁸⁸ a Fifth Circuit decision preceding the Circuit's application of the prosecution team standard in *Antone*. The defendants in *Deutsch* were convicted of offering to pay a U.S. Postal Service employee to extract credit cards from the mail primarily on the testimony of another U.S. Postal Service employee, Morrison.¹⁸⁹ Prior to trial, the defendants sought to obtain Morrison's personnel file.¹⁹⁰ The prosecution refused, arguing that it could not be compelled to disclose *Brady* material not in its possession and that, because the U.S. Postal Service was not an arm of the prosecution, the material it held was not in the government's possession.¹⁹¹ The Fifth Circuit rejected the government's argument and the lower court's acceptance of it, stating that it found "no reference in *Brady* to an arm of the prosecution."¹⁹² However, without identifying the factors closely connecting the U.S. Postal Service and the federal prosecutor's office, the court hinted that it applied the prosecution team standard when it stated that "there is no suggestion in *Brady* that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities."¹⁹³ Nevertheless, speaking implicitly to the scope of a prosecutor's duty to search for *Brady* material, the court remarked that "[t]he government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files."¹⁹⁴ *Deutsch* thus contemplates that the scope of a prosecutor's duty to search for *Brady* material not known to her but possessed by other branches of the government is limited only by the availability/accessibility of the other branch's material to the prosecutor.¹⁹⁵

¹⁸⁸ 475 F.2d 55 (5th Cir. 1973), *overruled on other grounds by* *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984).

¹⁸⁹ *Id.* at 56-57.

¹⁹⁰ *Id.* at 57.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* The summary of the facts indicates that Morrison's superiors at the U.S. Postal Service arranged for the law enforcement officers to arrest the defendants midway through the transaction. *See id.* at 56.

¹⁹⁴ *Id.* at 57 (emphasis added).

¹⁹⁵ The Fifth Circuit subsequently applied *Deutsch's* broad availability/accessibility standard in *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980). In that case, tried in the Eastern District of Texas, the defendant appealed based on the government's failure to disclose the full criminal record of its key witness, which was contained in documents from Colorado and Texas. *See id.* at 480. The prosecutor argued that he had neither possession nor knowledge of the material indicating the witness's criminal record, though his lack of knowledge was due to the fact that he failed to run an FBI or National Crime Information Center check. *See id.* at 481. Finding that the prosecutor had indeed suppressed evidence, the court relied on a prior Fifth Circuit decision for the proposition that "[t]he basic

The Fifth Circuit applied its broad availability/accessibility standard again in *Martinez v. Wainwright*, a case in which the defendant alleged that the prosecution violated its *Brady* obligations by failing to produce, in response to a specific request, a homicide victim's rap sheet.¹⁹⁶ Although a copy of the rap sheet was available in the medical examiner's office and from the FBI throughout the prosecution,¹⁹⁷ the prosecutor denied knowledge of a rap sheet before, during, and after the trial, assuring the court that he had made every effort possible to obtain one.¹⁹⁸ In finding a *Brady* violation, the Fifth Circuit rejected the prosecution's argument that it could not have suppressed a document not known to it and not within its possession, observing that "[t]he prosecutor never alleged any difficulty in gaining access to the rap sheet held by the medical examiner's office" and that "[t]he rule of *Brady* would be thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related governmental entity."¹⁹⁹ The Fifth Circuit's decision

import of *Brady* is . . . that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it." *Id.* (second alteration in original) (emphasis added) (quoting *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975)). Emphasizing its holding's basis in the availability of the evidence, the court remarked that "the prosecutor has ready access to a veritable storehouse of relevant facts and . . . this access must be shared." *Id.* The Fifth Circuit followed *Auten* in *Williams v. Whitley*, in which the court held that the prosecution suppressed evidence when it withheld a police report, even though the prosecutor had no knowledge or possession of the material. 940 F.2d 132, 133 (1991). The court reasoned that "the prosecution is deemed to have knowledge of information readily available to it." *Id.* The Fifth Circuit again applied the availability/accessibility standard in *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980). See *infra* notes 196–200 and accompanying text.

The Fifth Circuit has not consistently applied *Deutsch's* broad availability/accessibility standard. As discussed *supra*, Fifth Circuit opinions subsequent to *Deutsch* have adopted the narrower construction of the court's holding. See *supra* notes 123–31 and accompanying text. In *United States v. Trevino*, for example, the Fifth Circuit declined to find that a federal prosecutor violated his *Brady* obligations by failing to disclose a presentence report containing information which could have been used to impeach the government's primary witness. 556 F.2d 1265, 1270–72 (5th Cir. 1977). The court noted that "[n]othing in the *Brady* opinion would encompass a report compiled in an earlier prosecution and held by the convicting court—which may or may not be the court in which the discovery motion is considered—through its probation service." *Id.* at 1271. Without discussing why the evidence was unavailable to the prosecutor, the court stated that "*Brady* involved evidence available to and suppressed by the prosecution; its language is directed entirely to the proper role of the prosecutor in according the accused a fair trial." *Id.* at 1270. The court observed that if the presentence report had been in the hands of the prosecutor and had contained *Brady* material, then it might have been compelled to find a *Brady* violation. See *id.* at 1271 n.7. Because *Trevino* did not cite *Deutsch*, which the Fifth Circuit had decided only four years earlier, the decision's failure to find a *Brady* violation on the basis of the material's availability to the prosecution implicitly indicated the Fifth Circuit's retreat from the broad availability/accessibility standard (*i.e.*, cases like *Deutsch*) to the narrower prosecution team standard (*i.e.*, cases like *Antone*).

¹⁹⁶ 621 F.2d at 185–87.

¹⁹⁷ *Id.* at 187.

¹⁹⁸ *Id.* at 185–86.

¹⁹⁹ *Id.* at 187 (emphases added).

did not discuss the prosecution team standard or even cite its prior *Antone* decision, and it appeared to rely on the availability of the *Brady* material to the prosecutor rather than on its possession by an arm of the prosecution. However, the court did rebuff the prosecution's attempt to limit the scope of its duty to search for *Brady* material to law enforcement agencies, observing that such an argument "fails to explain why the medical examiner's office is not a state investigative agency such that information in its possession is attributable to the state."²⁰⁰

Despite the Seventh Circuit's occasional application of the more limited prosecution team standard,²⁰¹ it has also applied a form of the availability/accessibility standard that recognizes a good faith search exception to a prosecutor's duty to search for *Brady* material. In *Crivens v. Roth*, the Seventh Circuit found a *Brady* violation in a state prosecutor's failure to discover and disclose a government witness's criminal record not known to the prosecution but maintained by its investigative arm—in this case, the local police—because "the state . . . had the information at its disposal."²⁰² Although the facts suggest that the court could have applied the prosecution team standard,²⁰³ it expressly adopted the availability/accessibility standard applied in the Third and Fifth Circuits' *Perdomo* and *Wainwright* decisions. The court remarked that "[w]e agree with other circuits that have explained that 'the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.'"²⁰⁴ Similarly, in *United States v. Young*, the Seventh Circuit refused to find a *Brady* violation in a federal prosecutor's failure to discover and disclose a government witness's criminal record not known to him but maintained by state officials in another state, because the prosecution had made a good faith effort to discover *Brady* material not in its possession.²⁰⁵

²⁰⁰ *Id.* at 187 n.4.

²⁰¹ See *supra* notes 132–43 and accompanying text.

²⁰² 172 F.3d 991, 997 (7th Cir. 1999).

²⁰³ The facts of the case suggest that the Chicago Police Department alone worked with the prosecution to provide all the investigative and trial assistance in the criminal investigation. See *id.* at 993–94, 997.

²⁰⁴ *Id.* at 997–98 (emphasis added) (quoting *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991)). The court provided no discussion of a prosecution team standard, even though it cited the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), for the proposition that a prosecutor has an affirmative duty to disclose such evidence and a duty to learn of any favorable evidence known to the others acting on the government's behalf in a case. See *Crivens*, 172 F.3d at 996.

²⁰⁵ 20 F.3d 758, 764–65 (7th Cir. 1994). Robert Hochman has argued that cases like *Young* stand for the proposition that some circuits apply a same-sovereign standard (distinct from other standards) to determine the scope of a prosecutor's duty to search for *Brady* material. See Hochman, *supra* note 31, at 1680–81. In fact, *Young*, which relies on *Auten* and *Perdomo*, and like cases are better treated as part of the same line of cases that

Circuit Judge Eschbach stated that “the prosecution’s obligation in a criminal proceeding to disclose information is limited to information known to the prosecution.”²⁰⁶ Moreover, relying on the Third and Fifth Circuits’ *Perdomo* and *Auten* decisions, the court stated that it could find prosecutorial suppression only if “the government intentionally failed to seek out information readily available to it.”²⁰⁷ Thus, deviating from the Third and Fifth Circuit approaches, *Young* held that the availability/accessibility standard is satisfied if a prosecutor makes a good faith effort to discover *Brady* material.²⁰⁸

In addition to the prosecution team standard it has occasionally applied,²⁰⁹ the Ninth Circuit has also applied a form of the availability/accessibility standard that imposes a same-sovereign limitation on the scope of a prosecutor’s duty to search for *Brady* material not in her possession or knowledge. For example, in *United States v. Aichele*, the Ninth Circuit declined to find a *Brady* violation when a federal prosecutor failed to disclose impeachment material apparently known to him, but held by a state department of correction, because the material was not under the federal prosecutor’s control.²¹⁰ Circuit Judge Rymer stated that “the only impeachment material still sought was [the government witness’s] first California Department of Corrections file, which was under the control of California officials. The prosecution is under no obligation to turn over materials not under its control.”²¹¹ That *Aichele* was based on the same-sovereignty limitation and not on the control standard is evidenced by the court’s decision in

base the scope of a prosecutor’s duty to search for *Brady* material on the availability/accessibility of the material within some arm of the government. As observed *supra*, the Ninth Circuit has imposed a same-sovereign limitation on the accessibility/availability standard. See *infra* notes 210–14 and accompanying text. Judging from *Young*’s holding, the Seventh Circuit does not appear to have adopted the same limitation.

²⁰⁶ *Young*, 20 F.3d at 764.

²⁰⁷ *Id.*

²⁰⁸ The court in *Young* observed that the case was “simply not analogous to *Perdomo* and *Auten*” because “the government did not ‘keep itself in ignorance’” about the witness’s criminal history, but rather “diligently searched the pertinent criminal records for information on [the witness], asked [the witness] directly about his criminal history, and disclosed all of its information to *Young*.” *Id.* One could infer from this language that the decision was actually based on the prosecution’s good faith effort to discover *Brady* material not in its possession. However, reading *Young* as creating a “good faith effort to discover” exception to the availability/accessibility standard applied in *Perdomo* and *Auten* appears to render the case inconsistent with *Brady*’s holding that the good or bad faith of a prosecutor is irrelevant. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). On the other hand, the court’s acceptance of a good faith but unsuccessful effort to discover *Brady* material not in the same sovereign’s possession could be construed as consistent with Supreme Court precedent, because the Supreme Court has never required the prosecution to turn over exculpatory or impeachment material not in the same sovereign’s possession.

²⁰⁹ See *supra* notes 144–48 and accompanying text.

²¹⁰ 941 F.3d 761, 764 (9th Cir. 1991).

²¹¹ *Id.* *Aichele* relied on *United States v. Gatto*, 763 F.2d 1040, 1049 (9th Cir. 1985), for this proposition. See *Aichele*, 941 F.3d at 764. In *Gatto*, the Ninth Circuit held that the

United States v. Jennings, in which the Ninth Circuit upheld a district court order compelling a federal prosecutor to review the files of testifying federal law enforcement personnel, apparently for impeachment evidence.²¹² “[P]ersonal responsibility [for compliance with *Brady*],” the court noted, “cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies.”²¹³ In support of its holding, the court cited *Martinez v. Wainwright*, the Fifth Circuit decision applying the availability/accessibility standard to the determination of the scope of a prosecutor’s duty to search for *Brady* material not in his possession or knowledge.²¹⁴

The First Circuit has followed the Ninth Circuit’s line of cases imposing a same-sovereign requirement on the availability/accessibility standard. In *United States v. Sepulveda*, the First Circuit, relying on the Ninth Circuit’s decision in *Aichele*, held that a New Hampshire federal prosecutor did not have a duty to search for *Brady* material not known to him but possessed by New Hampshire state authorities.²¹⁵ The court based its decision solely on the assertion that “the rigors of *Brady* do not usually attach to material outside the federal government’s control.”²¹⁶ Similarly, in *United States v. Osorio*, the First Circuit found that a federal prosecutor violated his disclosure obligations because he failed to discover and disclose to the defense until midway through the defendant’s trial that the government’s chief witness was a major drug dealer; this information was unknown to the federal prosecutor but apparently was generally known within the U.S. Attorney’s Office and the FBI.²¹⁷ Implicitly imposing the same-sovereign requirement on the access/accessibility standard, the court stated that “[t]he government’ is not a congeries of independent hermetically sealed compartments; and the prosecutor in the courtroom, the United States Attorney’s Office in which he works, and the FBI are not

federal government need not produce materials controlled by state officials in response to a Rule 16 motion. 763 F.2d at 1049.

²¹² 960 F.2d 1488, 1490–92 (9th Cir. 1992).

²¹³ *Id.* at 1490. The lower court did not require the federal prosecutor to review the files of local and state law enforcement officers. *Id.* at 1489. The defendant apparently did not appeal this decision, which indicates that the validity of the same-sovereign limitation on the availability/accessibility standard was not in dispute in the Ninth Circuit at the time the court decided *Jennings*.

²¹⁴ *See id.* at 1490–91; *see also supra* notes 196–200 and accompanying text (discussing *Martinez*).

²¹⁵ 15 F.3d 1161, 1179 (1st Cir. 1993).

²¹⁶ *Id.* The alleged *Brady* material was a presentence report prepared for a New Hampshire state court that listed a key witness’s entire criminal history; this history was not fully set out in FBI records furnished to the defendant during pretrial discovery. *See id.* at 1178–79. The court did not indicate whether New Hampshire law enforcement was involved in the defendant’s investigation.

²¹⁷ 929 F.2d 753, 756–57 (1st Cir. 1991).

separate sovereignties. The prosecution of criminal activity is a joint enterprise among all these aspects of 'the government.'"²¹⁸

The Eighth Circuit has gone a step further than the First and Ninth Circuits by imposing a same-jurisdiction limitation in addition to the same-sovereign limitation on the availability/accessibility standard.²¹⁹ For example, in *United States v. Hawkins*, a post-*Kyles* decision, the court declined to find that a Missouri federal prosecutor violated his *Brady* obligations when he failed to discover and disclose *Brady* material not known to him but possessed by a federal prosecutor in Illinois.²²⁰ The court based its decision on the grounds that "the 'prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find impeaching evidence.'"²²¹

C. The "Actual Knowledge and Possession" Standard

The Seventh Circuit has, in a pair of pre-*Kyles* opinions, held that the prosecution has no duty to search for *Brady* material not known to or possessed by it. In *United States v. Romo*, the defendant alleged that the prosecution violated its duty under *Brady* to search for exculpatory or impeachment material because the prosecutor refused to respond to the defendant's requests that he make "various inquiries" of the local police force involved in the investigation that led to the defen-

²¹⁸ *Id.* at 760. It is important to note that the First Circuit was not articulating the prosecution team standard in this passage. As emphasized above, the court stated that "[i]t is apparent that [the chief witness's] past was well known to others in 'the government,' including both the United States Attorney's Office and the FBI, which was using him as a cooperating individual." *Id.* The court also stated that "[i]t is wholly unacceptable that the Assistant United States Attorney trying the case was not prompted personally or institutionally to seek from knowledgeable colleagues highly material impeachment information concerning the government's most significant witness." *Id.* at 761. These passages imply that a federal prosecutor has a duty to search for *Brady* material known to or held by individuals within his own office or by individuals within the FBI *regardless* of their involvement in the immediate criminal prosecution. Although the case does not explicitly do so, the *Osoyo* court's formulation of the scope of a prosecutor's duty to search for *Brady* material appears to limit that duty to members of law enforcement traditionally involved in criminal investigations.

²¹⁹ The Eighth Circuit implicitly applied the same-sovereign limitation to the availability/accessibility standard in *United States v. Dunn*, 851 F.2d 1099 (8th Cir. 1988). In *Dunn*, the court declined to find that a South Dakota federal prosecutor violated his *Brady* obligations by failing to discover and disclose *Brady* material gathered by a South Dakota child protection worker: "The district court found that [the state child protection worker] was not a government employee, and . . . [b]ecause [her] report was not in the government's possession, the *Brady* doctrine is inapplicable in this case." *Id.* at 1101.

²²⁰ 78 F.3d 348, 351 (8th Cir. 1996). The defendant also had charges pending against him in the Southern District of Illinois. *See id.* The court did not indicate if the Illinois charges arose from the same criminal investigation giving rise to the Missouri charges or if the *Brady* material in Illinois came from a source that participated in the investigation leading to the Missouri charges.

²²¹ *Id.* (quoting *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994)).

dant's indictment.²²² In finding that the district court did not abuse its discretion by refusing to compel the prosecution to comply with the defendant's request, Circuit Judge Manion stated that "prosecutors are not usually required to seek out [*Brady* material] which is not in their possession."²²³ The court held that the prosecution is not required to search for *Brady* material in response to a defendant's discovery request unless either the request gives an indication that there is exculpatory material to be discovered or the defendant makes a showing that the government has suppressed *Brady* material.²²⁴ Similarly, in *United States v. Moore*, the Seventh Circuit refused to find that the prosecution violated its *Brady* obligations by failing to disclose that one of its witnesses had previously been convicted of knowingly supplying false information to a police officer.²²⁵ Relying, as the *Romo* court had, on *Mendoza v. Miller*, Circuit Judge Wood stated that "[t]he rule in *Brady* simply does not apply unless the prosecutor had knowledge of the exculpatory information."²²⁶ Then, quoting the *Romo* court's erroneous reading of *Mendoza*,²²⁷ the *Moore* court went on to state that "'prosecutors are not usually required to seek out information which is not in their possession.'"²²⁸ The Seventh Circuit thus created a line of cases, without any support, that stand for the unquali-

²²² 914 F.2d 889, 898 (7th Cir. 1990).

²²³ *Id.* Were it not qualified, this assertion would be a misstatement of the law on its face, even before *Kyles*. Nonetheless, this assertion is at least a misstatement of the rule announced in *Mendoza v. Miller*, 779 F.2d 1287 (7th Cir. 1985), the case the *Romo* court cited in support of this assertion. In *Mendoza*, which involved a habeas corpus petition, a prisoner challenged a prison disciplinary board's failure to turn over FBI reports relating to his alleged offense. *See Mendoza*, 779 F.2d at 1296-97. Because the adjudication was civil in nature, *Brady* presumably did not apply. *See id.* at 1297. Nevertheless, in dictum, Circuit Judge Coffey applied the prosecution team standard to rule that the disciplinary board was not obligated to turn over the FBI report:

The prison staff conducts an investigation of prison incidents separate from any FBI investigation. Thus, the FBI is not a part of the disciplinary prosecution, they have no obligation to turn over their files to the disciplinary committee, and their alleged failure to disclose material cannot be attributed to the disciplinary committee.

Id. (citations omitted). Thus, even if this dictum were a binding statement of the law, it would not support the general proposition stated by the Seventh Circuit in *Romo* that "prosecutors are not usually required to seek out [*Brady* material] which is not in their possession." *Romo*, 914 F.2d at 898.

²²⁴ *See Romo*, 914 F.2d at 898-99. Circuit Judge Manion pointed to two other factors. First, he noted that the prosecution made available all material that was actually in its possession, "which negates most arguments that the prosecutors suppressed exculpatory information." *Id.* at 899. Second, he observed that the defense failed to subpoena the local police agency, and that this "strategic decision or mere failure . . . should not place the burden on the federal prosecutors to seek out such information on behalf of a defendant." *Id.*

²²⁵ 25 F.3d 563, 569 (7th Cir. 1994).

²²⁶ *Id.*

²²⁷ *See supra* note 223.

²²⁸ *Moore*, 25 F.3d at 569 (quoting *Romo*, 914 F.2d at 898).

fied proposition that the prosecution has no obligation to search for *Brady* material.²²⁹

III

MUST PROSECUTORS SEARCH THE INTELLIGENCE COMMUNITY FOR *BRADY* MATERIAL IN INTERNATIONAL TERRORIST PROSECUTIONS UNDER THE CIRCUIT APPROACHES?

As the overview of circuit case law in Part II indicates, the circuit courts have applied varying standards to determine the scope of a prosecutor's duty to search the government for *Brady* material. To understand why these approaches could be construed to require a trial court to impose on a federal prosecutor in an international terrorist prosecution a duty to search for *Brady* material in the hands of the intelligence community, one must first understand the nature of the federal government's interagency investigation of international terrorism.

A. The FBI's Inability to Conduct Independent Investigations of International Terrorism

Countless terrorists and terrorist organizations throughout the world²³⁰ perpetrate hundreds of international terrorist attacks each year.²³¹ Although the reasons for terrorist attacks vary widely,²³² the U.S. government believes that anti-U.S. sentiment motivated at least 219 of the 348 terrorist attacks that occurred in 2001 (4 of which occurred in North America).²³³ More disturbing than the frequency of terrorist attacks is their increased lethality,²³⁴ a reality due in part not

²²⁹ See, e.g., *United States v. Earnest*, 129 F.3d 906, 910 (7th Cir. 1997) ("[T]here is no affirmative duty on the part of the government to seek information not in its possession when it is unaware of the existence of that information."); *United States v. Jimenez-Rodriguez*, Nos. 94-1968, 94-2072, 1995 WL 709639 (1st Cir. Dec. 1, 1995) ("[T]he rule of *Brady v. Maryland* imposes no general due diligence requirement." (relying on *Moore*, 25 F.3d at 569)).

²³⁰ As of August 2002, the U.S. Department of State has designated thirty-four groups as foreign terrorist organizations. See U.S. Dep't of State, Foreign Terrorist Organizations (Aug. 9, 2002), http://astron.berkeley.edu/~jhall/export/US_Dept_State_FTO_site.pdf.

²³¹ See *supra* note 1.

²³² Although Americans may be most familiar with religiously motivated international terrorism, terrorism may be motivated by many other reasons, including economic frustration, deprivation of rights, and ethnic and racial divisions. See Stephen Sloan, *The Changing Nature of Terrorism*, in *THE TERRORISM THREAT AND U.S. GOVERNMENT RESPONSE: OPERATIONAL AND ORGANIZATIONAL FACTORS* 51, 56 (James M. Smith & William C. Thomas eds., 2001).

²³³ See *PATTERNS OF GLOBAL TERRORISM*, *supra* note 1, app. 1, at 171, 176. As indicated in the Introduction of this Note, the United States is the world's leading target of international terrorism, and government officials expect the use of terrorism against the United States and its interests to continue both domestically and abroad. See *supra* note 1.

²³⁴ See *PILLAR*, *supra* note 1, at 20-21; David Tucker, *Combating International Terrorism*, in *THE TERRORISM THREAT AND U.S. GOVERNMENT RESPONSE*, *supra* note 232, at 129, 131. One

only to the fact that terrorists increasingly are attacking civilians or other less-defended or undefended targets,²³⁵ but also to the growing lethality of the weapons available to them.²³⁶ International terrorists with access to biological weapons, for example—which more than ten countries reportedly have or are developing²³⁷—are capable of inflicting billions of dollars in losses and of taking hundreds of thousands of lives in a single attack.²³⁸

The clandestine and networked nature of modern international terrorist organizations requires the government to expend substantial resources on detection efforts.²³⁹ Because terrorist operations must

analyst has constructed a lethality index for all terrorist attacks occurring between 1969 and 1998 that indicates a 20% increase in the lethality of terrorist attacks during this period. See Tucker, *supra*, at 135–36. Recent events appear to support the conclusion that terrorism is becoming a more deadly crime. Between 1995 and 2001, four attacks—the Aum Shinrikyo’s sarin gas attack in the Tokyo subways, the Tamil Tiger truck bombing of the Central Bank in Colombo, the truck bombing of the U.S. Embassy in Nairobi, and the attacks on the World Trade Center and Pentagon—accounted for over 14,000 injuries and deaths. See PATTERNS OF GLOBAL TERRORISM, *supra* note 1, app. 1, at 173; Tucker, *supra*, at 136.

²³⁵ Policy makers expect that future terrorist attacks will be directed mainly at civilians or other less-defended or undefended targets. See *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 105th Cong. 60 (1997) (responses of the Defense Intelligence Agency to questions regarding global threats and challenges to the United States and its interests abroad).

²³⁶ George Tenet, director of the Central Intelligence Agency, remarked in a prepared statement to the Senate Select Committee on Intelligence that “[a]lthough terrorists we’ve preempted still appear to be relying on conventional weapons, we know that a number of these groups are seeking chemical, biological, radiological, or nuclear . . . agents.” *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 12 (2000) (statement of George J. Tenet, Director of Central Intelligence).

²³⁷ See U.S. Dep’t of Defense, *Information Paper: Department of Defense Biological Warfare Threat Analysis*, http://www.defenselink.mil/other_info/threat.html (last updated June 10, 1998). Iraq and the former Soviet Union are known to have biological weapons programs. See Lester C. Caudle III, *The Biological Warfare Threat*, in *MEDICAL ASPECTS OF CHEMICAL AND BIOLOGICAL WARFARE* 451, 456 (Frederick R. Sidell et al. eds., 1997). The government believes that China, Iran, North Korea, Libya, Syria, and Taiwan probably have such programs, and it is possible that Cuba, Israel, and Egypt do as well. *Id.*

²³⁸ One report has indicated that

if a biological agent such as anthrax were used on an urban population of approximately 5 million people in an economically developed country such as the United States, an attack on a large city from a single plane disseminating 50 kg of the dried agent in a suitable aerosol form would affect an area far in excess of 20 km downwind, with approximately 100,000 deaths and 250,000 being incapacitated or dying.

Caudle, *supra* note 237, at 456. Such a large-scale bioterrorist attack could have economic consequences ranging from \$477.7 million per 100,000 persons exposed up to \$26.2 billion per 100,000 persons exposed, depending on the biological agent used. Arnold F. Kaufmann et al., *The Economic Impact of a Bioterrorist Attack: Are Prevention and Postattack Intervention Programs Justifiable?*, 3 *EMERGING INFECTIOUS DISEASES* 83, 91 (1997).

²³⁹ Between 1996 and 2001, the U.S. government spent more than \$50 billion to detect and prevent terrorism. See Robert Dreyfuss, *Dim Intelligence: What Did We Get for All That Money?*, *AM. PROSPECT*, Oct. 22, 2001, at 10. In 2000, “the United States spent more than

be covert to succeed, terrorist organizations have sought, with some success, to avoid detection.²⁴⁰ Therefore, information about the actual operations of international terrorist networks is sparse. This reality, of course, makes it difficult to create a model of terrorist activity²⁴¹

\$1.3 billion seeking to prevent and prepare for terrorist use of nuclear, biological, or chemical weapons." *Id.*

²⁴⁰ See DAVID E. LONG, *THE ANATOMY OF TERRORISM* 7 (1990).

²⁴¹ Although the world will continue to witness the emergence of hierarchical, state-sponsored terrorist organizations, experts predict that modern terrorist networks are likely to operate in chain, hub (centrifugal), or all-channel (full-matrix) networks. See John Arquilla & David Ronfeldt, *The Advent of Netwar (Revisited)*, in *NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY* 1, 6–10 (John Arquilla & David Ronfeldt eds., 2001); J.K. Zawodny, *Infrastructures of Terrorist Organizations*, in *PERSPECTIVES ON TERRORISM* 61, 61–63 (Lawrence Zelic Freedman & Yonah Alexander eds., 1983). Active Middle Eastern terrorist groups Hizbollah, al-Qaeda, and Hamas employ the network model. Michele Zanini & Sean J.A. Edwards, *The Networking of Terror in the Information Age*, in *NETWORKS AND NETWARS*, *supra*, at 29, 32–33. Under the network model, satellite cells need not have specific organizational ties to any larger organization, nor are they necessarily dependent on some level of support from any larger organization. See Sloan, *supra* note 232, at 63.

A significant implication of the network model that makes international terror networks difficult investigative targets is the network's tendency to inspire intensely personalized loyalties. This reality is due in part to the fact that movement leaders act as direct participants in actions, see Zawodny, *supra*, at 63, and also to the indoctrination and intimidation that terrorists experience both before and after they join a terrorist group. Leaders of underground movements strive to maintain a collective belief system that urges the moral necessity of apolitical resistance. See Martha Crenshaw, *Decisions to Use Terrorism: Psychological Constraints on Instrumental Reasoning*, in 4 *INTERNATIONAL SOCIAL MOVEMENT RESEARCH: SOCIAL MOVEMENTS AND VIOLENCE: PARTICIPATION IN UNDERGROUND ORGANIZATIONS* 29, 30–36 (Donatella della Porta ed., 1992). They characterize their opposition as external forces foreign to their own ethnic, regional, or religious group, with which members identify deeply. See Donatella della Porta, *On Individual Motivations in Underground Political Organizations*, in 4 *INTERNATIONAL SOCIAL MOVEMENT RESEARCH*, *supra*, at 3, 12. Religious fundamentalists who propagate these radical religious belief systems may draw support from religious texts. For example, because some Muslims believe that the Koran enjoins the faithful from engaging in espionage, a radical Muslim terrorist organization might draw from the following text from the Koran to encourage operational secrecy:

O believers! Above all hold yourself from suspicion, for even a little suspicion is criminal. Do not spy on one another, or cut down another, for would anyone from among you desire to eat the flesh of his departed brother? Of course, you would feel horror at this. Fear God: God the Redeemer, the Merciful.

See Nikolas K. Gvosdev, *Espionage and the Ecclesia*, 42 *J. CHURCH & ST.* 803, 816 (2000). Once members join terrorist organizations, they are dissuaded from violating their loyalty to the group by a group dynamic of isolation, fear, and guilt. See Crenshaw, *supra*, at 30–36 (discussing the role of group dynamics and the creation and maintenance of a group belief system in solidifying group loyalty); della Porta, *supra*, at 6–25 (discussing the central role of adolescent peer group construction and political context in determining personal motivations to join terrorist organizations). For example, in the 1970s, the Abu Nidal Organization, a group still listed as a foreign terrorist organization by the State Department, see *PATTERNS OF GLOBAL TERRORISM*, *supra* note 1, app. B, at 85, tested each new recruit by making him commit an outrageous act, like a bank robbery or murder—something that the organization could use later to keep the individual in check. See DUANE R. CLARRIDGE, *A SPY FOR ALL SEASONS: MY LIFE IN THE CIA* 332 (1997). The group loyalty created by these practices makes it extremely unlikely that any cell members will agree to spy on their terrorist network for the U.S. government. A former CIA operative notes that “[u]nless one

that would permit the government to investigate and interdict terrorist conspiracies.²⁴²

The FBI is the branch of the federal government primarily responsible for investigating acts of international terrorism on behalf of federal prosecutors.²⁴³ It does so primarily to collect evidence to bring suspected terrorists to trial,²⁴⁴ but also for the

of bin Ladin's foot soldiers walks through the door of a U.S. consulate or embassy, the odds that a CIA counterterrorist officer will ever see one are extremely poor." Reuel Marc Gerecht, *The Counterterrorist Myth*, ATLANTIC MONTHLY, July-Aug. 2001, at 38, 41. A former CIA case officer told a *Newsweek* reporter that "[y]ou don't get walk-ins from terror cells." Evan Thomas, *Handbook for the New War*, NEWSWEEK, Oct. 8, 2001, at 34, 35. As counterintelligence expert Randy Scheunemann observes, "How does the CIA propose to penetrate cells made up of individuals who forged their ties over decades in the dust of Palestinian refugee camps, the chaos of Beirut or the killing fields of Afghanistan?" Andrew Roberts, *Bring Back 007*, SPECTATOR, Oct. 6, 2001, at 20, 21.

²⁴² One analyst identifies two realities that make forecasting the nature of terrorist threats and operations difficult: (1) terrorism is the result of evolving social, economic, or political forces that change over time, which makes it difficult to identify the next source of terrorism; and (2) terrorism is greatly impacted by technology, but changes in technology are difficult to predict. See Sloan, *supra* note 232, at 52. Peter Probst observes that the government's failure to deter terrorism can be traced in part to its failure to develop a model of terrorist behavior:

In my view, the greatest threat to our security remains problems of mindset and perception. We fail to appreciate how phenomena such as mindset and perception impact on terrorist thinking and operations. . . .

. . . .

We need to understand on a group-specific basis how the terrorists think, how they plan, how they collect intelligence, select targets, weigh options, and adapt to operational adversity.

. . . [If we develop such an understanding], when there is no hard intelligence as to the venue or timing of the next attack, we can more intelligently game out the terrorists [sic] available options and how the terrorist will most likely play his hand.

Peter S. Probst, *Intelligence and Force Protection vs Terrorism*, in THE TERRORISM THREAT AND U.S. GOVERNMENT RESPONSE, *supra* note 232, at 169, 174.

²⁴³ The authority for the FBI's investigative efforts derives from federal law providing that the Attorney General may appoint officials "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533 (2000). The Attorney General has delegated this authority to the FBI: federal regulations describe the FBI as having lead agency "responsibility in investigating all crimes . . . which involve terrorist activities or acts in preparation of terrorist activities Within the United States, this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate." 28 C.F.R. § 0.85(l) (2002).

²⁴⁴ See 18 U.S.C. § 3107 (2000) (empowering the FBI to execute seizures under warrant for violation of U.S. laws); *id.* § 3052 (authorizing FBI officials to serve warrants and subpoenas and to make arrests without a warrant for any offense against the United States committed in their presence or for any felony if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony); Arthur S. Hulnick, *Intelligence and Law Enforcement: The "Spies Are Not Cops" Problem*, 10 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 269, 276-77 (1997) (stating that the FBI uses its informers and collaborators to collect information to be used by prosecutors at trial).

purpose of disrupting, weakening, and eliminating terrorist networks.²⁴⁵

Although law enforcement efforts to investigate, apprehend, and prosecute international terrorists are increasing,²⁴⁶ the difficulty of investigating secretive international terror networks that operate mostly overseas dramatically impedes those efforts. The FBI conducts international terrorism investigations in accordance with the *Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations*, a classified document.²⁴⁷ Under these guidelines, the FBI may conduct investigations, participate with foreign officials in investigations abroad, or otherwise conduct activities outside the United States only with the approval of the Director of Central Intelligence and the Attorney General.²⁴⁸ Despite the FBI's growing international presence²⁴⁹ and authority under U.S. law to investigate terrorist conspiracies abroad,²⁵⁰ the FBI's investigative efforts are hampered by the fact that international law prohibits law enforce-

²⁴⁵ See U.S. DEP'T OF JUSTICE, FY 2001 PERFORMANCE REPORT & FY 2002 REVISED FINAL PERFORMANCE PLAN, FY 2003 PERFORMANCE PLAN 1, 14–18, <http://www.usdoj.gov/ag/annualreports/pr2001/pdf/2001PerformanceReport.pdf> (last visited Apr. 9, 2003). Immediately after the September 11, 2001 attacks, President George W. Bush called upon the law enforcement community to increase efforts to apprehend terrorists before they act and to shift focus from gathering evidence for use against suspected terrorists after such attacks have occurred to deterring and preventing future acts of terrorism. See Bob Woodward & Dan Balz, *Combating Terrorism: 'It Starts Today'*, WASH. POST, Feb. 1, 2002, at A1. At a September 17, 2001 cabinet meeting, President Bush informed his war cabinet that future counterterrorism efforts would stress “preemption of future attacks” instead of the “traditional emphasis on investigations, gathering of evidence and prosecution.” See *id.* A few days earlier, Attorney General John Ashcroft told the President that the chief mission of U.S. law enforcement would be to stop another terrorist attack, and that the focus of the FBI and Justice Department should change from criminal prosecution to crime prevention. See Bob Woodward & Dan Balz, *We Will Rally the World*, WASH. POST, Jan. 28, 2002, at A1. In a November 8, 2001 memorandum, Ashcroft stated that law enforcement “must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist attacks, preventing them from happening and punishing would-be perpetrators for their plans of terror.” See Eric Lichtblau & Josh Meyer, *Justice Dept. to Tighten Focus on Terrorism*, L.A. TIMES, Nov. 9, 2001, at A1.

²⁴⁶ See *supra* note 3.

²⁴⁷ Some parts of the document, however, have been released. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR FBI FOREIGN INTELLIGENCE COLLECTION AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS (1995), <http://www.usdoj.gov/ag/readingroom/terrorismintel2.pdf>.

²⁴⁸ *Id.* at 21. The U.S. Attorneys' Manual provides that “[o]verseas terrorist situations will undoubtedly entail coordination with one or more foreign governments and such coordination is best accomplished by and through the Department [of Justice] in consultation with the Department of State.” U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.136 (2002), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrn.htm#9-2.136.

²⁴⁹ As of late 2000, the FBI had agents stationed in forty-four foreign countries—twice as many as only seven years earlier. See PILLAR, *supra* note 1, at 80.

²⁵⁰ See 18 U.S.C. § 2332b(e)–(f) (2000) (extending extraterritorial federal jurisdiction over international terrorist conspiracies and granting the Attorney General primary investigative responsibility for all federal crimes of terrorism).

ment officers of the United States from exercising their functions abroad without the permission of the host state.²⁵¹ In addition, some foreign laws forbid host governments from entering into agreements to permit such activities.²⁵² Therefore, the FBI's overseas agents, known as legal attachés, typically do not investigate criminal matters personally, but instead work with local law enforcement agencies in countries that have agreed to cooperate with U.S. law enforcement efforts.²⁵³ Attachés have the authority to prepare evidence-gathering requests, assist in the negotiation of treaties, transmit information to other countries on new legislation and important cases, and organize training.²⁵⁴

Because of these restraints, the FBI cannot fulfill its investigative function in relation to clandestine international terrorist conspiracies without the cooperation of foreign countries.²⁵⁵ Although some terrorists operate in countries that assist the United States in investigating and apprehending terrorist organizations,²⁵⁶ international

²⁵¹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432 & cmt. b, 433 (1987). The U.S. Attorneys' Manual provides, in relevant part:

Most problems associated with international evidence gathering revolve around the concept of sovereignty. Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty. Even such seemingly innocuous acts as a telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas.

The solution is usually to invoke the aid of the foreign sovereign in obtaining the evidence.

U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 267 (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00267.htm.

²⁵² For example, the Iranian Constitution provides that "[a]ny form of agreement resulting in foreign control over the natural resources, economy, army, or culture of the country, as well as other aspects of the national life, is forbidden." IRAN CONST. ch. X, art. 153, available at <http://www.netiran.com/laws.html> (last visited Apr. 9, 2003).

²⁵³ See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 152 (1993); Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1414-17 (1998).

²⁵⁴ Zagaris, *supra* note 253, at 1419.

²⁵⁵ Cf. David A. Vise, *New Global Role Puts FBI in Unsavory Company*, WASH. POST, Oct. 29, 2000, at A1 ("FBI officials say they need relationships with the Saudis, Yemenis and others in the Middle East to fight terrorism effectively. . . . [T]he FBI depends upon 'friendly foreign governments,' not only to arrest and extradite fugitives but also to permit the bureau to operate on their soil."). In 1995, the FBI helped create the International Law Enforcement Academy to assist foreign law enforcement agencies train their officers. See GREGORY F. TREVERTON, *RESHAPING NATIONAL INTELLIGENCE IN AN AGE OF INFORMATION* 170 (2001).

²⁵⁶ For example, after the embassy bombings in Kenya and Tanzania, local authorities helped the FBI conduct interviews and searches and permitted the FBI to remove evidence and suspects to the United States. See David Johnston, *A Painstaking Search for Answers*, N.Y. TIMES, Aug. 12, 1998, at A8. Since September 11, 2001 at least forty countries have made

terrorists operate predominantly in countries governed by regimes either unable²⁵⁷ or unwilling to assist the FBI in investigating and apprehending suspected terrorists.²⁵⁸ Currently, only a small group of countries have signed mutual legal assistance treaties with the United States.²⁵⁹ These realities render the FBI unable to investigate international terrorism effectively without the assistance of the intelligence community.

B. The Intelligence Community's Role in Investigating International Terrorism

Many arms of the federal government participate in the investigation of international terrorism. The Office of Homeland Security is responsible for coordinating executive branch efforts to detect, prevent, and respond to terrorist threats and attacks within the United States, and for coordinating the collection of intelligence outside the

terrorism-related arrests. See James Risen & Tim Weiner, *CIA Is Said to Have Sought Syrian Help on Terror Foes*, N.Y. TIMES, Oct. 30, 2001, at B3. Singapore, for example, recently arrested fifteen persons suspected of having ties to the al-Qaeda network who were planning to bomb the local U.S. Embassy. See Craig Francis, *Singapore "Terror Network" Broken*, CNN, Jan. 7, 2002, <http://www.cnn.com/2002/WORLD/asiapcf/southeast/01/07/singapore.arrests/index.html>.

²⁵⁷ U.S. law enforcement agents operating abroad may find that investigative techniques used in the United States are not permitted in foreign countries. For example, several drug enforcement techniques regarded as essential in the United States—such as undercover operations, electronic surveillance, telephone taps, and informant recruitment methods—are forbidden or severely circumscribed elsewhere. See NADELMANN, *supra* note 253, at 200.

²⁵⁸ For example, the Yemeni government did not permit a full FBI investigation after the U.S.S. Cole was attacked near Yemen. See Peter Slevin & Alan Sipress, *Tests Ahead for Cooperation on Terrorism*, WASH. POST, Dec. 31, 2001, at A10. Relations eventually deteriorated to the point that FBI agents left the country temporarily. *Id.* Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are listed by the State Department as state sponsors of terrorism, see PATTERNS OF GLOBAL TERRORISM, *supra* note 1, at 63–68, and cannot be expected to cooperate with FBI efforts to interdict terrorist conspiracies. However, even nations allied with the United States sometimes are reluctant to cooperate with an FBI investigation. See, e.g., John Crewdson, *Belgian Authorities Reluctant to Help with Probe of Bomb Plot*, CHI. TRIB., Oct. 14, 2001, at 15. A nation may simply not want the public to know that it is cooperating with the United States to apprehend terrorists within its territory, or it may be unwilling to help the United States build a case because of its opposition to the death penalty, which is available for some terrorist crimes. See PILLAR, *supra* note 1, at 84–85.

²⁵⁹ The State Department reports that mutual legal assistance treaties are currently in force with the following countries: Anguilla, Antigua/Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Brazil, British Virgin Islands, Canada, Cayman Islands, Cyprus, Czech Republic, Dominica, Egypt, Estonia, Greece, Grenada, Hong Kong, Hungary, Israel, Italy, Jamaica, South Korea, Latvia, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, Netherlands, Panama, Philippines, Poland, Romania, St. Kitts-Nevis, St. Lucia, St. Vincent, Spain, Switzerland, Thailand, Trinidad, Turkey, Turks and Caicos Islands, Ukraine, United Kingdom, and Uruguay. U.S. DEP'T OF STATE, DEPARTMENT OF STATE CIRCULAR ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATIES, <http://travel.state.gov/mlat.html> (last visited Apr. 9, 2003).

United States regarding these threats of terrorism.²⁶⁰ The Office of Homeland Security also oversees the federal government's larger effort to detect, prevent, and respond to terrorist attacks on the United States, an effort that in one way or another draws support from dozens of federal departments and agencies.²⁶¹ The federal government may also enlist the help of state and local authorities in its investigative efforts if necessary.²⁶² The multi-agency nature of the government's investigation of international terrorism is evidenced by the fact that, since September 11, 2001, federal prosecutors have identified several investigative groups other than the FBI as the "lead agency" in cases of international terrorism referred to the Department of Justice for prosecution, including the Immigration and Naturalization Service, Secret Service, Customs Service, Internal Revenue Service, Postal Service, and Bureau of Alcohol, Tobacco, and Firearms, as well as various parts of the Departments of Agriculture, Commerce, Labor, State, Transportation, and Treasury.²⁶³

Of all the branches of the federal government that assist the FBI in its efforts to detect, investigate, and apprehend suspected international terrorists, the CIA, which has been monitoring international terrorism for decades,²⁶⁴ is uniquely positioned to assist law enforcement.

²⁶⁰ See Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

²⁶¹ These departments and agencies include the Department of Treasury, the Department of Defense, the Department of Justice, the Department of Health and Human Services, the Department of Transportation, the Department of State, the Department of the Interior, the Department of Energy, the Department of Labor, the Department of Commerce, the Department of Veterans Affairs, the Department of Agriculture, the Coast Guard, the Immigration and Naturalization Service and Border Patrol, the Transportation Security Administration, the Customs Service, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco and Firearms, the Federal Emergency Management Agency, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and the Environmental Protection Agency. See generally OFFICE OF THE PRESIDENT, THE DEPARTMENT OF HOMELAND SECURITY (2002) [hereinafter DEPARTMENT OF HOMELAND SECURITY], <http://www.whitehouse.gov/deptofhomeland/book.pdf> (describing the organization and function of the newly created Department of Homeland Security); OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 13-14 (2002) [hereinafter NATIONAL STRATEGY FOR HOMELAND SECURITY], http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf (outlining the Department of Homeland Security's approach to detection and prevention of terrorism).

²⁶² See DEPARTMENT OF HOMELAND SECURITY, *supra* note 261, at 3; NATIONAL STRATEGY FOR HOMELAND SECURITY, *supra* note 261, at 49-50.

²⁶³ See Transactional Records Access Clearinghouse, Referrals for Federal Prosecution Under Terrorism Programs Since September 11 by Lead Agency, at http://trac.syr.edu/tracreports/terrorism/supp/agency_ref.html (last visited Apr. 9, 2003).

²⁶⁴ See ANGELO CODEVILLA, INFORMING STATECRAFT: INTELLIGENCE FOR A NEW CENTURY 92-93 (1992) (discussing intelligence operations on international terrorists in the 1960s and 1970s). Executive Order 12,333, issued by President Reagan in 1981, gives the CIA the authority to "participate in law enforcement activities to investigate or prevent . . . international terrorist or narcotics activities." Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981). Congress recently amended the National Security Act of 1947 to include under

Human intelligence (HUMINT), the collection of which is primarily the responsibility of the CIA,²⁶⁵ promises to be the most valuable form of intelligence in the war on terrorism. Legislators and policy makers have long been aware of the value of HUMINT in investigating and preventing international terrorism.²⁶⁶ Former CIA Director James Woolsey has observed that

[i]t is not as if there are a large number of ways to find out what terrorists are going to do Espionage in this arena is really all we have going for us. . . . If you want to learn what *Hizbollah* is going to target next, you have to learn it the old fashioned way—you have to spy on them.²⁶⁷

the definition of “foreign intelligence” subject to collection by the CIA any information relating to “international terrorist activities.” See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 902, 115 Stat. 272, 387 (to be codified at 50 U.S.C. § 401a).

²⁶⁵ See SCOTT D. BRECKINRIDGE, *THE CIA AND THE U.S INTELLIGENCE SYSTEM* 103 (1986); MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 29 (2000).

²⁶⁶ See, e.g., *Report of the National Commission on Terrorism: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 2 (2000) (statement of Sen. Richard C. Shelby) (observing that “intelligence, particularly human intelligence, [plays a crucial role] in countering international terrorism”); *id.* at 17 (statement of Ambassador L. Paul Bremer, III, Chairman, National Commission on Terrorism) (noting that “[y]ou have to have a program which is not too risk-adverse, which tries, first of all, of course, to prevent the [terrorist] attacks, which largely depends on good intelligence. . . . Human intelligence. It’s number one, number two. It’s about number one through nine”); *Terrorism and Intelligence Operations: Hearing Before the J. Econ. Comm.*, 105th Cong. 80 (1998) (statement of Brian P. Fairchild) (explaining that “[m]any argue that technical intelligence is easier to collect, more accurate, and much more straightforward than human intelligence. Nothing could be further from the truth. The fact of the matter is, because of emerging encryption technologies, technical intelligence has become very difficult, and sometimes, impossible to collect”); COMM’N ON THE ROLES AND CAPABILITIES OF THE U.S. INTELLIGENCE CMTY., 103D CONG., *PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE* 61 (Comm. Print 1996) [hereinafter *PREPARING FOR THE 21ST CENTURY*], http://www.gpo.gov/su_docs/dpos/epubs/int/pdf/report.html. In 1996, a Staff Study by the Permanent Select Committee on Intelligence reported that Strategic Intelligence Reviews conducted by the National Security Council found that HUMINT would be of critical importance in providing information on terrorism:

Within several important specific subject areas, HUMINT’s contribution is particularly strong, such as in reporting on the transnational issues that are now among the highest priorities of the [intelligence community]: terrorism, narcotics, proliferation, and international economics. In providing information on terrorism, HUMINT garnered the grade “of critical value” almost 75 percent of the time it was given

. . . . Thus, of all the intelligence collection techniques, clandestine operations have a comparative advantage in collecting on most transnational issues.

See STAFF STUDY, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, 104TH CONG., IC21: THE INTELLIGENCE COMMUNITY IN THE 21ST CENTURY 186, 188 (Comm. Print 1996) [hereinafter *INTELLIGENCE COMMUNITY IN THE 21ST CENTURY*], available at http://www.access.gpo.gov/congress/house/intel/ic21/ic21_toc.html.

²⁶⁷ *Discussion of International Terrorism and American Security* (Apr. 21, 1996), LEXIS, News Library, Poltrn File.

In 1996, a congressional commission charged with reviewing the efficacy and appropriateness of U.S. intelligence activities in the post-Cold War global environment reported that

the function of collecting human intelligence is essential. Signals intelligence and other forms of technical collection are extremely valuable and frequently are the best source of information about some targets. Such forms of collection also are less likely to cause diplomatic and political flaps. They do not, however, provide sufficient access to targets such as terrorists or drug dealers who undertake their activities in secret or to the plans and intentions of foreign governments that are deliberately concealed from the outside world. Recruiting human sources—as difficult, imperfect, and risky as it is—often provides the only means of such access.²⁶⁸

The CIA can provide various forms of assistance in the context of international terrorism, but it assists law enforcement's investigative efforts primarily by providing tips and investigative leads to the FBI.²⁶⁹ Occasionally, the information regards specific threats, but more often it consists of names, phone numbers, and information about commercial transactions or other information that may be useful to the FBI.²⁷⁰ Regular communication between the FBI and CIA is assured by the operation of the FBI Counterterrorism Center, which was established in 1996 to enhance cooperation among and integration of law enforcement and elements of the intelligence community, including the CIA, in the war on international terrorism.²⁷¹ The FBI Counterterrorism Center employs several resources to accomplish its goals, including multi-agency task forces, ongoing liaison with federal, state, and local law enforcement agencies, and its Legal Attaché program.²⁷² Analysts from over a dozen federal agencies working at the Center, including a CIA analyst with access to the CIA's foreign networks, operate special computers that permit them to tap into their home federal agencies' intelligence databases and pull up information for the FBI.²⁷³ Oftentimes, law enforcement is able to follow up on intelligence leads by "asking fresh questions of intelligence assets in the

²⁶⁸ PREPARING FOR THE 21ST CENTURY, *supra* note 266, at 64.

²⁶⁹ See PILLAR, *supra* note 1, at 117. Prior to 1995, pursuant to a Memorandum of Understanding between the Justice Department and the intelligence community, the intelligence community reported information discovered during the course of intelligence collection relating to observed criminal activities by third parties. See PREPARING FOR THE 21ST CENTURY, *supra* note 266, at 282–83. However, the intelligence community now reports only "suspected significant criminal misconduct" violations committed by its officers, employees, contractors, or agents. See *id.* at 283.

²⁷⁰ PILLAR, *supra* note 1, at 117.

²⁷¹ For additional background information on the FBI's Counterterrorism Center, see John F. Lewis, Jr., *Fighting Terrorism in the 21st Century*, FBI L. ENFORCEMENT BULL., Mar. 1999, at 3, 7–8.

²⁷² *Id.* at 8.

²⁷³ Jim McGee, *The Rise of the FBI*, WASH. POST MAG., July 20, 1997, at 10, 26.

field.”²⁷⁴ The FBI and CIA frequently swap low-level personnel under this program, allowing FBI agents to work in the CIA’s centers, such as the Center for International Terrorism, and allowing CIA employees to work at law enforcement agencies.²⁷⁵

The level of CIA cooperation is enhanced by laws authorizing the FBI to “task” the omnipresent clandestine intelligence apparatus²⁷⁶ to identify potential informants who may have information about the plans and activities of foreign terrorists, and also to investigate the international activities of specific suspected terrorists.²⁷⁷ Previous investigations suggest that this authority has been used before.²⁷⁸ Specifically, § 403-5a permits the CIA, upon request, to collect information abroad on noncitizens in connection with an investigation, providing in relevant part:

(a) authority to provide assistance. . . . [E]lements of the intelligence community may, upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the information collected for purposes

²⁷⁴ PILLAR, *supra* note 1, at 118.

²⁷⁵ See *U.S. Government's Response to International Terrorism: Hearing Before the S. Judiciary Comm.*, 105th Cong. (1998) (statement of Louis J. Freeh, Director, FBI), <http://www.fbi.gov/congress/congress98/terror.htm>; Buntin, *supra* note 15, at 42–43.

²⁷⁶ The “intelligence community” is a conglomerate of government offices and agencies, including the CIA, the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Imagery and Mapping Agency (NIMA), and the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, and the Coast Guard. See 50 U.S.C. § 401a(4) (2000). The CIA and DIA are the important producers of “finished” intelligence—single reports that bring together separate pieces of specialized analysis and paint a comprehensive picture of a particular circumstance. See LOWENTHAL, *supra* note 265, at 54.

²⁷⁷ See Intelligence Authorization Act of 1996 § 814(a), 50 U.S.C. § 403-5a. In addition, Executive Order 12,333 permits the CIA to “participate in law enforcement activities to investigate or prevent . . . international terrorist or narcotics activities.” Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981).

²⁷⁸ See *Investigation of September 11 Intelligence Failures: J. Hearing Before the S. Intelligence Comm. and House Permanent Select Comm. on Intelligence*, 107th Cong., LEXIS, News Library, Poltrn File (remarks by Louis Freeh, Former Director, FBI) (“As these committees have known for several years, the FBI and the CIA have carried out joint operations around the world to disrupt, exploit and recover evidence on Al Qaida operatives who have targeted the United States. These operations [are] in part designed to obtain admissible evidence”) [hereinafter *Investigation of September 11 Intelligence Failures*]. After the 1993 World Trade Center bombing, the CIA gathered information on persons connected with Osama bin Laden in Kenya and Tanzania. See Gregory L. Vistica & Daniel Klaidman, *Tracking Terror: Inside the FBI and CIA's Joint Battle to Roll up Osama bin Laden's International Network*, NEWSWEEK, Oct. 19, 1998, at 46, 48. When the U.S. embassies in these countries were bombed in 1995, FBI investigators relied on information provided by the CIA. See *id.* “When agents hit the ground in Africa they had names, places and telephone numbers,” said one senior FBI official. *Id.*

of a law enforcement investigation or counterintelligence investigation.²⁷⁹

Section 403-5a was part of a larger bill that sought to counter the perceived lack of interagency coordination in the federal government's response to transnational threats such as terrorism.²⁸⁰ The Senate concluded that law enforcement could not effectively combat international terrorism without the assistance of the intelligence community, noting in its report accompanying the legislation that "the need to combat terrorism . . . and other transnational threats effectively requires that the capabilities of the Intelligence Community be harnessed to support law enforcement agencies as efficiently as possible."²⁸¹ The legislation also created the Committee on Transnational Threats of the National Security Council, which is designed, in part, to "develop policies and procedures to ensure the effective sharing of information among federal departments and agencies, including between the law enforcement and foreign policy communities; and develop guidelines for coordination of federal law enforcement and intelligence activities overseas."²⁸²

²⁷⁹ 50 U.S.C. § 403-5a.

²⁸⁰ See S. REP. NO. 104-258, at 35 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3945, 3980. The Senate Committee noted:

CIA and NSA currently interpret their legal authorities as permitting them to engage in intelligence collection only for a "foreign intelligence" purpose. (NSA believes that the "primary" purpose of the collection must be to obtain foreign intelligence.) The Brown Commission concluded that the Intelligence Community may be taking to [sic] restrictive a view regarding whether intelligence assets can be tasked by law enforcement agencies to collect information overseas about non-U.S. persons. The law enforcement proviso of the National Security Act was intended to prohibit the CIA from infringing on the domestic jurisdiction of the FBI and from becoming a national secret police that might be directed against U.S. citizens. These concerns are not present when the Intelligence Community collects against foreign persons outside the U.S.

.....
 [This legislation clarifies] that [the] CIA is not violating the law enforcement proviso if it collects intelligence overseas about non-U.S. persons at the request of a law enforcement agency and would also ensure that [the] CIA, NSA, and other collection agencies apply the same standard when responding to law enforcement requests.

Id.

²⁸¹ *Id.*

²⁸² *Id.* at 28. The Senate Committee noted:

A number of federal departments and agencies play important roles in combating transnational threats, but their activities are not well coordinated. Moreover, in the absence of higher level direction, law enforcement agencies have usually been left to take the lead. This has often resulted in conflicts with other agencies, including the Intelligence Community. In the Committee's view, a high-level group is needed to decide, as a policy matter, when to give priority to law enforcement, to intelligence, or to foreign policy or other considerations in responding to transnational threats.

Id.

C. The Prosecutor's Duty to Search the Intelligence Community Under the Circuit Approaches

Considering the relationship between law enforcement and the intelligence community in the federal government's investigation of international terrorism, it is not difficult to see how the courts of appeals' standards regarding a prosecutor's duty to search other arms of the government for *Brady* material could be construed to require federal prosecutors to search the intelligence community during criminal prosecutions of international terrorists. The availability/accessibility standard, regardless of whether the trial court imposes the same-sovereignty requirement, the same-jurisdiction requirement, or recognizes the good-faith search exception, considers only whether a prosecutor has access to the *Brady* material.²⁸³ The federal government's primary law enforcement entity, the FBI, is undoubtedly a part of the same sovereign as the federal government's intelligence community and is within the same jurisdiction. The prosecution team standard, on the other hand, focuses on the relationship between the government entity and the prosecutor's office, looking at the nature of the assistance provided and the extent of cooperation on a particular investigation.²⁸⁴ As discussed in Part II.A, the circuits are split on whether a prosecutor's duty to search for *Brady* material extends to agencies that have no interest in the prosecution, extends only to law enforcement entities, extends only to persons acting under the direction or control of a prosecutor, or extends to *Brady* material outside a prosecutor's jurisdiction.²⁸⁵ Despite this split, one can imagine a trial court accepting any or all of the following arguments to conclude that a prosecutor, under any of the standards, must search the intelligence community for *Brady* material when prosecuting an international terrorist: (1) The intelligence community, which has an interest in preventing international terrorism,²⁸⁶ has an interest in the prosecution of international terrorists because the prosecutions have the effect of preventing terrorism; (2) The intelligence community is acting as a quasi-law-enforcement entity insofar as it is cooperating extensively with law enforcement²⁸⁷ to provide invaluable assistance in the apprehension and prosecution of suspected international terrorists; and (3) The intelligence community is acting at the direction and

²⁸³ See *supra* Part II.B.

²⁸⁴ See *supra* Part II.A.

²⁸⁵ See *supra* Part II.A.

²⁸⁶ See *supra* note 263.

²⁸⁷ See *supra* Part III.B; see also *Investigation of September 11 Intelligence Failures*, *supra* note 278 (statement of Louis Freeh, Former Director, FBI) ("The cases that were worked in New York, again, we have dedicated FBI, CIA teams working overseas, exploiting information, conducting counterterrorism operations for intelligence purposes and simultaneously obtaining evidence, maintaining chains of custody and using it in evidence.").

control of the prosecution insofar as federal law empowers law enforcement to task the intelligence community to investigate the activities of suspected international terrorists on its behalf.²⁸⁸

Perhaps anticipating these judicial determinations, the U.S. Attorneys' Manual acknowledges that prosecutors could in certain cases be called upon to search the intelligence community for *Brady* material under either the prosecution team or availability/accessibility standard. The Manual provides that, "[a]s a general rule, a prosecutor should not seek access to [intelligence community] files except when . . . the facts of the case [create] an affirmative obligation to do so."²⁸⁹ However, the Manual identifies four situations in which a prosecutor must search the intelligence community for *Brady* material, including instances in which the intelligence community has been an active participant in the investigation or prosecution of a case, and instances in which known facts and the nature of a case suggest that there may be *Brady* material within the intelligence community.²⁹⁰ The search requirements in these situations are based on the Department of Justice's understanding of the search requirements imposed by the circuits' prosecution team and availability/accessibility standards described in Part II.²⁹¹

A prosecutorial duty to search the intelligence community's files in international terrorism prosecutions, under any of the circuit approaches, could paralyze the government's efforts to investigate international terrorism. Although the intelligence community can gather some HUMINT through non-clandestine activities,²⁹² its collection largely involves sending officers to foreign countries where they at-

²⁸⁸ See *supra* notes 276–82 and accompanying text.

²⁸⁹ U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2052 (2002), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

²⁹⁰ *Id.* Another situation in which a prosecutor must search the intelligence community for *Brady* material arises in a case in which the prosecution believes that the defendant may have had, or as part of her defense at trial will assert that he has had, contacts with the intelligence community. *Id.* This situation normally arises if the defendant claims that his actions were authorized by the intelligence community. See *id.* The final situation is a case in which the facts of a case lead a prosecutor to conclude that he should initiate a "prudential search" of intelligence community files—a search based not upon a known duty to the defendant or to a known nexus to national security matters, but rather on the fact that the case meets a certain profile of cases likely to implicate such issues. See *id.* In these types of cases, which may involve international terrorism, the search is designed to assist the prosecution in identifying and managing potential classified information problems before indictment and trial. See *id.*

²⁹¹ See *id.* The Criminal Resource Manual relies on the Fifth, Seventh, and D.C. Circuits' *Antone*, *Fairman*, and *Brooks* decisions for its discussion of the prosecution team standard, and it relies on the Third Circuit's *Perdomo* and the Fifth Circuit's *Deutsch* decisions for its discussion of the availability/accessibility standard. See *id.*

²⁹² See PAT M. HOLT, SECRET INTELLIGENCE AND PUBLIC POLICY 68 (1995).

tempt to recruit foreign nationals—also known as “agents”—to spy.²⁹³ Spying provides the greatest access to information about the identities, plans, activities, exact locations, planned targets, and, if possible, information about the vulnerabilities of technologically advanced²⁹⁴ and covert international terror networks.²⁹⁵ The intelligence community considers HUMINT sources to be extremely fragile because they take so long to recruit and develop²⁹⁶ and because HUMINT opera-

²⁹³ LOWENTHAL, *supra* note 265, at 67. An agent is someone who accepts a clandestine mission from an American representative even though he is not employed in a staff capacity by the CIA. See BRECKINRIDGE, *supra* note 265, at 123. Not all agents are “primary sources of intelligence.” *Id.* Agents are often access points to other sources—people who do not have a formalized relationship with the CIA but who occasionally are willing to tell CIA officers (full-time career employees at CIA headquarters or at CIA stations around the world) or agents some of what they know. See *id.*; HOLT, *supra* note 292, at 69.

²⁹⁴ Intelligence specialists believe that Osama bin Laden has the necessary technology to avoid attempts to track his movements and conversations. See Dreyfuss, *supra* note 239, at 11. For example, terrorists can “encrypt cell phone transmissions, steal cell phone numbers and program them into a single phone, or use prepaid cell phone cards purchased anonymously to keep their communications secure.” Zanini & Edwards, *supra* note 241, at 38. Observers believe that “[c]ommercial programmers have already written encryption software that is, for all practical purposes, unbreakable.” BRUCE D. BERKOWITZ & ALLAN E. GOODMAN, *BEST TRUTH: INTELLIGENCE IN THE INFORMATION AGE* 19 (2000); see TREVERTON, *supra* note 255, at 88. Some terrorist organizations may already possess such technology:

Rumors persist that the French police have been unable to decrypt the hard disk on a portable computer belonging to a captured member of the Spanish/Basque organization ETA. It has also been suggested that Israeli security forces were unsuccessful in their attempts at cracking the codes used by Hamas to send instructions for terrorist attacks over the Internet.

Zanini & Edwards, *supra* note 241, at 38 (citations omitted).

²⁹⁵ See Hulnick, *supra* note 244, at 277.

²⁹⁶ One of the most difficult aspects of collecting HUMINT is the recruitment of foreign agents. HOLT, *supra* note 292, at 69. After identifying groups of people who are likely to have valuable information, the CIA must then identify persons within this group who are likely to be vulnerable to recruitment. *Id.* A variety of characteristics can make a target vulnerable, including any financial difficulties, political sympathies, or personal grudges he might have that make him easy prey for blackmail. *Id.*

Case officers must carefully cultivate potential agents without revealing their CIA connection because successful clandestine collection of foreign intelligence requires that officers responsible for developing agents maintain the secrecy of their true identity. See BRECKINRIDGE, *supra* note 265, at 120. They must have some plausible cover—some reason for being in the foreign nation—that deflects special attention. *Id.* at 121. Cover may be official (*e.g.*, holding a government job outside of the embassy) or non-official (often an ostensible position with a CIA-created and controlled business). *Id.* Although official cover makes contact with the government easier, it also makes discovery of one’s true identity easier. See *id.* at 122. Cultivating potential agents is a process that can take years before the CIA decides either to recruit or abandon them. HOLT, *supra* note 292, at 69. For a description of the two-step interview and recruitment approach once used by one station in the former West Germany, see George G. Bull, *The Elicitation Interview*, in *INSIDE CIA’S PRIVATE WORLD: DECLASSIFIED ARTICLES FROM THE AGENCY’S INTERNAL JOURNAL, 1955–1992*, at 63 (H. Bradford Westerfield ed., 1995).

Should the potential agent agree to spy for the CIA, indoctrination or even training will follow, depending on the maturity and experience of the agent. BRECKINRIDGE, *supra* note 265, at 123. The officer may, for example, provide training to enable the agent to mask his relationship with the officer. ARTHUR S. HULNICK, *FIXING THE SPY MACHINE* 35

tions involve so much risk to both case officers and potential agents.²⁹⁷ Due to the value of agents' contributions to intelligence gathering, the identities of agents are some of the most sensitive secrets of the intelligence community.²⁹⁸ If a source were disclosed, the organization that the source had penetrated could take steps to eliminate the source or to turn the source into a means of counter-intelligence.²⁹⁹ Subjecting the intelligence community's files to a prosecutor's disclosure obligation could force the government to reveal to international terrorist networks its sources and methods of surveilling terrorist organizations. This disclosure could, in turn, permit these groups to eliminate agents and engage in effective counterintelligence.

Despite the vast amount of money spent investigating international terrorism,³⁰⁰ intelligence on international terrorist networks is, and promises to remain, difficult to obtain.³⁰¹ The CIA has had extreme difficulty in collecting such information thus far.³⁰² Several obstacles stand in the way. One obstacle is the steady decline of HUMINT collectors over the past decade: between 1990 and 1996, the CIA reduced the number of "core HUMINT collectors" by over thirty percent.³⁰³ Current and former intelligence officers report that the CIA now possesses a "deteriorated human-intelligence capability that makes it almost impossible to penetrate key targets such as terrorist organizations and cripples U.S. efforts to detect and prevent terrorist

(1999). The case officer may train the agent how to use photographic and recording equipment, how to conceal documents, and how to communicate with the officer. *Id.*

²⁹⁷ LOWENTHAL, *supra* note 265, at 68. Gregory Treverton, senior policy analyst at RAND and former Vice Chair of the National Intelligence Council, observed that

spying . . . is a target-of-opportunity enterprise. What spies may hear or steal today, or be able to communicate to their American case officers, they may not hear or see or be able to get out tomorrow. What is decisive today may be unobtainable tomorrow. Worse, the crisis moments when information from spies is most valuable to us may be precisely when they are most exposed, when to communicate with them is to run the greatest risk of disclosing their connection to us.

TREVERTON, *supra* note 255, at 152.

²⁹⁸ HOLT, *supra* note 292, at 73.

²⁹⁹ *See id.*

³⁰⁰ *See supra* note 239.

³⁰¹ Vice Admiral Thomas Wilson, the Director of the Defense Intelligence Agency, testified before the Senate Select Committee on Intelligence that "[t]he characteristics of the most effective terrorist organizations—highly compartmented operations planning, good cover and security, extreme suspicion of outsiders, and ruthlessness—make them very hard intelligence targets." *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 24 (2000) (statement of Vice Admiral Thomas R. Wilson, Director, Defense Intelligence Agency).

³⁰² *See* Seymour M. Hersh, *What Went Wrong: The C.I.A. and the Failure of American Intelligence*, NEW YORKER, Oct. 8, 2001, at 34; J. Michael Waller, *Blinded Vigilance*, INSIGHT ON THE NEWS, Oct. 15, 2001, at 14; Dreyfuss, *supra* note 239, at 10.

³⁰³ *See INTELLIGENCE COMMUNITY IN THE 21ST CENTURY*, *supra* note 266, at 193.

attacks.”³⁰⁴ Another obstacle is the fact that the CIA’s HUMINT operations rely heavily on case officers operating under official cover,³⁰⁵ a designation that makes it virtually impossible for them to recruit agents with connections to terrorist organizations.³⁰⁶ However, even if the CIA were to attempt to modify its cover operations to penetrate international terrorist networks,³⁰⁷ it might not be able to find case officers willing to take the assignments under non-official cover.³⁰⁸ Moreover, even if case officers were willing to serve under non-official cover, virtually none of the case officers and agents remaining in the CIA has the appropriate cover or language training to penetrate terrorist cells or to recruit agents in foreign countries.³⁰⁹ This language

³⁰⁴ J. Michael Waller, *Ground Down CIA Still in the Pit*, INSIGHT ON THE NEWS, Oct. 1, 2001, at 19, 20. Congress has taken steps to remove limitations on source recruitment. President Bush signed legislation on December 28, 2001 directing the current Director of Intelligence to rescind guidelines previously established in 1995 by then Director of Intelligence John Deutch governing the use of foreign assets or sources with criminal or human rights concerns. See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 403, 115 Stat. 1394, 1403; Tim Weiner, *CIA Re-examines Hiring of Ex-Terrorist as Agent*, N.Y. TIMES, Aug. 21, 1995, at A1. These guidelines apparently led to the removal of hundreds of foreign agents from the CIA payroll, causing what one reporter described as a “devastating effect on anti-terrorist operations in the Middle East.” Hersh, *supra* note 302, at 40. In instructing the CIA director to rescind these rules, Congress stated that the previous guidelines failed to fully address the “challenges of both existing and long-term threats to United States security.” Intelligence Authorization Act for Fiscal Year 2002 § 403, 115 Stat. at 1403. The legislation directed the CIA director to issue new guidelines that

more appropriately weigh and incentivize risks to ensure that qualified field intelligence officers can, and should, swiftly and directly gather intelligence from human sources in such a fashion as to ensure the ability to provide timely information that would allow for indications and warnings of plans and intentions of hostile actions or events

and which “ensure that such information is shared in a broad and expeditious fashion so that, to the extent possible, actions to protect American lives and interests can be taken.” *Id.*

³⁰⁵ See CODEVILLA, *supra* note 264, at 306–09.

³⁰⁶ See Gerecht, *supra* note 241, at 40. Reuel Marc Gerecht, a former CIA operative experienced in Middle Eastern matters, argues that “[t]he only effective way to run offensive counterterrorist operations against Islamic radicals in more or less hostile territory is with ‘non-official-cover’ officers—operatives who are in no way openly attached to the U.S. government.” *Id.*

³⁰⁷ There is no indication yet that the CIA has altered these operations. See *id.* (“But as of late 1999 no program to insert NOCs [non-official-cover officers] into an Islamic fundamentalist organization abroad had been implemented, according to one . . . officer who has served in the Middle East.”).

³⁰⁸ TREVERTON, *supra* note 255, at 155 (“The disadvantages of nonofficial cover are that it is expensive and time-consuming to implement, and given the lack of diplomatic immunity, it is potentially dangerous.”).

³⁰⁹ For example, although the CIA does not disclose the number of specialists who speak a specific language, CIA sources with knowledge of the agency’s language capabilities say that there are approximately only four or five competent Arabic speakers in the entire CIA. Claire Berlinski, *English Only Spoken Here*, WKLY. STANDARD, Dec. 3, 2001, at 22, 22. Part of the problem appears to be that case officers who study Arabic in the United States often serve only a single two- to three-year tour before being rotated elsewhere, where they lose their language capabilities. *Id.* at 23.

barrier compounds the CIA's official-cover problem and severely restricts HUMINT capabilities in critical locations.³¹⁰ It will take time for the intelligence community to produce tangible results in improving its ability to monitor international terrorism.³¹¹

IV

A PROPOSAL FOR A LIMITED PROSECUTORIAL DUTY TO SEARCH THE GOVERNMENT FOR *BRADY* MATERIAL IN INTERNATIONAL TERRORIST PROSECUTIONS

The previous two Parts of this Note described the various standards that the courts of appeals have applied to determine the scope of a prosecutor's duty to search for *Brady* material. They further explained how, in light of the extensive interagency cooperation in the federal government's investigation of international terrorism, these standards could be construed to require a federal prosecutor to search the intelligence community's files in prosecutions of international terrorists. Responding to the disclosure threat posed by the circuit approaches, this Part sets out a standard for determining the scope of a prosecutor's duty to search the government for *Brady* material. The standard serves the government's interests in protecting classified information related to international terrorism investigations better than the current circuit approaches. This Part also explains how the proposed standard conforms to existing Supreme Court case law and implements all the policies that prosecutorial disclosure is intended to serve.

A. The Proposed Standard and Its Requirements

A federal prosecutor's duty to discover and disclose *Brady* material should extend to materials possessed by other arms of the federal government only if the following conditions are met: First, the government entity must have engaged in law enforcement activity under a prosecutor's direction and control in relation to the federal government's criminal investigation of the defendant. Second, if the first condition is met, then a prosecutor need search only those files containing materials produced as a result of the entity's law enforcement

³¹⁰ A House Intelligence Report accompanying the fiscal year 2002 bill to fund intelligence activities noted that "[i]ntelligence officers overseas often cannot contact and recruit key potential sources because they do not possess the requisite language skills." H.R. REP. NO. 107-219, at 19 (2001). Congress also has taken steps to reduce the language barrier. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 313, 116 Stat. 2391, 2391 (authorizing the creation of the National Virtual Translation Center).

³¹¹ Perhaps being optimistic, a retired CIA case officer experienced in Middle East affairs recently told a *Newsweek* reporter that it would take the CIA "six years to build an intelligence service capable of 'seeding' agents into the radical Islamic underworld." Thomas, *supra* note 241, at 36.

activity. Third, if the government entity engaged in law enforcement activities under the direction and control of a prosecutor's law enforcement investigative arm (as opposed to the prosecutor himself), then the defendant must request the exculpatory or impeachment material with enough specificity to indicate to the prosecutor both the material's location within the federal government and its nature.³¹²

These three conditions serve several valuable purposes. The first condition of the proposed standard requires that the material subject to a prosecutor's disclosure obligation be the product of law enforcement activity conducted under a prosecutor's direction and control.³¹³ This condition is designed both to ensure that a prosecutor has actual notice of the likelihood that another government entity may possess *Brady* material, and to create safe harbors for government agencies that do not wish to be subject to a prosecutor's disclosure obligation. The "direction and control" element of this condition recognizes that certain activities (e.g., intercepting electronic and telephonic communications, recording statements, and collecting materials for analysis) conducted by government entities not acting under a prosecutor's direction and control should not subject the entity to a prosecutor's disclosure obligation merely because its investigative activities in relation to someone who is or may become a criminal defendant resemble law enforcement activity designed to support a criminal investigation and prosecution. Unless the government entity conducts law enforcement activity under the direction and control of a prosecutor, there is no reasonable basis for concluding that the

³¹² One should not confuse this proposed standard with the prosecution team standard. The prosecution team standard gives no indication that a prosecutor need search only those files containing materials produced as a result of law enforcement activity conducted under the direction and control of a prosecutor. *See supra* Part II.A. Second, the prosecution team standard does not impose a specific request requirement in cases in which the government entity has not engaged in law enforcement activity under the direction and control of a prosecutor. *See supra* Part II.A. Thus, unlike the proposed standard, the prosecution team standard does not require that a prosecutor have actual notice in these circumstances as to the location and nature of the files that he is supposed to discover and disclose to the defendant.

³¹³ The "law enforcement" element of this condition recognizes that not all investigative activity conducted by a government entity in relation to someone who is or may become a criminal defendant is "law enforcement activity"—activity that is designed to assist in the prosecution of the defendant. Only that activity designed either to assist in the collection of evidence for use in a criminal prosecution or to provide trial assistance is "law enforcement activity." Such activities might include identifying and interviewing potential trial witnesses; taking witness statements for a prosecutor; contacting persons for the purpose of securing their testimony; conducting searches and seizures; collecting and analyzing demonstrative evidence; taking persons into custody for interrogation; discussing matters with federal prosecutors; and participating in a defendant's trial by providing testimonial, documentary, or demonstrative evidence. Of course, investigative activity conducted under the direction and control of a prosecutor almost certainly will be "law enforcement activity," for a prosecutor would have no other purpose in directing and controlling the activity than the furtherance of a criminal investigation or prosecution.

prosecution has notice that the entity might have evidence that qualifies as *Brady* material. In addition, the condition permits a government entity that wishes to avoid being subject to a prosecutor's disclosure obligations to a specific defendant (because, for example, it is itself investigating the defendant) to do so by avoiding a specific relationship with a prosecutor or by declining to engage in specific forms of investigative conduct under the prosecutor's direction and control.

The second condition of the proposed standard limits a prosecutor's search obligation to those files containing materials produced as a result of law enforcement activity conducted under a prosecutor's direction and control. This condition is designed to ensure that criminal defendants are not permitted (through a prosecutor) to search sensitive government documents indiscriminately. Limiting a prosecutor's search obligation to files containing materials produced as a result of directed and controlled law enforcement activity shields from a prosecutor's discovery and disclosure obligations those files not containing materials produced under those circumstances. Thus, under the proposed standard, if a government entity engages in both investigative activity under the direction and control of a prosecutor and also independent and undirected investigative activity, a prosecutor need search only those files containing materials produced as a result of the directed and controlled activity. In the context of the government's investigation of international terrorism, the proposed standard would permit elements of the intelligence community to structure their record retention procedures so that they could assist in an investigation without thereby exposing all of their materials relating to the target of a criminal investigation to a prosecutor's disclosure obligation.

The third condition requires defendants, in those cases in which a government entity has engaged in investigative activity on behalf of law enforcement but not under a prosecutor's direction and control, to bring the material within the prosecution's search obligation by requesting the material with sufficient specificity to indicate both its location within government and nature. The requirement is designed to limit the burden imposed by the *Brady* search duty by requiring that prosecutors be given some notice as to which arm of the government may possess *Brady* material. As noted in Part III.B, dozens of federal agencies are involved in the federal government's general investigation of international terrorism,³¹⁴ and even greater numbers of state and local law enforcement agencies may be involved in a particular federal investigation.³¹⁵ Although a federal prosecutor likely would

³¹⁴ See *supra* notes 260–63 and accompanying text.

³¹⁵ See *supra* note 262 and accompanying text.

know which arm of the government has taken the lead in investigating and collecting evidence on his behalf and under his direction and control,³¹⁶ he likely would not know the nature and extent of each and every federal, state, and local government entity's involvement in the federal investigation of a defendant, even if those entities engaged in activity under the direction and control of his law enforcement investigative arm. Consider the consequences, for example, if the FBI were to receive four hundred tips from anonymous sources, eleven different federal entities, and six foreign agencies in response to a public request for assistance during the course of a three-year FBI investigation of an international terrorist network. A general request for *Brady* material, alone, would not provide a prosecutor with sufficient notice of the potential existence of *Brady* material within the government. Unless the defendant directs the prosecution's attention toward a particular government entity and toward specific files within that entity, a general *Brady* request would be unreasonably burdensome. The prosecutor would be forced to devote his limited resources to searching indiscriminately each and every federal or state entity with a possible connection to the government's investigation of the defendant, and to identifying each of the thousands of records within those entities that may contain *Brady*—as opposed to merely *relevant*—material.³¹⁷

B. The Proposed Standard's Fidelity to Supreme Court Precedent

The scope of the prosecutorial duty to search for *Brady* material proposed in Part IV.A is consistent with *Brady* and its Supreme Court progeny. Because the specific request requirement that the proposed

³¹⁶ For a listing of all federal agencies making international terrorism referrals—495 referrals in all—to federal prosecutors between October 2001 and March 2002, see Transactional Records Access Clearinghouse, *supra* note 263. Attorney General guidelines provide that special agents heading any FBI investigation must maintain periodic contact with the appropriate federal prosecutor as circumstances require and as requested by the prosecutor, and must present all relevant facts to the federal prosecutor if an investigation warrants prosecution. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 11 (2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf>. These guidelines also provide that if an investigation produces credible information concerning criminal activity outside the FBI's investigative jurisdiction, the FBI field office must, subject to some exceptions, transmit the information or refer the complaint to law enforcement agencies having jurisdiction. *Id.* at 11–12. A similar prosecutorial notice requirement applies when the FBI conducts a terrorism enterprise investigation, which is designed to obtain information concerning the nature and structure of a specific terrorist enterprise. *See id.* at 17.

³¹⁷ Recall that *Brady* material is evidence that is material to guilt or punishment; only evidence whose nondisclosure would undermine confidence in a trial result is *Brady* material. *See* *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

standard imposes in certain circumstances is likely to arise often,³¹⁸ and because, on its face, the requirement is the one most likely to be characterized as inconsistent with Supreme Court precedent, this subpart discusses it first. Section 2 discusses the fidelity of the other limitations to Supreme Court precedent.

1. *The Specific Request Requirement*

Supreme Court precedent does not foreclose the imposition of a specific request requirement in cases in which a government entity has engaged in law enforcement activity not under a prosecutor's direction and control, but rather on behalf of law enforcement entities. *Brady* itself held that "the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment."³¹⁹ Nevertheless, in *Agurs*, the Supreme Court held that a prosecutor must disclose *Brady* material even if he receives no *Brady* request at all. However, the *Agurs* opinion clearly indicates that the Court understood this duty to be limited to materials in a prosecutor's actual possession:

In many cases, . . . exculpatory information *in the possession of the prosecutor* may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better *notice* than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence *in the hands of the prosecutor*. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.³²⁰

One could fairly construe *Agurs* to require that a prosecutor disclose *Brady* material in his possession even absent a specific request, given that *Agurs* involved *Brady* material knowingly possessed by a prosecutor.³²¹ One cannot, however, fairly construe *Agurs* to require that a prosecutor search also for *Brady* material not in his knowledge or possession in the absence of a specific *Brady* request. In other words, a

³¹⁸ As one may imagine, in the context of an international terrorism investigation (and perhaps any investigation), the intelligence community likely would be involved long before the investigation reaches the point at which the lead investigative entity—most likely the FBI—would refer the matter to a prosecutor. Thus, in any given terrorism investigation, the intelligence community's involvement might be limited to pre-referral liaisons with a federal law enforcement agency, not a federal prosecutor.

³¹⁹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added).

³²⁰ *United States v. Agurs*, 427 U.S. 97, 106–07 (1976) (emphases added).

³²¹ *See id.* at 101 (noting that although the government argued on appeal only that the prosecutor had no duty to disclose absent a request, it apparently did not argue that the prosecutor lacked knowledge or possession of *Brady* material).

fair reading of *Agurs* compels the conclusion that the Court did not require a *Brady* request in that case for the sole reason that the prosecution already had notice of the *Brady* materials in its possession.³²²

Although its *Agurs* opinion appeared to limit the circumstances in which a prosecutor must produce *Brady* material absent a request, the Supreme Court subsequently, and without justification, construed *Agurs* to require that a prosecutor search for *Brady* material not within his knowledge or possession even in the absence of a specific *Brady* request. In *Bagley*, which found that a prosecutor had suppressed evidence, the Court relied on *Agurs* for the proposition that a prosecutor violates his *Brady* obligations regardless of whether the defendant has made a request for *Brady* material "if there is a reasonable probability that, had the evidence [possessed by the government] been disclosed to the defense, the result of the proceeding would have been different."³²³ For two reasons, however, one should not construe *Bagley* as controlling law on the specific request issue in cases in which the government entity to be searched is not the prosecution's investigative arm. First, because the defendant in *Bagley* had in fact made a specific request for the undisclosed material,³²⁴ the issue of whether a defendant must make a specific *Brady* request in cases in which the prosecution has neither knowledge nor possession of *Brady* material was not before the Court. Therefore, the Court's broad assertion is mere dictum. Second, even if the Court's dictum were binding, because the alleged prosecutorial nondisclosure in *Bagley* involved evidence known only to and held by the prosecutor's law enforcement investigative arm,³²⁵ it is not clear how *Bagley*'s enunciated rule—that a pros-

³²² The Supreme Court's *Giglio* opinion also failed to indicate whether a defendant is required to make a specific request for *Brady* material. See *Giglio v. United States*, 405 U.S. 150 (1972). However, *Giglio* does not provide any inferential guidance on this issue because, like *Agurs*, *Giglio* involved *Brady* material in the actual possession of the prosecution. *Id.* at 150–51.

³²³ *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Court relied on *Bagley*'s search requirement language in two subsequent cases. In *Pennsylvania v. Ritchie*, the Court relied on *Bagley* for the proposition that "the obligation to disclose exculpatory material does not depend on the presence of a specific request." 480 U.S. 39, 58 n.15 (1987). The *Ritchie* Court came to this unwarranted conclusion even though the defendant in the case had made a specific request for material within the possession of an investigative agency (material that the agency sought to protect from disclosure), and even though the material was known only to and held by the prosecutor's investigative arm. See *id.* at 43, 44 n.4. The Court relied on *Bagley* again in *Kyles v. Whitley* for the proposition that "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" 514 U.S. 419, 433–34 (1995) (quoting *Bagley*, 473 U.S. at 682). Like the *Ritchie* Court, the *Kyles* Court came to this conclusion even though the defendant made a general request for exculpatory and impeachment material, and even though the material was known only to and held by the prosecutor's investigative arm. See *id.* at 428, 438.

³²⁴ See *Bagley*, 473 U.S. at 669–70.

³²⁵ See *id.* at 669–71.

ecutor may be guilty of suppressing evidence not known to or possessed by him even absent a specific request—follows from the Court’s holding in *Agurs*. *Agurs* eliminated *Brady*’s specific request requirement only in those cases in which obviously exculpatory material is within a prosecutor’s actual knowledge and possession,³²⁶ presumably because it is only in this circumstance that a prosecutor already has notice of the material. In *Bagley*, on the other hand, the prosecutor did not know of or possess any obviously exculpatory material, and, therefore, absent a specific request by the defendant, the prosecutor could not have had notice of *Brady* material in the government’s possession. Thus, the universal no-request-needed rule announced in *Bagley* does not, contrary to the Court’s suggestion, follow from *Agurs*. Moreover, if the *Bagley* Court meant to extend *Agurs*’s scope, it offered no rationale for the extension. For these reasons, the Court should not construe *Bagley* as deciding the issue of whether a prosecutor violates his *Brady* obligations by failing to disclose *Brady* material not known to or possessed by him or his investigative arm in cases in which a defendant fails to give the prosecution notice of the material by making a specific request.

2. *The Law Enforcement Activity Under Prosecutorial Direction and Control Limitation*

Nor does Supreme Court precedent foreclose the proposed standard’s condition that the prosecution need search only those government entity files produced as a result of law enforcement activity under the direction and control of the prosecution. Recall that in *Kyles*, which involved a prosecutor’s failure to discover and disclose *Brady* material possessed by his investigative arm—the police³²⁷—the Court did not explain its statement that a prosecutor’s duty to search the government for *Brady* material extends to entities “acting on the government’s behalf.”³²⁸ Certainly nothing in *Kyles* or in any other *Brady* case compels the conclusion that a government entity surveilling persons monitored also by law enforcement is “acting on the government’s behalf” for *Brady* purposes in those cases in which the government entity is not acting under a prosecutor’s direction and control for the purpose of producing evidence for a criminal prosecu-

³²⁶ See *supra* notes 320–22 and accompanying text.

³²⁷ See *Kyles*, 514 U.S. at 438.

³²⁸ *Id.* at 437. Accord *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002).

tion.³²⁹ All of the Supreme Court's *Brady* cases, including *Ritchie*,³³⁰ involved *Brady* material possessed either by a prosecutor or by law enforcement entities acting in law enforcement capacities under the direction and control of a prosecutor—as agents for the collection of evidence on behalf of a prosecutor for use in criminal prosecutions.³³¹ These are important factual characteristics because the Court, in requiring the prosecutor in each of those cases to discover and disclose *Brady* materials not within her possession or knowledge, did not (1) compel a law enforcement agency to act in a capacity in which it was neither institutionally nor financially able or willing to act;³³² (2) cre-

³²⁹ Assisting law enforcement in its investigation of a defendant absent a request or prosecutorial direction and control should not alone be sufficient to extend a prosecutor's search obligation to the intelligence community. Without prosecutorial direction and control, any form of investigative assistance by the intelligence community related to the target of a law enforcement investigation, such as the provision of a single anonymous tip, could be construed as the kind of assistance that opens up all of the intelligence community's files to the defendant.

³³⁰ The Court's *Ritchie* opinion indicates that the outside agency—the Pennsylvania Children and Youth Services (CYS)—was the state entity responsible for investigating violations of laws against the mistreatment and neglect of children. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987). In Pennsylvania at the time the Court decided *Ritchie*, child mistreatment investigations were not handled by the police but instead were handed off to CYS. See *id.* (“The girl reported the incidents to the police, and the matter then was referred to the CYS.”). Then-existing Pennsylvania law suggests that CYS was in the habit of passing its investigative files on to the prosecution. See *id.* at 43–44 n.2. Thus, although CYS was not officially a law enforcement entity, CYS appeared to act as a law enforcement entity for *Brady* purposes because it regularly collected evidence on behalf of the prosecution for use in criminal prosecutions, a function which gave rise to an institutional relationship with the prosecution from which one could imply direction and control.

³³¹ See *Strickler v. Greene*, 527 U.S. 263, 273–75 (1999); *Kyles*, 514 U.S. at 437–38; *Ritchie*, 480 U.S. at 43–44; *United States v. Bagley*, 473 U.S. 667, 669–72 (1985); *United States v. Agurs*, 427 U.S. 97, 100–01, 106–07 (1976); *Moore v. Illinois*, 408 U.S. 786, 791–95 (1972); *Giglio v. United States*, 405 U.S. 150, 152, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 84 (1963). In fact, unlike the intelligence community's investigation of international terrorism, the law enforcement investigations in the Supreme Court's *Brady* cases discussed in Part I would not have occurred but for the prosecution's need for admissible evidence. The intelligence community, on the other hand, has a non-law-enforcement purpose for conducting its investigation of international terrorism that is independent of law enforcement's need to obtain admissible evidence. See 50 U.S.C. § 403-3(d)(1) (2000) (providing that the Director of Central Intelligence Agency shall “collect intelligence through human sources and by other appropriate means”); *id.* § 401a (defining *foreign intelligence* as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons”); Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (directing the intelligence community to “conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States,” including the “[c]ollection of information concerning, and the conduct of activities to protect against, intelligence activities directed against the United States, international terrorist and international narcotics activities, and other hostile activities directed against the United States by foreign powers, organizations, persons, and their agents”).

³³² For a comparison of the functions and methods of the intelligence community as opposed to that of law enforcement, see INTELLIGENCE COMMUNITY IN THE 21ST CENTURY, *supra* note 266, at 272–78. Treating the intelligence community as an arm of the prosecu-

ate a relationship between the prosecution and a law enforcement agency that did not previously exist;³³³ (3) require a law enforcement agency to produce materials that it had not already produced;³³⁴ or (4) jeopardize a law enforcement agency's ability to fulfill its institutional purpose.³³⁵ With the exception of *Ritchie*, which discusses the fourth implication,³³⁶ none of the Court's *Brady* cases discusses the above implications of extending a prosecutor's duty to search for *Brady* material beyond his investigative arm. Thus, it is not clear that *Kyles*, or any other Supreme Court *Brady* case, would compel the courts to extend a prosecutor's search obligation to the intelligence community in cases in which the conditions discussed in Part IV.A are not met; i.e., if the intelligence community is not acting as a law enforcement entity under a prosecutor's direction and control in relation to a criminal investigation and prosecution.

tion by including its files within a prosecutor's disclosure obligation undoubtedly would increase the costs of maintaining secrecy because it would require the intelligence community to implement new procedures for the collection and storage of investigative records. For example, the intelligence community would want to create and implement procedures to ensure that employees separate materials produced as a result of engaging in law enforcement activity under the direction and control of a prosecutor or law enforcement from materials that are not, even if both materials relate to the same target. Moreover, the intelligence community presumably would have to devote more of its legal resources to making determinations regarding which materials belong in which files. For an overview of the costs associated with protecting government secrets from disclosure, see REPORT OF THE COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, S. DOC. NO. 105-2, at 1-16 (1997), <http://www.access.gpo.gov/congress/commissions/secrecy>.

³³³ Imposing on the intelligence community the same disclosure obligations as law enforcement regardless of the nature of its relationship with law enforcement would effectively treat spies like police—it would create the impression that the intelligence community is just another arm of the prosecution's office. This would give the Attorney General an interest in influencing the intelligence community's collection requirements and procedures—an interest presently reserved to the Director of Intelligence and the President.

³³⁴ If the courts were to extend a prosecutor's discovery and disclosure obligation to the intelligence community, the intelligence community would no longer be solely in the business of gathering intelligence for use by the President: it would also be in the business of gathering evidence for prosecutors for use in criminal prosecutions. Thus, the intrinsic nature of the intelligence community's work product would be altered.

³³⁵ Compelling a prosecutor to search his evidence-collecting arm does not jeopardize that arm's ability to collect evidence in the future in the same way that forcing a prosecutor to search an intelligence-collecting arm of the federal government jeopardizes that arm's ability to collect intelligence. The intelligence community relies on confidential informants for much of its information. See *supra* notes 293-94. A source would be less willing to relay intelligence were he to believe that his relationship with the intelligence community could be discovered and disclosed by a prosecutor searching through intelligence community files for information to pass on to criminal defendants.

³³⁶ See *Ritchie*, 480 U.S. at 60-61.

C. The Proposed Standard's Fidelity to the Policies Underlying Prosecutorial Disclosure

Not only is the proposed standard outlined in Part IV.A consistent with Supreme Court precedent, it is also better suited to serve the policies underlying prosecutorial disclosure than any of the existing circuit approaches. As discussed in Part I, the prosecution's duty to search for and disclose exculpatory or impeachment evidence in the possession of some arm of the government is intended to implement several policies. These policies include the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (*i.e.*, preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions.³³⁷ Any standard controlling the scope of a prosecutor's search duty must respect all of these policies.

The circuit split discussed in Part II regarding the appropriate scope of a prosecutor's duty to search for *Brady* material possessed by some arm of the government reveals that the lower courts have no common understanding of the policies that *Brady* disclosure aims to effectuate. More specifically, the courts of appeals define the scope of *Brady*'s search requirement in ways that effectively implement one policy to the neglect of other policies. The line of decisions following the prosecution team standard,³³⁸ for example, reflects those courts' implicit understanding that disclosure is intended primarily to prevent prosecutorial negligence. If these courts had understood *Brady*'s search requirement also to be a mechanism for ensuring the accuracy of criminal convictions and for preventing harm to defendants, they would not have limited the prosecution's discovery and disclosure obligation only to those law enforcement entities acting under a prosecutor's direction and control in a particular criminal investigation.³³⁹ It is certainly not difficult to imagine that a government entity unrelated to a particular criminal investigation and prosecution (or even a prosecutor's investigative arm) might possess *Brady* material related to a specific defendant's prosecution that is the product of a separate, unrelated investigation of the defendant, especially in cases involving repeat offenders or organized crime rings. That *Brady* disclosure is not intended solely to prevent prosecutorial misconduct, however, is evident from express language in the Supreme Court's opinions. If *Brady*'s sole aim were to prevent prosecutorial misconduct, why would the Supreme Court have held that a prosecutor's good or bad faith in suppressing evidence is irrelevant? Under *Brady*, a prosecutor who innocently overlooks *Brady* material in his possession is no less culpable

³³⁷ See *supra* Part I.A.

³³⁸ See *supra* Part II.A.

³³⁹ See *supra* Part II.A.

than a prosecutor who intentionally withholds exculpatory or impeachment evidence from the defendant.³⁴⁰

The line of decisions following the availability/accessibility standard,³⁴¹ on the other hand, reflect those courts' implicit understanding that the disclosure rule is intended primarily to prevent harm to defendants and to ensure the accuracy of criminal convictions. These courts' lack of attention to the policy of preventing prosecutorial misconduct is apparent from the almost unlimited scope of the search duty they impose and from their failure to discuss the issues of notice and administrative burden in their opinions.³⁴² That *Brady* disclosure is not intended merely to ensure that defendants are not harmed and that criminal convictions are accurate, however, is evident from the express limits on the *Brady* disclosure obligation. If *Brady*'s sole aim were to prevent harm to defendants, why would the Supreme Court have limited the discovery and disclosure requirement to materials within the government's possession? Under *Brady*, if a prosecutor were to suspect, for example, that a private third party might have information that corroborates some aspect of the defendant's theory, he would have no obligation to search for and subsequently disclose this information to the defendant.³⁴³ Moreover, why would the Supreme Court limit the prosecution's discovery and disclosure duties to *material* evidence—evidence that, if disclosed, gives rise to a reasonable probability that the trial result would have been different?³⁴⁴ Under *Brady*, if a prosecutor were aware of evidence in the possession of the police that could be used to undermine the state's theories of guilt but which is not so significant that its nondisclosure would undermine confidence in the trial's result, the prosecutor would have no obligation under *Brady* to discover and disclose this evidence.³⁴⁵ *Brady* imposes these limitations even though nondisclosure certainly harms a defendant deprived of the opportunity to use every shred of evidence to his advantage in these circumstances.

³⁴⁰ See *supra* note 51 and accompanying text; see also *United States v. Agurs*, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." (footnote and citation omitted)).

³⁴¹ See *supra* Part II.B.

³⁴² See *supra* Part II.B.

³⁴³ Cf., e.g., *United States v. Woodruff*, 296 F.3d 1041, 1043 n.1 (11th Cir. 2002) ("To establish a *Brady* violation, the defendant must show . . . that the government possessed evidence favorable to the defendant . . ."); *United States v. Hughes*, 211 F.3d 676, 688 (1st Cir. 2000) (holding that a prosecutor had no obligation to disclose evidence possessed by foreign entity because the government had no control over the evidence).

³⁴⁴ See *supra* notes 62–63, 67 and accompanying text.

³⁴⁵ See *supra* note 63 and accompanying text.

The search standard proposed in Part IV.A, which requires greater prosecutorial notice, minimizes the administrative burden posed by a prosecutor's *Brady* obligations and provides safe harbors for government entities not wishing to come under a prosecutor's disclosure duty. Moreover, the standard implements *all* the policies that disclosure is intended to serve—preserving the adversarial system of justice, preventing prosecutorial misconduct, preventing harm to defendants, promoting public confidence in criminal convictions, and ensuring the administration of accurate convictions.

1. *Preserving the Adversarial System of Justice*

By requiring that defendants make specific requests in those cases in which the government entity thought to possess *Brady* material has acted under the direction and control of law enforcement rather than a prosecutor, the proposed standard preserves the adversarial system of justice. The criminal justice system seeks to implement the criminal laws in a way that effectuates not only substantive goals but also process goals.³⁴⁶ Among these process goals is the preservation of the adversarial system of adjudication.³⁴⁷ Under the adversarial system of adjudication, each party is responsible for investigating the facts. It is commonly believed that adversaries will discover more facts and transmit more useful information to the fact finder using this approach.³⁴⁸ Indeed, the discovery process itself is adversarial in nature. For example, the federal discovery rules condition a prosecutor's right to discovery on the defendant's exercise of his rights to discovery³⁴⁹ (with the exception of cases involving the public alibi, insanity, or public-authority defense provisions).³⁵⁰ In addition, a prosecutor is not obligated to disclose to a defendant all evidence that might be helpful to him, but only that evidence which the

³⁴⁶ For a discussion of the criminal law's process goals, see 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 1.6 (1984).

³⁴⁷ See *id.* § 1.6(a), at 37–42.

³⁴⁸ *Id.* § 1.6(a), at 38, 40; see also Zacharias, *supra* note 37, at 56 (describing various justifications for the adversarial model and observing that “[w]hen the various justifications for the adversary system are considered as a whole, one can see that the ‘justice’ it strives for has several elements” and that “[a]scertaining the true facts is not the only or paramount goal. Fairness and respect for client individuality play an equal part, even though full assertion of client rights may interfere with truth-seeking. Efficient fact-finding also is an important objective”).

³⁴⁹ See FED. R. CRIM. P. 16(b)(1) (discussing information subject to disclosure by the defendant). For example, the Federal Rules of Evidence permit the prosecution to seek from the defense any scientific reports produced by the defense in connection with the case only after the defendant has exercised his right to obtain similar reports from the prosecution. See FED. R. CRIM. P. 16(b)(1)(B). For a discussion of reciprocal and conditional discovery, see 2 LAFAVE & ISRAEL, *supra* note 346, § 19.4(d), at 517–19.

³⁵⁰ See FED. R. CRIM. P. 12.1, 12.2, 12.3.

prosecution is statutorily and constitutionally required to disclose.³⁵¹ Any other discovery approach would transform the American adversarial system of justice into an inquisitorial system, in which the development of relevant facts is primarily the state's responsibility.³⁵² Therefore, to preserve the adversarial nature of the discovery process and to enable the parties to discover as many relevant facts as possible, courts should adopt a *Brady* search standard that requires the participation of both parties. The standard proposed in Part IV.A seeks to achieve these goals by distributing the burden of discovering *Brady* material not known to or possessed by a prosecutor or his investigative arm between both the prosecutor and the defendant. Moreover, not only does this standard make it more likely that the prosecution will discover *Brady* material in the federal government's possession, the specific request requirement also limits a prosecutor's administrative burden by not imposing a duty to search every federal agency that may be involved in the government's general investigation of international terrorism.

2. Preventing Prosecutorial Misconduct

By clearly requiring that a prosecutor search a government entity for *Brady* material only if the entity has engaged in law enforcement activity under her direction and control or if the defendant has made a specific request indicating the location and nature of the material, the proposed standard prevents prosecutorial misconduct. Prosecutors are held to the highest ethical standards. As the Supreme Court observed in *Agurs*:

For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."³⁵³

A prosecutor, though she is required to comply with various legal and ethical requirements in criminal proceedings,³⁵⁴ presumably could engage in a variety of forms of misconduct during the course of a prosecution, including knowingly using false testimony; delaying disclosure of, suppressing, manipulating, or fabricating evidence; coer-

³⁵¹ See 2 LAFAYE & ISRAEL, *supra* note 346, § 19.3.

³⁵² Cf. 1 LAFAYE & ISRAEL, *supra* note 346, § 1.6, at 38 (comparing the inquisitorial system of continental Europe with the American adversarial system).

³⁵³ *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); see also 1 AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 3-1.1, at 6–8 (2d ed. 1986) (discussing the function of prosecutors).

³⁵⁴ See generally David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3008–27 (1999) (discussing prosecutors' ethical and legal disclosure obligations).

ing witnesses; prosecuting baseless charges; or otherwise neglecting her legal and ethical obligations.³⁵⁵ Not only is preventing prosecutorial misconduct a worthy ethical goal in and of itself, preventing prosecutorial misconduct in the *Brady* context enables courts to implement the other policies underlying *Brady*—preserving the adversarial system of justice, ensuring the accuracy of convictions, promoting public confidence in trial results, and ensuring that defendants are treated fairly. If they wish to prevent prosecutorial misconduct, courts must minimize opportunities for prosecutors to neglect their obligation to discover and disclose *Brady* material not in their possession or knowledge. Because the proposed standard gives both the prosecution and the court a concrete standard for determining where the prosecutor must look and what she must look for, it is less likely that a prosecutor will intentionally or negligently fail to meet her prosecutorial disclosure obligations and thereby deceive both the defendant and the court. In other words, if confusion as to the scope and extent of the prosecution's search duty is minimized, and the burden imposed by an unlimited prosecutorial search obligation is lessened, a prosecutor's office will be less able to use confusion or administrative burden as an excuse for not disclosing information to a defendant.

3. *Promoting Public Confidence in Criminal Convictions*

By clearly requiring that a prosecutor search all government entities that have engaged in law enforcement activity under his direction and control, the proposed standard does not undermine public confidence in criminal convictions. The need to preserve the appearance of fairness in criminal trials is as important as providing fair procedures to defendants. As the Supreme Court has stated, "justice must satisfy the appearance of justice."³⁵⁶ In the *Brady* context, preserving the appearance of fairness requires only that a prosecutor discover and disclose all *Brady* material known to and possessed by him or his investigative arm. The proposed standard promotes public confidence in the fairness of criminal trials and the accuracy of criminal convictions by requiring that a prosecutor search for and disclose all exculpatory or impeachment material known to and possessed by gov-

³⁵⁵ For a chart of the most common forms of police and prosecutorial misconduct leading to wrongful convictions, see Innocence Project, Police and Prosecutorial Misconduct, <http://www.innocenceproject.org/causes/policemisconduct.php> (last visited Apr. 9, 2003).

³⁵⁶ *Offutt v. United States*, 348 U.S. 11, 14 (1954); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) ("In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." (quoting *The Writings and Speeches of Daniel Webster*)).

ernment entities that engage in law enforcement activities under a prosecutor's direction and control. The intelligence community is generally understood not to serve the same law enforcement function as the FBI, which collects evidence on behalf of federal prosecutors for use in criminal prosecutions.³⁵⁷ Therefore, the public is unlikely to lose confidence in criminal convictions simply because the prosecution is not (absent a specific request) required to search the files of government entities, like those within the intelligence community, that have not engaged in law enforcement activities under a prosecutor's direction and control.

4. *Ensuring the Administration of Accurate Convictions*

By removing from the scope of a prosecutor's search obligation (absent a specific request) any entity that has not engaged in law enforcement activities under her direction and control, the proposed standard does not undermine courts' ability to administer accurate convictions. The Supreme Court has stated that "[t]he basic purpose of a trial is the determination of truth,"³⁵⁸ and that "[d]iscovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. [It serves] . . . the broader public interest in a full and truthful disclosure of critical facts."³⁵⁹ Yet one must understand a trial's truth-seeking purpose within the constraints imposed by the Constitution and by criminal law, both of which provide various rules and procedures that, when applied, functionally impede the truth-seeking function of a criminal trial. For example, the Constitution permits defendants to refuse to testify at trial³⁶⁰ and constrains the prosecution's power to search for relevant evidence.³⁶¹ In addition, the Federal Rules of Criminal Procedure prevent prosecutors from conducting discovery against defendants unless the defendant first attempts to discover evidence in the government's possession.³⁶² Moreover, courts routinely suppress incriminating but unlawfully obtained

³⁵⁷ For a discussion of the differences between the FBI's and CIA's functions, see INTELLIGENCE COMMUNITY IN THE 21ST CENTURY, *supra* note 266, at 275-77.

³⁵⁸ *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966); *see also* *Estes v. Texas*, 381 U.S. 532, 540 (1965) ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial.").

³⁵⁹ *Taylor v. Illinois*, 484 U.S. 400, 411-12 (1988). In *United States v. Nixon*, the Supreme Court observed that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive." Consequently, "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." 418 U.S. 683, 709 (1974).

³⁶⁰ *See* U.S. CONST. amend. V.

³⁶¹ *See* U.S. CONST. amend. IV.

³⁶² *See* FED. R. CRIM. P. 16(b).

demonstrative evidence under exclusionary rules,³⁶³ and often prevent the admission of highly relevant and probative testimonial evidence based on assertions of privilege.³⁶⁴ These constraints and exclusions demonstrate that courts must often decline to fully promote the truth-seeking function of a criminal trial in order to implement other important policies. In the *Brady* context, the judicial desire to ensure the accuracy of criminal convictions³⁶⁵ must be understood in light of the express limitations that the Supreme Court has placed on the prosecution's search duty—the materiality requirement and the requirement that the material be in the government's possession. The fact that courts do not require prosecutors to search for and disclose evidence that would be merely helpful to defendants,³⁶⁶ or to search for and disclose *Brady* material not in the government's possession,³⁶⁷ indicates that courts are not willing to disregard the other policy considerations underlying *Brady* in an effort to maximize accuracy in criminal convictions. It is no surprise, then, that the *Kyles* Court did not conclude that the accuracy of convictions would be threatened by its holding that a prosecutor's duty to search for *Brady* material is limited to entities that investigate crimes on her behalf.³⁶⁸ Therefore, one should not infer in cases in which the conditions of the proposed standard are not met and, therefore, in which the prosecution has no duty to search the intelligence community for *Brady* material, that the policy of ensuring the accurate administration of convictions has not been given effect. Rather, one should understand courts in these circumstances as merely giving limited effect to

³⁶³ For discussion of the exclusionary rules and other truth-impairing procedures, see generally 1 LAFAVE & ISRAEL, *supra* note 346, §§ 9.1–10.6; Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1374–85 (1991).

³⁶⁴ See FED. R. EVID. 501.

³⁶⁵ One commentator questions whether the Supreme Court's *Brady* cases demonstrate any desire to ensure the accuracy of criminal convictions. Tom Stacy argues that any conception of accurate adjudication has two components, one relating to "error-avoidance," which concerns whether a given procedure minimizes the total number of erroneous verdicts, and one relating to "error-allocation," which concerns how a given procedure allocates errors between erroneous convictions and erroneous acquittals. Stacy, *supra* note 363, at 1406–07. Any conception of accurate adjudication, he argues, must decide whether and to what extent either of these two components—error-avoidance or error-allocation—will be more important. *Id.* at 1407. Stacy observes that criminal procedure traditionally has taken an innocence-weighted approach (which views erroneous convictions as worse than erroneous acquittals) to error-allocation that regards error-allocation as more important than error-avoidance. *Id.* at 1408. He observes, however, that the Supreme Court's materiality requirement in the *Brady* context deviates from criminal procedure's innocence-weighted approach: "[T]he [materiality] standard increases the number of erroneous verdicts and violates a conception of accuracy emphasizing either error-avoidance or an innocence-weighted approach to error-allocation." *Id.* at 1417 (footnote omitted).

³⁶⁶ See *supra* Part I.A.

³⁶⁷ See *supra* Part I.B.

³⁶⁸ Cf. *supra* note 119 and accompanying text (describing the search duty imposed by *Kyles*).

the policy due to a need to implement the other policies underlying the *Brady* decision.

5. *Preventing Harm to Defendants*

Finally, defendants are not harmed—in the sense that they are not deprived of a fair trial—simply because a prosecutor's search obligation does not (absent a specific request) extend beyond those government entities that have engaged in law enforcement activities under his direction and control. As discussed in Part I.A, the *Brady* Court understood harm to defendants in terms of prosecutorial misconduct, accuracy of convictions, and deception of the court.³⁶⁹ As discussed throughout this subpart, the proposed standard implements all of these policies.³⁷⁰ Moreover, because harm to defendants may also include unfair surprise at trial,³⁷¹ it should be noted that the proposed standard does not increase the likelihood of unfair surprise because it does not deprive defendants of *Brady* material within a prosecutor's possession or within the possession of the prosecution's investigative arms. Prosecutors gain no evidentiary advantage by virtue of the limited search obligation, and neither defendants nor the courts are defrauded by prosecutors who may in fact have access to materials to which they claim to have no access.

CONCLUSION

Law enforcement's ability to investigate international terrorism is in a precarious state. Thus, the effective investigation of international terrorism requires extensive cooperation among government agencies. Because disclosure of intelligence community files to suspected international terrorists could undermine the government's ability to monitor and penetrate terrorist networks, imposing on prosecutors the duty to search for and disclose *Brady* material within intelligence community files, regardless of the nature of the intelligence community's relationship to the prosecution, could eviscerate the government's already limited ability to investigate international terrorism effectively. The *Brady* search standards adopted by the courts of appeals have the potential to do just that. For this reason, courts can and must adopt a construction of the Supreme Court's line of *Brady*

³⁶⁹ See *supra* notes 47–53 and accompanying text.

³⁷⁰ See *supra* Part IV.C.2–4.

³⁷¹ The purpose of discovery is, in part, to avoid unfair surprise. See FED. R. CRIM. P. 16 advisory committee's note (stating that "broad discovery contributes to the fair and efficient administration of criminal justice by . . . minimizing the undesirable effect of surprise at the trial"). Accordingly, the Supreme Court has stated that "the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." *Taylor v. Illinois*, 484 U.S. 400, 411 n.16 (1988).

cases that limits a prosecutor's duty to search government entities for exculpatory or impeachment material if the federal courts—as opposed to military tribunals—are to function as the appropriate forum for the prosecution of international terrorists. Such an approach would impose on a prosecutor a duty to search government entities not acting under his direction and control for *Brady* material only if a defendant requests the material with enough specificity to indicate both its location within government and its nature, and would require a prosecutor to search only those files that are the product of law enforcement activities conducted under his direction and control and in relation to a specific criminal investigation. In other words, a prosecutor should be required to search the files of government entities only if those entities have acted in a law enforcement capacity under his direction and control. Only this limited approach implements all of the policies that disclosure is intended to serve—preserving the adversarial system of justice, preventing prosecutorial misconduct, preventing harm to defendants, promoting public confidence in criminal convictions, and ensuring the administration of accurate convictions—while simultaneously serving the government's interest in preventing the disclosure of classified information relating to suspected international terrorists.

The necessity of adopting a limited prosecutorial obligation to search the government for *Brady* material cannot be understated, for a government unable to prosecute certain classes of offenses in its courts is left with no other option but to attempt prosecution in another forum or to avoid prosecution altogether.³⁷² Trying interna-

³⁷² The U.S. government could pursue a variety of extra-judicial strategies to prevent international terrorism. See Raphael F. Perl, Cong. Research Serv., Pub. No. IB95112, *Terrorism, the Future, and U.S. Foreign Policy* 4 (2001), http://www.fpc.gov/CRS_REPS/tf1217.pdf (discussing the policy framework through which past administrations have responded to terrorism and the dilemmas of these approaches). For example, the government could take diplomatic or economic action to persuade foreign states and organizations to assist in the war on terrorism. Congress already has granted the President authority to take such action. See *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, § 324, 110 Stat. 1214, 1255 (finding that

because the United Nations has been an inadequate forum for the discussion of cooperative, multilateral responses to the threat of international terrorism, the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism, including efforts to strengthen international sanctions, and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism

); see also *International Security and Development Cooperation Act of 1985* § 505, 22 U.S.C. § 2349aa-9 (2000) (granting the President the power to ban the importation of any goods or services from any country that supports terrorism); *International Emergency Economic Powers Act of 1978*, 50 U.S.C. §§ 1701–1706 (empowering the President to regulate international financial transactions in times of emergency). Specifically, the United States could seek to persuade foreign nations to criminalize international terrorists activities, investigate them—with or without help from U.S. law enforcement—and then either prose-

tional terrorists in alternative fora is precisely what President Bush has proposed to do in creating military tribunals. However, this approach raises several concerns, the most significant of which is that secret trials may undermine the legitimacy of the war against terrorism. If other nations begin to perceive the tribunals as unjust mechanisms for exacting arbitrary retribution, they may be less willing to cooperate with the United States in the war on terrorism.³⁷³ In addition, trying non-citizens under different standards than those that Americans would face for similar crimes increases the chances that Americans tried abroad may face the same double standard in the future.³⁷⁴ Finally, trying suspected international terrorists under rules inconsistent with traditional notions of due process undermines the authority of constitutional principles and sets a precedent for future prosecutions of other crimes in alternative fora whenever the nation faces unusual challenges. In light of the threat to the integrity of the criminal justice system posed by criminal prosecutions in military tribunals, the

cute terrorists themselves or extradite them to some nation that will. Alternatively, the government could initiate covert paramilitary operations—action deigned to produce a particular result in a foreign country while concealing U.S. involvement. See HOLT, *supra* note 292, at 135–67 (discussing the nature, benefits, and shortcomings of covert CIA action); PILLAR, *supra* note 1, at 120; JOHN B. WOLF, ANTITERRORIST INITIATIVES vii–xi, 18–19 (1989) (discussing the advantages of open paramilitary action coupled with an effective propaganda campaign). In 1996, Congress authorized the President to order covert action to prevent international terrorism. See Antiterrorism and Effective Death Penalty Act of 1996 § 324, 110 Stat. at 1255 (finding that “the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens”). In addition, the government could take full-scale, direct military action to bunt down and destroy international terrorist networks and the political regimes that harbor them. See Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 245 (Henry H. Han ed., 1993). However, it is not clear that any of these alternatives is a viable method of preventing international terrorism both in the short and long term. See PILLAR, *supra* note 1, at 85, 90–92 (discussing the advantages of permitting other states to prosecute terrorists but noting the obstacle posed by differing legal regimes); Richard Falk, *Ending Terrorism*, in TERRORISM & POLITICAL VIOLENCE, *supra*, at 430 (observing that covert operations are “inherently more difficult to constrain within limits of law and morality”); Phil Williams, *Combating Transnational Organized Crime*, in TRANSNATIONAL THREATS: BLENDING LAW ENFORCEMENT AND MILITARY STRATEGIES 197 (Carolyn W. Pumphrey ed., 2000) (observing the difficulty of distinguishing the good guys from the bad guys when militarily engaging criminals abroad). Moreover, although use of political, economic, and military force could conceivably prevent international terrorism, it appears to be no way for a government to enforce its criminal laws solely against those who would violate them.

³⁷³ Foreign nations have already expressed such sentiments. The Spanish, for example, flirted with the notion of refusing to extradite suspected al-Qaeda members because of the U.S. decision to employ military tribunals. See Jonah Goldberg, *Europeans Save the World*, NAT’L REV., Nov. 30, 2001, <http://www.nationalreview.com/goldberg/goldberg113001.shtml>.

³⁷⁴ See William Glaberson, *Critics’ Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1; Anne-Marie Slaughter, *Tougher than Terror: To Fight Criminal Terrorism We Need to Strengthen Our Domestic and Global System of Criminal Justice, Not Militarize It*, AM. PROSPECT, Jan. 28, 2002, at 22.

courts must adopt a construction of the prosecution's duty to search for *Brady* material that invites the government to prosecute in that forum—one that requires a search of intelligence community files only in instances in which the intelligence community has acted as a law enforcement entity under a prosecutor's direction and control.

SUCCESSFUL BRADY/NAPUE CASES

(Updated September 6, 2017)

* capital case

I. UNITED STATES SUPREME COURT

***Wearry v. Cain**

136 S.Ct. 1002 (2016) (per curiam)

United States Supreme Court summarily reverses Louisiana court's denial of postconviction relief on *Brady* claim, holding that state prejudicially failed to disclose material evidence including inmates' statements casting doubt on the credibility of the testimony of the state's key witnesses. Wearry was convicted by a jury of capital murder and sentenced to death, largely on the basis of testimony of two inmates, Scott and Brown, both of whose testimony was significantly different from the various statements they had provided to law enforcement prior to trial. There was no physical evidence linking Wearry to the crime and Wearry presented an alibi defense at trial. After Wearry's conviction became final, he obtained information that the prosecution had withheld (1) police reports that indicated that one inmate had reported that Scott "wanted to make sure [Wearry] gets the needle cause he jacked over me" and another inmate lied to investigators at Scott's urging, stating that he had witnessed the murder; (2) information that Brown had twice sought a deal to reduce his sentence in exchange for testifying against Wearry, and that the police had told him they would talk to the DA; and (3) medical records on Hutchinson, an individual whom Scott had reported ran into the street to flag down the victim on the night of the murder, pulled the victim out of the car, and shoved him into the cargo space and got into the cargo space himself. The medical records indicated that nine days before the murder Hutchinson had undergone knee surgery and would not have been able to run, bend, or lift substantial weight. The new evidence is sufficient to undermine confidence in the guilty verdict. "The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." 136 S.Ct. at 1006. "Scott's credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Moreover, any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister—as the prosecution had insisted in its closing argument—but by the possibility of a reduced sentence on an existing conviction." *Id.* at 1006-07. The Louisiana court improperly evaluated the materiality of each piece of withheld evidence rather than all of them cumulatively.

***Smith v. Cain,**

565 U.S. 73 (2012)

In Louisiana death penalty case, reversing denial of post-conviction relief where the prosecution failed to disclose statements by the only eyewitness to the five murders that he was unable to

describe or identify any of the three assailants. The suppressed evidence was material given that the eyewitness provided the only evidence linking the defendant to the murders and the undisclosed statements directly contradicted the eyewitness' emphatic identification of the defendant at trial as the first gunman to enter the room where the killings occurred. That the eyewitness made inconsistent statements on the night of the murder suggesting that he could identify the first gunman did not render the undisclosed statements immaterial. Nor did the State's speculation that the undisclosed statements could have been made because of the eyewitness' fear of retaliation. (Dissent by Thomas.)

***Banks v. Dretke,**
540 U.S. 668 (2004)

Texas death row inmate was entitled to habeas relief from his death sentence due to the prosecution's suppression of evidence of a trial witness's informant status where that witness's testimony was key to the prosecution's claim of future dangerousness and the witness was not otherwise effectively impeached. Petitioner established cause for his failure to present the evidence establishing the *Brady* violation to the state court in that petitioner reasonably relied on the government's pre-trial promise to disclose all *Brady* material, and the state had continued to deny that the witness was an informant at state post-conviction proceedings.

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

Reversing denial of habeas relief as to capital conviction and death sentence where state withheld eyewitness and informant statements, and a list of license numbers. Withheld evidence is to be evaluated collectively, not item-by-item, and the standard is a "reasonable probability" of a different result. The Court also made clear that "the 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." 514 U.S. at 437.

Giglio v. United States,
405 U.S. 150 (1972)

Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony. Prosecutor's knowing creation of a false impression requires new trial "if there is any reasonable likelihood that the false testimony could have affected the verdict."

***Miller v. Pate,**
386 U.S. 1 (1967)

Illinois death row inmate entitled to habeas relief where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

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

Suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution. (Here, the state court had concluded that Brady was entitled to resentencing because of the prosecution's failure to disclose an extrajudicial statement by the co-defendant where he admitted to being the actual killer. The Supreme Court affirmed the state court's ruling that Brady was not entitled to a new guilt-innocence trial.)

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

"When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process. In addition, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." See *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. State of Kansas*, 317 U.S. 213. And "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." See *Alcorta v. State of Texas*, 355 U.S. 28.

II. UNITED STATES COURTS OF APPEALS

United States v. Cessa,
861 F.3d 121 (5th Cir. 2017)

In conspiracy to launder drug proceeds case, appeals court vacates judgment of district court on *Brady* claim and remands for further consideration of the claim. Defendant was indicted and charged with counts of conspiring to launder drug proceeds with the Zetas, a Mexican gang, by buying, training, and racing quarter horses in the U.S. and Mexico. He was convicted and sentenced to 200 months in prison and forfeiture of his personal property and a \$60 million money judgment. Prior to trial, he moved that the government provide all interview memoranda, and the district court granted the motion. The court reviewed the interview memoranda and denied defendant access to those relating to a particular witness, stating that nothing in them was helpful to the defense. The Court of Appeals holds that the district court did not consider all three prongs of *Brady* when determining not to disclose the memos; it is clear both from the court's language and its timing that it considered only whether the interview memos were favorable, not whether they were material. Materiality of impeachment evidence may become clear only during or after a witness's testimony and materiality of exculpatory evidence may become clear only upon a full review of trial evidence. Furthermore, the district court clearly erred in finding that the interview memos were not favorable to the defense. Some of the witness's statements were exculpatory: they supported defendant's theory that he did not buy the horses using Zeta money and instead bought the horses with his own money and gave them to the Zetas as gifts because he feared the Zetas, and that he did not join the conspiracy at all. Some of the witness's statements in the memos were

inconsistent with his trial testimony that the Zetas delivered money to defendant and that defendant was “friends” with one of the Zetas rather than afraid of him. Instead of addressing the second and third prongs of *Brady* (suppression and materiality), the Court of Appeals remands for full assessment of the memos and the interview notes associated with them (which the government contends not to have thoroughly reviewed).

***Thomas v. Westbrooks,**
849 F.3d 659 (6th Cir. 2017) (cert. pet. filed Aug. 17, 2017)

Court of Appeals reverses district court’s denial of Thomas’s habeas corpus petition filed under 28 U.S.C. § 2254 challenging his Tennessee conviction and death sentence. Thomas was convicted of felony murder arising from the shooting of an armored truck driver in the course of a robbery. Prior to his trial on this case, he was tried and convicted in federal court of interfering with interstate commerce, carrying a firearm in relation to a crime of violence, and being a felon in possession of a firearm, all stemming from the same event. Thomas’s girlfriend testified at both trials, indicating that Thomas was present at the scene of the shooting and connecting him to other circumstantial evidence in the case. After the federal case, but before the state case, the FBI paid Thomas’s girlfriend \$750, and this information was contained in the file the FBI provided to the state prosecutors, but it was not provided to the defense. Thomas’s girlfriend testified at trial that she did not receive any reward money, and the prosecutor emphasized to the jury that she testified simply because it was the right thing to do. On appeal, the state conceded that the prosecution suppressed the information about the \$750 payment and that the information was favorable to Thomas, but argued that it was not material evidence and so the suppression was not prejudicial. The Sixth Circuit holds that the district court’s conclusion that the evidence was not material because there was substantial evidence linking Thomas to the crime is a mischaracterization of *Brady* requirements – the question is whether the guilty verdict is worthy of confidence in the absence of the suppressed evidence, and the court concludes that it is not. Thomas’s girlfriend’s testimony was vital to the prosecution’s case because she provided the only information linking Thomas to the scene, to his codefendant, and to transactions cited as circumstantial evidence of his involvement in the shooting. Without the evidence of the \$750 payment, Thomas had no basis upon which to impeach her on the basis of her financial interest. “[I]f the jury had been presented with evidence of an unusual payment to an individual who can be fairly characterized as an accessory after the fact, it might well have chosen to disregard her testimony against Thomas as untrustworthy and unreliable.” 849 F.3d at 665.

***Dennis v. Sec’y, Pa. Dep’t of Corr.,**
834 F.3d 263 (3d Cir. 2016) (en banc)

In post-AEDPA capital murder case, Third Circuit affirms grant of habeas corpus relief by district court on *Brady* claim. Third Circuit holds that Pennsylvania state court unreasonably disregarded the impeachment value of a receipt that discredited a government’s key witness’ testimony concerning when she saw Dennis, unreasonably applied *Brady* in concluding that the documents suggesting that a third party committed the murder were immaterial, and acted contrary to clearly established federal law in adding an admissibility requirement to *Brady* where none exists. Dennis

was convicted of killing a high school student, based largely on eyewitness testimony. Dennis presented an alibi defense, along with evidence of mistaken identity and good character. He and others testified that he was on a bus and at singing practice at and around the time of the murder. The prosecution withheld (1) a time-stamped receipt concerning when a witness picked up her welfare benefits, which corroborated the time which the defense theorized the witness saw Dennis on a bus; (2) a police activity sheet that indicated that one of the eyewitnesses who testified against Dennis had provided information inconsistent with her testimony; and (3) documents regarding a tip from an inmate that stated that a third party had identified himself as the killer. The Pennsylvania Supreme Court's decisions denying the *Brady* claims rested on unreasonable conclusions of fact and unreasonable applications of clearly established law, or were contrary to Supreme Court precedent for the following reasons:

- (1) With regard to the receipt, the state court's findings that the receipt was cumulative of other testimony and also had no bearing on the alibi were unreasonable determinations of fact and an unreasonable application of *Brady*. The state court failed to recognize the impeachment value of the receipt, which provided documentary evidence that the witness's trial testimony about the time she saw Dennis was false. It would have corroborated Dennis's testimony that he saw the witness when he got off the bus – the witness's correct testimony “would have strengthened Dennis's and his father's testimony that Dennis had been with his father that afternoon and was on the bus at the time of the murder.” 834 F.3d at 287. This was sufficient to demonstrate the receipt's favorability under *Brady*, particularly because this was the only disinterested witness who otherwise corroborated the testimony of Dennis and his family and friends. The receipt was material – “Transforming . . . a disinterested individual with documentary support, into a defense witness, meets the requirements of *Brady* materiality because it would have necessarily bolstered Dennis's alibi defense narrative and ‘put the whole case in . . . a different light.’” 834 F.3d at 295. The police had the receipt and therefore so did the prosecution; the defense had no affirmative due diligence obligation under *Brady* to obtain the receipt independently when the prosecution team had it: “the concept of ‘due diligence’ plays no role in *Brady* analysis.” 834 F.3d 291.
- (2) With regard to the police activity sheet, one of the eyewitnesses made a statement to her aunt and uncle that she recognized the perpetrators from high school, and this statement was not disclosed to the defense at trial. The state court's denial of the *Brady* claim articulated the correct standard for materiality but applied the standard inconsistently with Supreme Court precedent. The statement could have been used as impeachment to undercut the eyewitness's credibility in a manner not duplicated by other challenges the defense was able to level at trial and the prosecution argued that the eyewitness's testimony was “enough to convict” Dennis. 834 F.3d at 299. “Armed with the activity sheet, defense counsel could have impeached [the witness] in a manner that very well may have led her to admit she recognized the perpetrators from her high school,” 834 F.3d at 301, as well as to challenge the adequacy of the police investigation and to mount an “other suspect” defense at trial.
- (3) With regard to the documents relating to an inmate's statement that a third person had confessed to the killing, the state court's conclusion that the documents were not material

was an unreasonable application of *Brady*, and its conclusion that the documents were inadmissible was contrary to clearly established law, which does not have an admissibility requirement for disclosure purposes. The statement that someone else committed the crime was exculpatory. The statement “was not fruitless [as found by the state court], it was simply not rigorously pursued.” 834 F.3d at 307.

The cumulative materiality of the withheld documents “commands” relief. 834 F.3d at 311-12.

NOTE: This case also interprets *Richter*’s “gap-filling” of theories upon which the state court denied relief as “reserved for those cases in which the federal court cannot be sure of the precise basis for the state court’s ruling. . . . It does not permit a federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent ‘gap’ by coming up with its own theory or argument, let alone one, as here, never raised to the state court.” 834 F.3d at 282 (citing *Premo v. Moore*, 562 U.S. 115 (2011)). “[W]hen the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that ‘could have supported’ the state court’s decision.” 834 F.3d at 283.

Fuentes v. Griffin,
829 F.3d 233 (2d Cir. 2016)

Second Circuit reverses denial of habeas corpus relief by district court in non-capital case charging rape and sodomy of the first degree, which had held that the New York state court’s denial of Fuentes’ *Brady* claim was neither contrary to nor unreasonable application of clearly established federal law. Second Circuit holds that Fuentes’ *Brady* claim should have been granted on the ground that the state court’s rejection of the *Brady* claim was an unreasonable application (under 28 U.S.C. §2254(d)(1)) of the materiality standard established by *Kyles v. Whitley*, 514 U.S. 419 (1995). The prosecution suppressed a record of a psychiatric evaluation of the complainant that impeached her testimony and supported the defendant’s version of events. The record was relevant because the issue was not whether an alleged rapist was the defendant, but rather whether the event was a consensual sexual encounter rather than a sexual assault. It was material because the complainant provided the only evidence that what occurred was a crime and the withheld document was the only evidence by which the defense could have impeached the complainant’s credibility as to her mental state. The suppressed psychiatric record indicated that the complainant reported depression, suicidal thoughts, frequent crying spells, and family problems dating back two years and cannabis abuse for a year before the alleged assault. That record could have confirmed Fuentes’ testimony that the complainant was acting erratically on the night of their encounter and also explained the complainant’s crying during her testimony. “Based on clearly established fundamental rights and principles, we think it indisputable that if the prosecution has a witness’s psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall with *Brady* principles, and that the Supreme Court has so recognized.” 829 F.3d at 247 (citing, *e.g.*, *United States v. Abel*, 469 U.S. 45, 52 (1984); *Williams (Michael) v. Taylor*, 529 U.S. 420, 427 (2000)). The trial court’s determination that the record did not contain anything exculpatory, and the state appellate court’s conclusion that the report supported the prosecution’s case because it corroborated the complainant’s testimony that she was upset that she had put herself in danger by walking home alone, were unreasonable because they

relied upon a misreading of the withheld report, which indicated that the complainant's symptoms were long-standing and not caused by immediate events, and that they may have provided an explanation for the complainant's reporting the incident as a crime that corroborated the defense theory that the complainant was angry and upset about being rejected. The state's conclusion that the suppression of the report was not prejudicial because the evidence against the defense was overwhelming was also unreasonable because the evidence against the defendant was not overwhelming, as there was no physical or medical evidence that the complainant had been subjected to force, and the complainant's testimony was contrary to that of others in several respects.

Carrillo v. City of Los Angeles,
798 F.3d 1210 (9th Cir. 2015), cert. denied, 136 S.Ct. 1671 (2016)

Ninth Circuit affirms district court's denial of officer-defendants' motion to dismiss plaintiff-exonerees' § 1983 lawsuit on qualified immunity grounds where "first, the law at the time of the investigations clearly established that police officers had to disclose material, exculpatory evidence under *Brady*, and second, that any reasonable officer would have understood that *Brady* required the disclosure of the specific evidence allegedly withheld." 798 F.3d at 1213. The evidence withheld included both impeachment and exculpatory evidence. The impeachment evidence included statements to police officers by a testifying eyewitness that the eyewitness saw the shooter only in profile, asked to be hypnotized because he could not remember what the shooter looked like, and recalled the shooter did not have a mustache unlike every person in the photo lineup; statements to police officers by another testifying eyewitness that he selected the defendant in the lineup because of his face, but the hair of the perpetrator was curlier; statements by another eyewitness that he selected several other photographs from a "gang book" before selecting defendant's, and that the officer had told him the others could not be the perpetrator but defendant was. The exculpatory evidence included evidence of a previous attempt on the victim's life by another perpetrator.

Comstock v. Humphries,
786 F.3d 701 (9th Cir. 2015)

In post-AEDPA case involving conviction for possession of stolen property, Comstock was entitled to habeas relief due to the prosecution's failure to disclose a material and exculpatory statements made by the alleged victim, Street. The state's theory was that Comstock or another person stole Street's wrestling championship ring and Comstock pawned it; the defense at trial was that Comstock found the ring outside Street's apartment. Comstock was sentenced to 10-15 years under Nevada's habitual offender statute. Street testified at trial that he never loaned the ring, it never fell off accidentally, and although he had misplaced it in his apartment, he did not recall losing it outside, and that Comstock was a maintenance worker and had been inside his apartment. In a presentencing statement, Street wrote that he had told the prosecutor and investigating detective prior to trial that he was not sure the ring had been stolen at all; he remembered having taken the ring off outside his apartment and putting it on the ground or air conditioner, and that he didn't remember putting it back on. The prosecution had not disclosed this fact to the defense, and

argued in the opposition brief to the defense motion for new trial that Street had told the prosecution only that it was “possible” he could have taken the ring off, but that in fact that did not happen. The trial court denied the motion for new trial. The Court of Appeals held that Street’s statements were favorable to Comstock: they impeached Street’s credibility about how he handled his ring and cast serious doubt as to whether there was a crime at all (the Nevada Supreme Court did not make a clear determination about this). The statements were suppressed—there is no evidence to the contrary, only the prosecution’s arguments in the opposition to the motion for new trial (the Nevada Supreme Court did not make a factual finding regarding what the state knew prior to trial). The statements were material, both as impeachment of Street’s testimony and as exculpatory, particularly in light of the prosecution’s closing argument. Defense counsel attempted to cross-examine Street about the possibility he had dropped the ring, but the cross-examination fell flat, and the disclosure of Street’s pretrial statements would have transformed this cross. The prosecution argued that Street never would have lost the ring because it was too important to him, and that therefore there must have been a crime; but Street’s pretrial statements called that into question as well, and would have made the prosecution’s case significantly weaker. The Nevada Supreme Court’s findings to the contrary were an unreasonable application of *Brady*.

Armstrong v. Daily,
786 F.3d 529 (7th Cir. 2015)

Seventh Circuit affirms district court’s denial of officer-defendants’ motion to dismiss plaintiff-exoneree’s § 1983 lawsuit on qualified immunity grounds where the officers intentionally destroyed evidence:

Though *Brady* did not announce a duty to preserve evidence, a duty to refrain from bad-faith destruction flows necessarily, and obviously, from its familiar holding that suppression of material exculpatory evidence violates due process. [Citing *Brady*.] *Brady* would mean nothing if, as [the officer] argues, a prosecutor could comply with its command by deliberately destroying exculpatory evidence and then disclosing the fact of destruction to the defense. [¶] Under [the officer’s] argument, a reasonable police investigator could have believed in 1980 that if he possessed exculpatory evidence, he had an obligation to disclose it to the defense unless he deliberately destroyed it first. No reasonable police officer or prosecutor could have believed that in 1980. That is not a reasonable interpretation of *Brady*, and neither [the officer] nor the partial dissenting opinion has directed us to any courts that have adopted it. Under the law in 1980, including at least *Killian* and *Brady*, prosecutors had a clearly established legal duty not to act in bad faith to destroy evidence, which if suppressed or destroyed, “creates a reasonable doubt that did not otherwise exist.” See *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

Bies v. Sheldon,
775 F.3d 386 (6th Cir. 2014)

As in *Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2014), the Sixth Circuit affirmed the grant of relief in this formerly capital case from Ohio, finding that the prosecution violated *Brady* by failing to

disclose favorable, material information which undermined confidence in petitioner's convictions for the murder and attempted sexual assault of a ten year old boy in an abandoned building. Lacking any physical evidence to connect him to the crime, "[t]he State's case against Bies rested almost entirely upon an unrecorded statement that Bies allegedly made to the police following a prolonged and highly suggestive custodial interrogation." 775 F.3d at 388. Discovery conducted during petitioner's federal habeas proceedings yielded "hundreds of pages of evidence," including "a substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder – two of whom had apparently confessed to the crime [including one suspect named Roger Cordray], and neither of whom was ever ruled out as the perpetrator." 775 F.3d at 394-95. After Bies was granted abeyance to present the new *Brady* claim to the state court, the state court declined to adjudicate the claim on the merits, resulting in *de novo* review in federal court. After noting that the first two elements of the *Brady* analysis – suppression and favorability – were not disputed, the Sixth Circuit quickly determined that the previously undisclosed information had also been "material" under *Brady*. The facts regarding Cordray alone, had they been disclosed, would have provided a compelling counter-narrative to the State's theory of the case and could have created a reasonable doubt as to Bies' guilt in the minds of the jurors. "Considering the evidence collectively," the court concluded, "it is painfully clear that the result of the trial would likely have been different had the suppressed evidence been disclosed to the defense." *Id.* at 403.

Gumm v. Mitchell,
775 F.3d 345 (6th Cir. 2014)

The Sixth Circuit affirmed the grant of relief in this formerly capital case from Ohio, finding that the prosecution violated *Brady* by failing to disclose favorable, material information, and that the prosecutor committed additional misconduct by eliciting and emphasizing unreliable evidence of petitioner's propensity to engage in violent and distasteful acts. Petitioner and his co-defendant, Michael Bies (see *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014)), were convicted and sentenced to death (both men's death sentences were later set aside pursuant to *Atkins v. Virginia*) in connection with the 1992 murder and attempted sexual assault of a ten year old boy in an abandoned building in Cincinnati. Because there was no physical evidence linking petitioner to the crime, the prosecution's case was built upon witness testimony placing him near the scene around the time of the crime and a confession provided after extensive interrogation. Examining petitioner's claim *de novo* because it had been disposed of in state court on the basis of lack of subject matter jurisdiction, the Sixth Circuit began by describing a vast array of undisclosed evidence related to other individuals who had been investigated for the murder, including evidence that Roger Cordray had confessed to the crime. Although some of this evidence would have been inadmissible at trial, much of it, including Cordray's confession and law enforcement's apparent failure to pursue a wide array of leads, would have been admitted. With regard to materiality, the Sixth Circuit found that, "[c]onsidering the quality and quantity of the evidence that the state failed to disclose, the potential for that evidence to have affected the outcome of Petitioner's trial is inescapable." 775 F.3d at 370. The prosecutor also committed misconduct by eliciting specific language from two lay witnesses in an "intentional and deliberate manner," including claims that petitioner had "fucked a horse" and had been "so hard up he'd do it to anyone," – and by using that language

to build an unreliable and improper propensity argument. The court concluded that “the case against petitioner was so weak and the prosecutor’s misconduct so ‘pronounced and persistent’ that it ... had a ‘probably cumulative effect upon the jury which cannot be disregarded as inconsequential.’” *Id.* at 385 (quoting *Berger v. United States*, 295 U.S. 78, 89 (1935)).

Amado v. Gonzalez,
758 F.3d 1119 (9th Cir. 2014)

In gang-related homicide case where petitioner was convicted under an aiding and abetting theory, he was entitled to habeas relief due to the prosecution’s failure to disclose that the key eyewitness against petitioner was on felony probation for a robbery and had been a member of a gang affiliated with the targeted victims. The state appellate court’s finding that the evidence about the witness was not newly discovered was an unreasonable determination of the facts in light of the evidence before it. In addition, the state appellate court’s ruling that petitioner was required to show that he could not have discovered the evidence through the exercise of due diligence was contrary to clearly established Supreme Court precedent. “Especially in a period of strained public budgets, a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations. No *Brady* case discusses such a requirement, and none should be imposed.” Because the witness had been prosecuted by the same district attorney’s office that prosecuted petitioner, the witness’s criminal history was deemed available to the prosecution. That the witness had been impeached at trial by cross-examination about his weak vision did not defeat a finding of materiality as to the undisclosed evidence. Importantly, the eyewitness provided the only evidence that petitioner brought a gun to the crime scene. Without this testimony, it was unlikely that the jury could have found the requisite mental state.

***Lambert v. Beard,**
537 Fed.Appx. 78 (3rd Cir. 2013) (unpublished), cert. denied, 134 S.Ct. 1938 (2014)

On remand from the Supreme Court for further consideration of *Brady* claim under §2254(d), adhering to prior judgment, and finding that alternative grounds for state court decision identified in Supreme Court’s opinion (*Wetzel v. Lambert*, 132 S.Ct. 1195 (2012)) were unreasonable under § 2254(d)(1) and (d)(2). Lambert was convicted and sentenced to death for his alleged participation in a 1982 robbery and double murder with another man, Reese. Lambert and Reese came to the attention of law enforcement through the claims of one Bernard Jackson, who fingered them after receiving word that an eyewitness had identified him as one of the robbers, and Jackson’s statements and trial testimony were a central component of the state’s case. *See* 633 F.3d at 131 (“It is undisputed that without Jackson’s statements to the police, the Commonwealth could not have indicted Lambert on these charges.”). At the joint trial of Lambert and Reese, Jackson’s credibility “was savaged” with numerous inconsistent statements and his ready admission that he was testifying to benefit himself. *Id.* Despite the devastating impeachment, Jackson “somewhat proudly” concluded his testimony by emphasizing that he had

always been consistent in identifying Lambert and Reese as the two robbers. *Id.* However a “Police Activity Sheet” discovered during state post-conviction proceedings established that this claim was also inconsistent with a prior statement by Jackson. When presented with Lambert’s *Brady* claim based on the prosecution’s suppression of the Police Activity Sheet, the state post-conviction courts denied relief on the ground that any additional impeachment value it may have provided was merely cumulative, and that the suppressed information was therefore immaterial. In subsequent federal habeas proceedings, the district court “did not mention the Police Activity Sheet” 633 F.3d at 132. After describing its role under § 2254(d), the Third Circuit examined and rejected the Pennsylvania Supreme Court’s conclusion that the suppressed evidence was immaterial. Relying on “the logic of” *Napue v. Illinois*, 360 U.S. 264 (1959), as “extended to the *Brady* context” in *Banks v. Dretke*, 540 U.S. 668 (2004), the Third Circuit observed that “it is patently unreasonable to presume – without explanation – that whenever a witness is impeached in one manner, any other impeachment becomes immaterial.” 633 F.3d at 134. The Third Circuit went on to explain as follows:

What is critical here is that the undisclosed statement by Jackson that there was another participant – a “co-defendant,” to use his word – was not just one more piece of impeachment material to be placed in a “so what” category because Jackson had already been so thoroughly impeached. Rather, the undisclosed Police Activity Sheet would have opened an entirely new line of impeachment, and would have done far more than simply allow the defense to point out – as it did – that Jackson was inconsistent and often changed his story. The way we know that ... is that by not disclosing it, the prosecution was able to rely on Jackson’s consistency in naming Reese and Lambert as the perpetrators, the only point on which he was consistent at trial. The Supreme Court has instructed that we may take the Commonwealth at its word that this was important. ... Here, the prosecution’s closing argument emphasized Jackson’s consistency in naming Lambert and Reese as the perpetrators. No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of *Brady* was an unreasonable application of clearly established Supreme Court precedent.

633 F.3d at 135.

Dow v. Virga,
729 F.3d 1041 (9th Cir. 2013)

In robbery case, habeas relief is granted under *Napue* where prosecutor elicited and then failed to correct false testimony by a detective who stated that petitioner (rather than his attorney) had asked that each of the participants in a lineup wear a bandage under his right eye at the location at which petitioner had a small scar under his. The prosecutor then capitalized on the false testimony during argument by telling the jury that petitioner had demonstrated consciousness of guilt by trying to hide his scar in order to prevent the sole eyewitness from identifying him. In finding the misconduct harmless, the state court applied a standard that was “contrary to” the harmless standard required by *Napue*. (The state court asked whether it was reasonably probable that a result more favorable to petitioner would have occurred absent the misconduct,

rather than whether there was a reasonable likelihood that the false testimony could have affected the judgment.) But even presuming the correct standard had been applied, the state court's application of that standard would have constituted an "unreasonable application" of clearly established Supreme Court law. The evidence of guilt was weak and had resulted in a hung jury at the first trial. The eyewitness's identification of petitioner was inconsistent but was bolstered at the retrial by the detective's false testimony and the arguments made in reliance on it.

Aguilar v. Woodford,
725 F.3d 970 (9th Cir. 2013), cert. denied, 134 S.Ct. 1869 (2014)

In murder case where eyewitness identification testimony was subject to challenge and the defense presented evidence that a third party was the actual shooter, the prosecution violated *Brady v. Maryland* by failing to disclose information demonstrating the unreliability of the "scent dog" it relied upon to connect petitioner to the shooting. The California Court of Appeal unreasonably applied *Brady* in concluding that the information was not material. In support of this claim, petitioner attached the transcript from another case in which the trial court excluded scent identification evidence after the prosecution stipulated to mistakes made by the dog, and a letter, dated sixth months prior to trial, in which LA County Public Defender informed the DA of the problems with the dog's work and specifically identified that information as material subject to disclosure under *Brady*. The knowledge conveyed from the Public Defender to the DA was "imputed" to the prosecutor who tried petitioner's case. Even if the DA's office had been ignorant, the knowledge possessed by the Sheriff's Department about the mistakes would also have been sufficient to constitute suppression. The suppressed information could have had supported a powerful argument for excluding the scent identification testimony and at the very least it provided powerful impeachment material.

***Browning v. Trammell,**
717 F.3d 1092 (10th Cir. 2013)

The Tenth Circuit affirmed the grant of guilt-or-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Oklahoma capital case. Petitioner was convicted and sentenced to death for killing the adoptive parents of his former girlfriend, Tackett, who was also wounded in the alleged attack and served as the prosecution's central witness at trial. The defense theory was that Tackett and petitioner's co-defendant, Pethel, had conspired to frame petitioner so that Tackett could inherit the deceased victims' property. Prior to trial, Tackett's own attorney provided the prosecution with Tackett's mental health records, but later insisted the records were privileged, had been disclosed by mistake, and should not be made available to the defense. The trial court reviewed the records in camera pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and found that they were covered by state law privilege, and that their content was neither favorable nor material. The court therefore refused to disclose them to the defense, and the Oklahoma Court of Criminal Appeals (OCCA) later upheld that ruling. Petitioner then raised his *Brady* claim again in federal habeas proceedings. The district court conducted its own in camera review

of Tackett's mental health records, disagreed with the state court's assessment of their content, ordered them disclosed to habeas counsel, and later granted relief. After determining that "a Brady claim resolved through the process established in Ritchie has been 'adjudicated on the merits' for purposes of § 2254(d)," 717 F.3d at 1103, the Tenth Circuit observed that "neither the state trial court nor the OCCA gave any reasoned explanation" for concluding that Tackett's mental health records contained nothing favorable or material, *id.* at 1104, and then found those conclusions unreasonable. The court noted that the "State does not contest the favorability" of the records, then found as follows:

On the exculpatory side, [Tackett's] records describe her as hostile, assaultive, combative, and even potentially homicidal. Such evidence tends to show that a person with a motive to kill might even have a disposition to kill. ¶ On the impeaching side, Tackett's psychiatric evaluations evinced, among other things, memory deficits, magical thinking, blurring of reality and fantasy, and projection of blame onto others. This is classic impeachment evidence. ... ¶ Accordingly, we agree with the district court's disposition of the favorability question: "There is no reasonable argument or theory that could support the [Oklahoma courts'] conclusion that the sealed material contained nothing favorable to Browning's defense."

717 F.3d at 1105.

With regard to materiality, the Tenth Circuit observed that, "[b]y rejecting Browning's materiality argument, the Oklahoma courts necessarily concluded that Tackett's mental health records – had they been available for use at trial – could not have put the trial in a 'different light' and 'undermine[d] confidence in the verdict.'" 717 F.3d at 1106 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). After framing the "question for ... review [a]s whether the Oklahoma courts reached that conclusion unreasonably," *id.* the Tenth Circuit concluded that they did:

Tackett was the prosecution's indispensable witness, and all sides knew that Browning's fate turned on her credibility. In case that was not obvious to the jury, the prosecution made it abundantly clear at closing argument[.] * * * If, as the prosecution told the jury at the time, Browning's only defense was to discredit Tackett – and this was really the only possible defense in light of her powerful eyewitness testimony – then it is difficult to see how the Oklahoma courts could reasonably conclude there was nothing material about a recent diagnosis of a severe mental disorder that made her hostile, assaultive, combative, and even potentially homicidal, or that Tackett was known to blur reality and fantasy and project blame onto others.

717 F.3d at 1106. The court went on to consider the state's argument that the impact of the mental health records would have been offset by other evidence corroborating Tackett's trial testimony, but found it insufficient. "In any event," the Tenth Circuit concluded, "whether the jury necessarily would have reached an alternate conclusion is not the appropriate inquiry. We only inquire whether the Oklahoma courts could have reasonably decided that the mental health evidence would not have mattered. The answer is no. This evidence would have mattered, even in light of the State's corroborating evidence." *Id.* at 1107.

***Milke v. Ryan,**
711 F.3d 998 (9th Cir. 2013)

The Ninth Circuit granted relief in this Arizona capital case, finding that the prosecution violated *Brady v. Maryland* by failing to disclose a substantial body of information undermining the credibility of Phoenix police detective Armando Saldate, whose uncorroborated claim that petitioner had confessed constituted the only evidence against her. Petitioner was convicted and sentenced to death for her alleged participation in a conspiracy to kidnap and murder her own four year old son. The murder was actually carried out by two men, Styers and Scott, but neither implicated petitioner or testified against her, and no physical evidence connected her to the crime scene. The prosecution's case therefore rested on Det. Saldate's testimony that, during a thirty minute, unrecorded interrogation, petitioner had given him a full confession to participation in the conspiracy. Petitioner consistently denied confessing to Saldate, contended that he had ignored her request for counsel and his own superior's directive to record the interrogation, and pointed out that Saldate failed to even secure her signature on a Miranda waiver. Recognizing the importance of challenging Saldate's account, petitioner's trial counsel attempted to subpoena his "entire personnel file," but the prosecution successfully moved to quash that request, and the defense acquired nothing with impeachment value. After her convictions and sentence were affirmed on direct appeal, petitioner sought state postconviction relief alleging, among other things, that the prosecution had violated *Brady* by failing to disclose documents establishing that Saldate had a history of misconduct and dishonesty. In support of her claims, petitioner supplied the state post-conviction judge (who had also presided over her trial) with hundreds of pages of records from other cases in which Saldate had committed various forms of misconduct, including lying under oath, violating suspects' rights during interrogations, and abusing his authority with female suspects. "[D]espite this trove of undisclosed impeachment evidence, the post-conviction court rejected Milke's claim that she'd been denied access to impeachment material." 711 F.3d at 1005. The Arizona Supreme Court subsequently denied a petition for review. Petitioner then sought federal habeas relief. After ordering the state to disclose Saldate's personnel files – which yielded only two years' worth of files from a twenty-one year career – the district court denied relief. After determining that the state post-conviction court's denial of relief was both contrary to federal law, and based on an unreasonable determination of the facts in light of the state court record, the Ninth Circuit proceeded to the merits of petitioner's *Brady* claim. The court first reviewed the wealth of "favorable" evidence documenting Saldate's misconduct and dishonesty to his superiors and to courts. *See* 711 F.3d at 1012-16. With regard to "suppression," the court explained that Saldate's involvement in petitioner's case coincided with a number of other controversies involving his misconduct in other cases – all of which were handled by the Maricopa County Attorney's Office – such that "it must have occurred to ... someone in the prosecutor's office or the police department (or both) that Saldate was also the key witness [in this case]. Yet no one saw fit to disclose ... Saldate's misconduct to Milke's lawyer." *Id.* at 1017. The court also noted that although the "court documents showing Saldate's misconduct were available in the public record," the state remained obligated to disclose them because defense counsel lacked the information to find them independently. *Id.* The court explained that Milke was able to discover the court documents detailing Saldate's misconduct only after a team

of approximately ten researchers in post-conviction proceedings spent nearly 7000 hours sifting through court records. ... The team worked eight hours a day for three and a half months, turning up 100 cases involving Saldate. Another researcher then spent a month reading motions and transcripts from those cases to find examples of Saldate's misconduct. A reasonably diligent lawyer couldn't possibly have found these records in time to use them at Milke's trial. 711 F.3d at 1018. With regard to "prejudice," the Ninth Circuit summed up the impact of the suppressed information as follows:

Milke's alleged confession, as reported by Saldate, was the only direct evidence linking Milke to the crime. But the confession was only as good as Saldate's word, as he's the only one who claims to have heard Milke confess and there's no recording, written statement or any other evidence that Milke confessed. Saldate's credibility was crucial to the state's case against Milke. It's hard to imagine anything more relevant to the jury's – or the judge's – determination whether to believe Saldate than evidence that Saldate lied under oath and trampled the constitutional rights of suspects in discharging his official duties. If even a single juror had found Saldate untrustworthy based on the documentation that he habitually lied under oath or that he took advantage of women he had in his power, there would have been at least a hung jury. Likewise, if this evidence had been disclosed, it may well have led the judge to order a new trial, enter judgment notwithstanding the verdict or, at least, impose a sentence less than death. The prosecution did its best to impugn Milke's credibility. It wasn't entitled, at the same time, to hide the evidence that undermined Saldate's credibility. ¶ Also at issue was Saldate's claim – again, unsupported by evidence – that Milke waived her *Miranda* rights and didn't ask for a lawyer. Beyond its effect on Saldate's credibility, evidence of Saldate's falsifications and his disregard of *Miranda*, would have been highly relevant to the determination of whether Milke's alleged confession had been lawfully obtained. The suppression of evidence of Saldate's lies and misconduct thus qualifies as prejudicial for purposes of *Brady* and *Giglio*.

711 F.3d at 1018-19.

The Ninth Circuit went on to remand the case with instructions that the district court not only to issue the writ, but also require the state to disclose all of Saldate's personnel records, and then "provide a statement under oath from a relevant police official certifying that all of the records have been disclosed and none has been omitted, lost or destroyed." 711 F.3d at 1019. The court further directed that, in the event such a certification is not produced, the district court "shall hold an evidentiary hearing to determine whether any records have not been produced, and, if so, why." *Id.* Finally, the court directed that the "clerk of our court shall send copies of this opinion to the United States Attorney for the District of Arizona and to the Assistant United States Attorney General of the Civil Rights Division, for possible investigation into whether Saldate's conduct, and that of his supervisors and other state and local officials, amounts to a pattern of violating the federally protected rights of Arizona residents." *Id.* Chief Judge Kozinski (who also wrote the opinion for the court) added a separate concurring opinion expressing further skepticism of Saldate's testimony, criticizing Arizona officials for "having given free rein to a lawless cop to misbehave again and again," 711 F.3d at 1024, and noting that he would have also

reversed the district court's determination that petitioner had knowingly waived her *Miranda* rights, *see id.* at 1025.

Munchinski v. Wilson,
694 F.3d 308 (3rd Cir. 2012)

The Third Circuit affirmed the district court's grant of the previously authorized second habeas petition in this Pennsylvania double murder case known as the "Bear Rock Murders," noting the state's concession on the merits of petitioner's *Brady v. Maryland* claims and rejecting its contentions that the claims were barred as untimely, defaulted, and not sufficiently supported to warrant consideration in a second federal petition. After one jury hung, the prosecution's theory at the second trial was that petitioner, a co-defendant, and one Bowen – who became the key witness after contacting law enforcement from prison and offering his assistance – went to see the victims about a drug transaction, and that petitioner and the co-defendant raped the victims, then shot them. Aside from Bowen's testimony, the prosecution presented testimony from three acquaintances and a jailhouse informant who claimed that petitioner had made inculpatory remarks to them. Through years of investigation and court-ordered discovery, three state post-conviction proceedings, and two federal habeas proceedings, petitioner amassed an array of material, previously suppressed information, including doctored investigative reports, inconsistent statements, witness-coaching, and wilful non-compliance with post-conviction orders for evidence production. Among other things, the new information established that "the murders could not have happened as the Commonwealth proposed at trial" because "the Commonwealth's timeline is inconsistent with the physical evidence," and "Bowen, the only witness who could provide any details supporting the Commonwealth's theory of the case, was not even in Pennsylvania the night of the murders" 694 F.3d at 335-36; *see also id.* at 336 (noting that the witnesses who claimed to have heard petitioner confess had a clear "motivation to fabricate"). After rejecting the state's various procedural defenses, the Third Circuit noted that the state had "expressly and rightly conceded" that the state court's denial of relief involved an unreasonable application of *Brady*. The court then concluded with the following observation: "It seems that the Commonwealth's decision to appeal the District Court's judgment may have been motivated by considerations external to this particular case, because it is difficult to discern any significant justification on this record for continuing to defend what is now acknowledged by all to be a badly tainted and highly suspect conviction." *Id.* at 339.

***Wolfe v. Clarke,**
691 F.3d 410 (4th Cir. 2012)

The Fourth Circuit affirmed the grant of relief in this Virginia murder-for-hire capital case, finding that the prosecution violated *Brady v. Maryland* by suppressing a police report impeaching its key witness, and that petitioner had shown cause and prejudice to overcome the default of the *Brady* claim resulting from his failure to present it to the state courts. Petitioner's convictions arose out of the murder of a drug dealer. While it was undisputed that the murder

was actually committed by one Barber, the theory underlying the prosecution of petitioner was that he had hired his friend, Barber, to carry out the killing. Barber testified to that effect – in exchange for a sixty year sentence – at petitioner’s trial, and petitioner was convicted of capital murder, conspiring to distribute marijuana, and a related firearms count. After petitioner’s state post-conviction proceedings were complete and his federal habeas petition had been filed, Barber signed an affidavit recanting his testimony against petitioner. Acting on that development, petitioner immediately amended his federal petition to include a *Brady* claim, and an argument that the claim should be reviewed on its merits via the *Schlup v. Delo*, 513 U.S. 298 (1995), actual innocence gateway; he later added requests for discovery and an evidentiary hearing. The district court denied relief without a hearing, but the Fourth Circuit remanded for further consideration of petitioner’s entitlement to a hearing, discovery and merits review. On remand, the district court held that petitioner had satisfied *Schlup*, then granted discovery and a hearing. During the “contentious” discovery proceedings that followed, the prosecution grudgingly disgorged the “Newsome report” (among many other favorable documents) which showed that Detective Newsome had suggested the murder-for-hire theory involving petitioner to Barber as a way for Barber to improve his own bargaining position. After an evidentiary hearing at which Barber recanted his testimony against petitioner under oath, the district court found a series of *Brady* violations and granted relief from all of petitioner’s convictions. On appeal, the Fourth Circuit found it unnecessary to look beyond the suppressed Newsome report, which it described as “[t]he single, plainly momentous item of suppressed Barber impeachment evidence” 691 F.3d at 417. After rejecting several procedural arguments asserted by the state, the court observed that the absence of an adjudication on the merits by the state court rendered § 2254(d) inapplicable, then held that petitioner had satisfied all three components of the *Brady* test. The Newsome report was “favorable” because it was “indubitably impeaching, in that it establishes a motive not only for Barber to implicate someone else, but to point the finger specifically at Wolfe.” *Id.* at 423. After noting that “[t]he Commonwealth did not contest the suppression issue,” and that the “willfulness or inadvertence” of the prosecution’s nondisclosure is irrelevant under *Brady*, the Fourth Circuit made clear that, in this case, “the Commonwealth’s suppression ... was entirely intentional.” *Id.*; see also *id.* at 424 (quoting district court’s criticism of prosecutor’s description of his disclosure policy, and adding that, “We sincerely hope that the Commonwealth’s Attorney and his assistants have finally taken heed of those rebukes”). The Fourth Circuit also had no difficulty finding materiality, explaining that, “[i]n these circumstances, where ‘the jury had to believe that Barber was credible and that his version of events was in fact truthful and accurate in order to support [Wolfe’s] conviction,’ the materiality of the Newsome report is manifest.” *Id.* at 424 (quoting district court order). Finally, a majority of the Fourth Circuit panel upheld the district court’s determination that the *Brady* violation resulting from suppression of the Newsome report warranted a grant of relief from petitioner’s drug conspiracy and firearms convictions as well as his capital murder conviction. While the majority acknowledged that the conspiracy and firearm convictions were supported by admissions made during petitioner’s own testimony, it also accepted his contention that those admissions had been made necessary only because of the circumstances created by the *Brady* violation. The majority explained:

Because the Commonwealth concedes that Wolfe’s trial testimony was central to

his drug conspiracy conviction and sentence, and because the Commonwealth cannot prove that Wolfe would have testified if the Newsome report had not been suppressed, we agree with the district court that Wolfe is entitled to vacatur of all three of his state convictions.

691 F.3d at 426.

***Guzman v. Secretary, Dept. of Corrections,**
663 F.3d 1336 (11th Cir. 2011)

The Eleventh Circuit affirmed the grant of guilt-or-innocence phase relief in this Florida capital case, finding that the state violated *Giglio v. United States* when its key witness (Cronin) and its lead investigator (Sylvester) testified falsely about the existence of a deal between the state and Cronin, and did not disclose that Sylvester had paid Cronin a \$500 reward shortly before she testified to the grand jury that indicted petitioner. Although Sylvester testified at petitioner's state post-conviction relief hearing that she never informed the prosecutor of the payment (and the prosecutor corroborated that assertion), the Eleventh Circuit agreed with the Florida Supreme Court that, pursuant to *Kyles v. Whitley*, 514 U.S. 419 (1995), "Sylvester's knowledge of this evidence was imputed to the prosecutor." 663 F.3d at 1349. The Eleventh Circuit began its assessment of the state courts' denial of relief on petitioner's Giglio claim by agreeing with their conclusion that, given the extent to which Cronin was actually impeached at trial, "[t]he addition of the truthful testimony about the \$500 reward would not have made a material difference in Cronin's credibility to the finder of fact." 663 F.3d at 1350. Despite this finding, however, the Eleventh Circuit went on to determine that the Florida Supreme Court's failure to account for the impact of the \$500 payment on the motivation of Cronin – a prostitute and crack addict to whom \$500 was a lot of money – to lie rendered its decision defective. The Eleventh Circuit then identified "several reasons" why the Florida Supreme Court's decision did not prevent a grant of federal habeas relief: (1) while the state court emphasized that another informant had also implicated petitioner, and that the victim's wounds were consistent with a knife possessed by petitioner, the other informant had recanted before petitioner's trial, and the knife wound evidence was not particularly strong; (2) the state court also discounted the extent to which the trial was a credibility contest between petitioner and Cronin, and the possibility that, had the \$500 payment – and the timing of that payment – been disclosed, petitioner's own (not implausible) account would have prevailed; (3) the state court "either did not consider or unreasonably discounted the import of the fact that both Cronin and Sylvester testified falsely," which deprived petitioner's defense counsel of the opportunity not only to mount a stronger challenge to Cronin, but also to impugn the credibility of the state's lead investigator. 663 F.3d at 1351-52. The court further noted that the evidence against petitioner at trial "was circumstantial and far from overwhelming":

There were no eyewitnesses or unbiased observers who testified as to the murder-robbery. Guzman never confessed to law enforcement. Both witnesses who testified that Guzman had confessed, Cronin and Rogers [the jailhouse informant], recanted their testimony at one time or another prior to trial. There was no blood or fingerprints on the sword recovered from [the victim's] room. ...

As a result, Cronin's and Detective Sylvester's testimony was the crux of the State's case ..., and it was thus objectively unreasonable to discount the effect of bias on that crucial body of evidence under the totality of the circumstances in this case.

663 F.3d at 1354.

Finally – and without specifically explaining why it was necessary in light of the prior determinations that the state court had unreasonably applied *Giglio*'s materiality standard, and that petitioner's claim was meritorious – the Eleventh Circuit examined whether the error was harmless under *Brecht*, and concluded that it was not. See 663 F.3d at 1355-56.

***Sivak v. Hardison,
658 F.3d 898 (9th Cir. 2011)**

In pre-AEDPA robbery-murder case, Idaho death row inmate was entitled to habeas relief as to his death sentence based on prosecutor's knowing presentation of perjured testimony by jailhouse informant regarding his motives for testifying and his expectations of receiving preferential treatment from the State. Both Sivak and his co-defendant had admitted being present when the crime occurred but each man claimed that the other was responsible for the robbery and murder. The informant, who was in jail facing burglary and escape charges, testified that Sivak confessed to being the actual killer. The informant claimed that he was testifying because he had a wife and kids out on the streets and he didn't want anything to happen to them. He denied seeking favoritism from State authorities. He stated that his escape charge was dismissed after the preliminary hearing and that a charge pending in another city was dismissed but the informant denied knowing whether the prosecutor's office was involved in the dismissals. The informant also denied that he was presently free because of his testimony against Sivak and a man charged with murder in Kansas, claiming he had traveled to Kansas for "personal" reasons. Through federal discovery Sivak obtained evidentiary proof of his allegation that false testimony had knowingly been presented concerning the informant's expectation of benefits: (1) a letter from the county prosecutor to the prosecutor in a neighboring county where the escape charge was pending urging dismissal of the charge in light of the informant's willingness to testify against several inmates facing murder charges; (2) a letter from the same prosecutor a few days later to the chairman of the state Commission for Pardons and Parole recommending that the informant be given additional consideration for parole at an upcoming hearing based on the informant's cooperation in several murder trials and a murder investigation; (3) a letter from the informant to a Kansas prosecutor complaining that an Idaho investigator had said the informant would receive assistance but the informant wasn't receiving any and adding that he wanted \$6000 in cash as witness fees; and (4) a subsequent letter from the Idaho investigator to the informant telling him his witness fees should arrive shortly, recounting that the informant had earlier been told after requesting a deal there could not be an guarantee of assistance but also setting out the "arrangements" that were made in anticipation of testimony in three murder trials: (a) the dismissal of criminal charges in two jurisdictions, (b) a reduced sentence, and (c) a parole from the Idaho State Correctional Institute. The fourth letter closed with a statement that the informant would still be in prison without the prosecution's intervention. The false testimony

was not prejudicial as to the murder conviction in light of strong evidence of guilt under either a direct felony-murder theory or an aiding-and-abetting felony-murder theory. It was prejudicial as to sentence, however. Had the informant's testimony been rejected, a second informant's testimony would have been called into doubt. And without Sivak's purported confessions, the aggravating factors were significantly weakened.

LaCaze v. Warden Louisiana Correctional Institute for Women,
645 F.3d 728 (5th Cir. 2011), cert. denied, 132 S.Ct. 1137 (2012)

In murder case where the actual killer was the lover of LaCaze, who was the victim's wife, and the killer testified that he killed the victim at LaCaze's request, LaCaze was entitled to habeas relief because of the prosecution's failure to disclose that the prosecutor had assured the killer that his son would not be prosecuted for his role in the killing. (The son had driven his father to and from the scene of the killing. LaCaze's defense was that the victim had arranged for the killer to take his life because of the victim's failing health.) That there was not an enforceable deal concerning the son did not defeat the *Brady* claim given that the killer received an assurance from the prosecutor that the son would not be prosecuted and the killer believed the prosecutor. The Louisiana Supreme Court employed an improper legal standard when it determined that the undisclosed agreement regarding the son was immaterial because the main source of bias and motivation to lie, i.e., the killer received a forty year sentence for a manslaughter plea, had been disclosed. "The materiality inquiry does not turn on which of two competing sources of bias a court, in hindsight, determines the jury would have considered more important. Rather, the inquiry is whether an undisclosed source of bias—even if it is not the only source or even the 'main source' could reasonably be taken to put the whole case in a different light." The state court also used the incorrect standard when it found the non-disclosed agreement to be immaterial because there was sufficient evidence to support LaCaze's conviction. Given that the killer's testimony was the only direct evidence of LaCaze's intent, disclosure of his bias to the jury might have put the whole case in a different light. Notably, in its opening statement, closing argument, and rebuttal, the prosecutor argued that the killer had no reason to lie. "In circumstances like these, where 'the jury's estimate of the truthfulness and reliability of [the witness] may well be determinative of guilt or innocence,' the failure to disclose *Brady* information is material."

Houston v. Waller,
420 Fed.Appx. 501, 2011 WL 1496350 (6th Cir. April 20, 2011) (unpublished)

Habeas relief granted to petitioner convicted of selling cocaine and aggravated assault where government withheld exculpatory evidence showing that federal agent Howell who was in charge of petitioner's case had been using cocaine and taking cocaine from controlled buys, and was later indicted for tampering with evidence and possession of controlled substances. *Brady v. Maryland* required disclosure of Howell's drug use because he was a key witness and his cocaine use "impact[ed] his credibility and recollection of events" and constituted material impeachment evidence affecting the cocaine amounts purchased.

***Breakiron v. Horn,**
642 F.3d 126 (3rd Cir. 2011)

Habeas relief granted as to robbery conviction based on prosecution's suppression of evidence that would have impeached a jailhouse informant who testified that Breakiron had admitted to hiding in the bar's bathroom until the other patrons left and then attacking the bartender before taking her to his father's house where he finished her off. This testimony contradicted Breakiron's account of the bartender striking him first and then his blacking out before discovering the victim with a knife in her back. According to Breakiron, he only stole money from the bar as an afterthought when attempting to cover up the killing. (The district court had granted relief as to the murder conviction due to the *Brady* violation – the Commonwealth had failed to disclose that the informant had a prior conviction for assault with intent to rob, had sought a deal in exchange for his testimony against Breakiron, and was a suspect in an investigation pending at the time he testified. The Commonwealth did not appeal the grant of relief as to the murder charge.) The robbery-related *Brady* claim was reviewed de novo because it was not adjudicated on the merits by the state court. The informant's testimony was held to be material to the robbery charge as well as the murder charge in that: (1) it suggested that the incident as a whole was a premeditated and intentional plan; (2) Breakiron "finishing off" the victim at another location suggested that the money was taken prior to the victim's death; and (3) Breakiron's credibility in general was undermined by the informant's contrary account of the incident.

United States v. Kott,
432 Fed.Appx.736, 2011 WL 1058180 (9th Cir. March 24, 2011) (unpublished)

Conviction vacated and case remanded for new trial where newly disclosed evidence, viewed collectively, is material and prosecution's failure to disclose it violated *Brady*. There was no doubt "prosecution suppressed evidence favorable to" defense, and only inquiry is whether prejudice ensued. Newly disclosed evidence of police department files suggesting key prosecution witness Allen sexually exploited minors and attempted to conceal behavior by soliciting perjury was both admissible and not cumulative because it could have been used to impeach Allen's testimony, undermine his credibility, and aid defendant's testimony. The new evidence also documented multiple "prior inconsistent statements" about payments defendant "allegedly received" and reasons for them which could have undermined Allen's credibility while bolstering that of defendant.

Maxwell v. Roe,
628 F.3d 486 (9th Cir. 2010), cert. denied, 132 S.Ct. 611 (2012)

In murder case, habeas relief granted on *Brady* claim and claim that false evidence was presented where both claims related to jailhouse informant whose testimony was crucial to the prosecution. Maxwell was convicted, inter alia, of two murders and sentenced to life without parole. The only

evidence linking Maxwell to one murder was a palm print found on a public bench near the victim's body in an area Maxwell often visited, some muddy and consistent footprints, and a generic Bic lighter found in Maxwell's pocket at the time of his arrest. (The age of the palm print—the State's "best physical evidence"—could not be determined.) Evidence linking Maxwell to the other murder was the in-courtroom voice identification of Maxwell by a witness who had been unable to pick Maxwell out of an earlier lineup in which he spoke, and Maxwell's possession of a knife consistent with the victim's stab wound. Without physical evidence, the state "rested its case" on informant Storch who testified Maxwell had showed him an article about the killings that referenced the palm print and then stated that the mistake Maxwell had made by leaving the print was unusual for him. (The prosecution argued that Maxwell's remarks implicated him in all ten of the murders Maxwell was charged with having committed, although Maxwell was ultimately convicted of only two.) A hearing was held in state court on Maxwell's claim that Storch gave false testimony. The state court ruled that while Storch later became a sophisticated informant and established liar, Storch was a "neophyte" jailhouse informant at the time of Maxwell's trial and had not lied regarding Maxwell's confession. The federal district court denied Maxwell relief, concluding "Storch's lies about the deal he received from the prosecution and about his informant history did not prejudice Maxwell" and that any "withheld information was neither material nor prejudicial." Regarding the false testimony claim, the court of appeals held that the state court's finding that Storch had not lied about Maxwell's confession was an unreasonable determination of the facts in light of the evidence before the state court. The appeals court first noted the numerous undisputed lies that Storch had told at the trial, including false statements about his motivation for coming forward and a false denial about whether his public defender had worked out a plea agreement before Storch personally negotiated a more favorable deal in exchange for his testimony against Maxwell. The court of appeals also observed that Storch had misrepresented his sophistication and experience as an informant at the time of the Maxwell trial. In addition, the record contained evidence about Storch's signature modus operandi for "booking" fellow inmates – gaining physical access to a high-profile defendant, obtaining media accounts of the case, and then contacting the District Attorney or law enforcement with an offer to testify. The appeals court then noted the numerous times Storch had lied under oath in other cases, which ultimately led to a perjury indictment. After determining that Storch had lied about the confession, the appeals court applied circuit precedent under which knowledge by the prosecution of the false testimony need not be shown to establish a due process violation. Because the state court's rejection of the claim was premised on an unreasonable determination of the facts as to whether Storch lied, the appeals court assessed the issue of materiality de novo. Given the paucity of evidence implicating Maxwell, the content of Storch's testimony, the prosecutor's emphasis on Storch's testimony during argument, and the fact that the jury asked to see Storch's testimony during deliberations, materiality was found. As to the Brady claim, because no state court issued a reasoned decision for denying the claim, the court of appeals reviewed the "factual record de novo to determine whether the California Supreme Court's summary denial of the claim constituted an unreasonable application of *Brady*." It then found "that the state court could not have reasonably determined that the suppressed evidence relating to the deal Storch received and Storch's prior cooperation with law enforcement as an informant was not material." While Storch admitted during cross-examination

that he had received a reduced sentence of sixteen months on pending charges as a result of his testimony against Maxwell, he lied about the fact that his public defender had earlier negotiated a less favorable deal for him. “[T]he fact that Storch pursued an additional benefit to himself— independent of and subsequent to the agreement worked out by his public defender— would have provided Maxwell with impeaching evidence relevant to Storch’s motivation for testifying and of a different character than the other impeachment evidence which came to light.” In addition, “the details of Storch’s plea negotiations would have helped to establish Storch’s sophistication and directly contradicted the naivete he professed at trial.” The appeals court found: “The prosecution’s failure to correct Storch’s false testimony about his prior deals was prejudicial.” In addition, the prosecution failed to disclose that although Storch had never testified for the district attorney, he “had on several occasions aided in investigations and acted as an informant on numerous previous occasions.” Viewed cumulatively, “[t]he prosecution’s failure to disclose this impeachment evidence undermines confidence in the outcome of Maxwell’s trial, and the California Supreme Court’s decision to the contrary was an unreasonable application of *Brady*.”

Goudy v. Basinger,
604 F.3d 394 (7th Cir. 2010)

Habeas relief granted in case involving murder and attempted murder convictions where prosecution withheld three police reports detailing eyewitness statements that: (1) implicated the key prosecution witness in the crime and conflicted with the version of events he testified to; (2) contradicted an eyewitness’s statement at trial that Goudy was the shooter on the driver’s side of the vehicle; and (3) conflicted with another eyewitness’s description of the gunmen. State court agreed prosecution suppressed exculpatory evidence, but concluded the new evidence was not material. In reaching that conclusion, the state court erred in two ways. First, although the state court initially identified the correct legal principle for determining materiality, its actual analysis required Goudy to prove the new evidence “would have” established his innocence—a burden “diametrically different” than the clearly established federal law in *Kyles v. Whitley*, 514 U.S. 419 (1995). Second, also contrary to *Kyles*, the state court failed to recognize and then assess the cumulative materiality of the suppressed evidence, but instead dismissed “each piece of suppressed evidence in seriatim.” In denying relief, the state court unreasonably applied clearly established federal law.

Robinson v. Mills,
592 F.3d 730 (6th Cir. 2010)

Prisoner convicted of first degree murder and sentenced to life imprisonment was entitled to habeas relief where prosecution withheld material impeachment evidence “likely [to] have altered” the outcome of proceedings, i.e., evidence that the key prosecution witness was a confidential informant. Robinson and Smith were indicted for the murder of Irwin, a drug dealer. Robinson had agreed to meet Irwin to repay monies he owed to him. Smith agreed to accompany Robinson and provided him with a small handgun. At the arranged meeting, Irwin was driving a

car and armed with a 357 magnum. Sims was in the front seat passenger. Robinson got in the car and sat in the back seat. According to Robinson, Irwin threatened him and his family, and pointed the gun at him. Robinson then shot Irwin in self defense. Robinson testified Smith was not involved in the killing and Smith's statement to police corroborated Robinson's fear of Irwin. At the preliminary hearing, Sims testified that she did not see what happened when the shooting occurred and did not know if Irwin reached for his gun, but that Robinson told her "that he had to kill Irwin or Irwin would have killed him." Sims' trial testimony "differed significantly." Sims testified that after picking up Robinson, Irwin turned slowly into a parking lot while eating a sandwich, "making it unlikely" Irwin "grabbed his gun with his right hand." Sims also testified Robinson was "'smiling,'" "paint[ing] Robinson as cold and calculating" and contradicting "his assertion that" the shooting "was self-defense rather than murder." Unknown to Robinson at the time of trial was that Sims was "a paid confidential informant" for the police. Sims informed on Irwin's sister and worked and received payment on "at least seven other occasions." Just 18 days before Robinson's trial, Sims helped a detective by making a "controlled buy" from a witness who later appeared at Robinson's trial. The undisclosed impeachment evidence of Sims was not "merely" cumulative; it was "different in kind because the suppressed material would have offered insight into why Sims' testimony differed from her testimony at the preliminary hearing." The new information was "material," demonstrating Sims' "pro-prosecution bias" at trial.

***Simmons v. Beard,**

590 F.3d 223 (3rd Cir. 2009), cert. dismissed, 130 S.Ct. 1574 (2010).

Under AEDPA, habeas relief granted due to state's failure to disclose impeachment evidence related to the two primary witnesses who tied the petitioner to the crimes. The victim was an elderly woman killed in her home. Three neighbors identified the petitioner as the person last seen with the victim asking to use her phone. These witnesses were all connected as they lived in the same house. They only came forward identifying the petitioner after his arrest and pictures had been publicized. Another witness testified that she had been robbed and sexually assaulted by a man described similarly shortly after the murder but before the body was found and her attacker referenced the murder. While she reported the assault on the day it occurred, she made no mention of the statement referencing the murder and she only identified the petitioner in a photo array after the murder and his picture had been publicized. She identified him a second time in a lineup requested by defense counsel. The petitioner's girlfriend, who had initially made statements to police that would have provided the petitioner with an alibi defense, contradicted the asserted alibi in her trial testimony. The state had failed to disclose four items from the defense. First, the petitioner's girlfriend was a suspect and was threatened with arrest if she did not cooperate with police. She cooperated and all of her in-person or phone conversations with the petitioner were recorded. Second, the other assault victim had attempted to buy a pistol soon after the assault and lied on the forms to avoid disclosing her 1951 felony conviction for burglary, which made her ineligible to purchase a weapon. The lie made her subject to prosecution for perjury. She was charged with the weapons charge, but the prosecutor and detective in this case dismissed the charges against her and did not forward the information as they did in other cases where persons were suspected of perjury. Third, lab reports of evidence

collected following her assault report showed no blood or seminal fluid and the hairs that were examined were consistent with the assault victim but not the petitioner. Finally, at some point prior to trial, the assault victim was shown a mug book containing the petitioner's picture but did not identify him. A police officer testified in the preliminary hearing, however, that she had not been shown a mug book. This failed identification was the only *Brady* issue the state court reviewed on the merits. The Third Circuit's review under AEDPA was complicated because there was a four-way split in the state court decision with no ground receiving a majority support. Because the state court found procedural bars for three of the claims, there was no adjudication on the merits. The state court's decision on the failed mug book identification was "an unreasonable construction of the factual evidence" presented in state court because the court failed to consider the undisputed fact that the defense would not have requested a lineup if this information had been disclosed. Likewise, because the state court had reviewed the merits of only the mug book identification claim, "the [state] court did not reach the issue of the collective effect of multiple violations." Conducting this collective analysis, the court found the suppressed evidence to be material as "it calls into question the credibility of the two witnesses at the heart of the case." The prosecutor also recognized that the other assault victim was a "critical witness," beginning his opening statement describing her testimony and even calling her a "critical" witness. "Overall the picture of what [the] trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened."

***Wilson v. Beard,**
589 F.3d 651 (3rd Cir. 2009)

The Third Circuit affirmed the grant of guilt-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Pennsylvania capital case. The prosecution's case against petitioner for the shooting death of a patron in a bar was "based almost entirely on the testimony of ... three witnesses," 589 F.3d at 656 – Jackson (a bar patron and eyewitness), Rahming (also a bar patron and eyewitness), and Gainer (a onetime cellmate who claimed petitioner had confessed to him). In state post-conviction proceedings, new information about all three witnesses came to light. Jackson's previously undisclosed rap sheet indicated that he had been arrested for impersonating a police officer six weeks before the shooting. A presentence report produced after that arrest revealed six more out-of-state arrests, two of which involved impersonating a police officer, as well as a history of skull fractures, apparent brain damage and memory loss, a distorted perception of reality, and a strong propensity to try to assist law enforcement. With regard to Rahming, new information indicated that on the day after he testified against petitioner, a detective transported him to a local emergency center, where he was diagnosed with schizophrenia. This revelation led to a review of Rahming's rap sheet and other documents indicating a long history of mental health problems, substance abuse, seizures, memory loss, and hallucinations. In his testimony at petitioner's post-conviction relief hearing, Rahming further admitted that he had been intoxicated at the time of the shooting allegedly committed by petitioner. As to Gainer, new information established that his longtime police handler had provided him with interest-free loans when he acted as an informant, which contradicted that officer's testimony that he had "never given [Gainer] anything." 589 F.3d at 662. After

determining that the Pennsylvania Supreme Court's denial of petitioner's claim on procedural grounds did not bar federal review, and that the absence of a merits adjudication by the state court precluded application of § 2254(d), the Third Circuit addressed the merits. The court first rejected the state's contention that Jackson's rap sheet had not been "suppressed" because it was a matter of public record accessible to trial counsel through the exercise of due diligence. The court explained that "it is clear that the prosecutor had the information ... in her file, [yet] she failed to disclose this information when asked by the court during a charging conference for the witnesses' criminal histories" 589 F.3d at 664. With regard to Rahming's trip to the emergency center and Gainer's interest-free loans, the court had no difficulty determining that this information was known to members of the "prosecution team" for Brady purposes. The court also rejected the state's argument that disclosure of Jackson's rap sheet and Rahming's emergency center visit would have led to discovery of the more detailed (and damaging) information about their histories. Emphasizing *Kyles v. Whitley*'s focus on what "competent counsel" could have done with favorable information, the Third Circuit concluded that, in this case, competent counsel would have pursued the additional information, and would have used it at trial. Finally, the court held that the undisclosed information was material in that it would have facilitated devastating impeachment of the three witnesses at the center of the prosecution's case:

Although the shooting occurred in a relatively crowded bar, no other eyewitnesses testified and the Commonwealth presented no physical evidence implicating Wilson as the shooter. In light of the importance of the testimony of these three witnesses and the significant impeachment value of the undisclosed information, we conclude that Wilson's right to due process ... was violated

589 F.3d at 667.

United States v. Torres,
569 F.3d 1277 (10th Cir. 2009)

Distribution conviction reversed on direct appeal. The defendant was convicted of distribution to a confidential informant during a controlled buy. Prior to trial, the government disclosed that the informant was paid \$100, cooperated with the government for approximately eight months, had previously been a drug user but had not used in 15 months, and she had two prior felony convictions. The defense was prohibited from cross-examining the informant with criminal complaints for drug possession and forgery that had been dismissed in the year prior to the defendant's arrest. Following trial, the defense discovered evidence related to the informant that had not been disclosed and filed a motion for new trial. The District Court improperly applied the newly discovered evidence test and denied relief. Reversal required because the government failed to disclose that (1) the informant had been retained by the DEA on two prior occasions and had been de-activated following the forgery charge, which was later dismissed; and (2) she had misidentified the defendant as his cousin.

United States v. Price,
566 F.3d 900 (9th Cir. 2009)

Felon in possession of firearm conviction vacated due to government's failure to disclose key witness' criminal record. The pistol was found under the driver's seat of a car that was pulled over with the defendant riding in the rear. While circumstantial evidence pointed to the defendant, the key government evidence was the testimony of a witness that testified she had seen the defendant with the pistol 15 minutes before the car had been stopped. Although the defendant was aware that the witness had a prior theft conviction, the defendant was not told that the witness had a lengthy history of convictions for theft and fraudulently using false registration tags, as well as arrests for shoplifting. The undisclosed evidence was material as the prosecutor relied heavily on the witness' testimony in closing and the defendant was acquitted of the drug trafficking charges tried at the same time. The District Court erred in finding no *Brady* violation simply because the prosecutor did not personally have knowledge of the witness' history, although the record was clear that, at minimum, the prosecutor had requested a detective to obtain this information.

Shortt v. Roe,
342 Fed.Appx. 331, 2009 WL 2487046 (9th Cir. 2009) (unpublished)

Habeas relief granted in murder and robbery case because the state failed to disclose that a state witness had been given sentencing consideration in exchange for his testimony against the petitioner and failed to correct the witness' false testimony denying receiving consideration. Under AEDPA, the state court's decision was an objectively unreasonable application of both *Brady* and *Napue*.

***Douglas v. Workman,**
560 F.3d 1156 (10th Cir. 2009)

Under AEDPA, habeas relief granted to two prisoners due to state's failure to disclose deal the Oklahoma prosecution made in exchange for shooting victim/key witness' testimony. The witness, a member of the Crips, was shot in a drive-by shooting along with a teenage girl who died. The witness initially made contradictory statements to police, but ultimately identified Powell and Douglas as the shooters. Both were charged with capital murder. The witness had cocaine trafficking charges pending at the time of the shooting. Prior to the preliminary hearing, he was also charged with throwing a rock at a police car. By the time of Douglas' trial, he pled to a lesser offense of possession with intent to distribute and received a 10 year sentence. The other charge was dismissed. After serving four months of his sentence he was released on pre-parole. That status was revoked when he was arrested for receiving stolen property. He had a pre-parole interview for a second consideration and was notified that release would not be recommended just three days before he initially met with the capital prosecutor. During his testimony in Douglas' trial, he denied any deals or help from the prosecutor in exchange for his testimony. The prosecutor even elicited his testimony that he had never asked the prosecutor for

help. His testimony was the “linchpin” in the state’s case, which culminated with the state’s closing argument emphasizing his trustworthiness. Just one day after Douglas’ trial, the prosecutor sent a detailed letter to the parole board in support of the witness’ parole application and referencing the witness’ testimony in the upcoming Powell trial. The witness was granted pre-parole status again but was reincarcerated following another violation. The witness contacted his mother, who called the prosecutor, who then contacted the sentence administration auditor just a week before Powell’s trial. Without disclosure of any of this information, the witness again served as the key witness for the state. He again denied any deals or assistance and the state again elicited his testimony that he had not even asked for help. A month after Powell’s trial, the prosecutor contacted the prison warden who approved the restoration of 400 days credit to the witness, effectively discharging his sentence and getting him released from prison. While Powell and Douglas sat on death row, the prosecutor’s assistance to the witness continued. Assault with a deadly weapon charges for shooting someone were dismissed due to “insufficient evidence of identification.” Drive-by shooting charges were dismissed “due to lack of cooperation from the victims.” The witness had an assault and battery charge for beating his girlfriend with a baseball bat and trafficking in cocaine charges. Even though the capital prosecutor was no longer in the district attorney’s office, he contacted the prosecutor on the witness’ behalf. The witness was also arrested for murder charges in Texas. The witness was sentenced to 15 years on the assault case and was then allowed to plead to the trafficking charge for a five year (“unusually lenient”) concurrent sentence. The witness was allowed to plead to a reduced aggravated robbery charge in Texas and received a twelve and a half year sentence concurrent with his Oklahoma sentences. While Powell and Douglas were pending in federal habeas, the witness disclosed that he had been unable to identify any of the shooters. He said that he would not testify against either defendant unless the state assisted him with his then-pending trafficking case. Thereafter, the prosecutor continued to assist him because he threatened to reveal his perjury in the trials. The district court granted relief to Powell but denied relief to Douglas. The Tenth Circuit held that both men were entitled to habeas relief. For Douglas, whose appeal had been pending in the Tenth Circuit when the witness recanted his testimony and revealed the deal, there were some complicated procedural holdings resolving statute of limitations and possibly second petition/successor issues in Douglas’ favor prior to reaching the merits. De novo review was applied because the state court never addressed the *Brady* claims on the merits. The court found that the witness’ identification of the petitioners was “indispensable” as the “only direct evidence linking [the petitioners] to the murder.” If the juries had discounted his testimony as not credible, they almost certainly would have acquitted the petitioners. While defense counsel attempted to impeach the witness on the issue of his motive to testify, they were “stonewalled” by the witness’ repeated denials and “stymied from rebutting those denials” by the state’s failure to disclose the relevant impeaching evidence. While there was less evidence of a deal prior to Douglas’ trial, the evidence still supported a finding that the state was offering assistance to the witness in exchange for his testimony. Two witnesses testified in the trial that the witness told them he had made a deal with the prosecutor in exchange for his testimony. The witness was not charged with drug or weapons offenses, even though the prosecutor knew that the witness was in possession of a loaded gun and crack cocaine at the time of the shooting. And the prosecutor sent a letter to the parole board just one day after trial. In light of the continued

assistance to the witness long after the trials were over and even after the prosecutor left the district attorney's office, "the reasonable inference [of a deal prior to trial] becomes inescapable." Even if the deal was tacit, disclosure was required. "A deal is a deal—explicit or tacit. There is no logic that supports distinguishing between the two." *Id.* at 1186.

Harris v. Lafler,
553 F.3d 1028 (6th Cir. 2009)

Under AEDPA, habeas relief granted in second-degree murder case due to the state's failure to disclose three statements made by police officers to the state's primary witness. The witness and the petitioner were in a bar fight. Later that night, a vehicle followed the car in which their opponent rode and shots were fired into that vehicle killing two passengers. The witness and the petitioner were arrested a month later. The witness testified at the preliminary hearing that he drove the vehicle and the petitioner fired into the other vehicle. Defense counsel asked him six times whether any promises or deals had been made in exchange for his testimony. The witness said no. This testimony was read into the trial evidence, after the witness invoked his Fifth Amendment rights. The state failed to disclose to the defense that police officers had told the witness: (1) his girlfriend would be released if they were satisfied with his statement; (2) he would be released if he testified at the preliminary hearing consistent with his statement; and (3) he should tell no one that police had promised him anything in return for his statements or testimony. These statements were material because they could have been used to cast doubt on the witness' credibility. The state had also "featured" the witness' "eyewitness account" in closing arguments. The court rejected the state's request for remand for an evidentiary hearing because the state had never before challenged the factual accuracy of the witness' post-conviction statements. "The time to submit evidence or seek an evidentiary hearing is before factual allegations become the basis for a decision against the State, not after."

Drake v. Portuondo,
553 F.3d 230 (2nd Cir. 2009)

Habeas relief granted in double murder case on *Napue* claim because the prosecution knowingly presented false testimony from a prison psychologist. No deference was given to the state courts' conclusions because the state court refused to permit development of the factual record. Two high school students were killed while in a car parked near a junkyard. The couple had been using the location as a lovers' lane. Drake, another high school student, had dressed in military fatigues and fired into the car. According to his statement, he was out looking for abandoned cars to shoot at the junkyard and was not aware the car was occupied when he opened fire on it. Upon finding the couple, Drake stabbed the male victim because he was groaning and Drake was in a panic. Drake took the bodies to a dump in a neighboring town but was spotted by police. While the male victim was clothed, the female victim was not. The prosecutor ultimately developed a theory that the crime had a sexual motivation. The female victim had a bruised rectum and also had post-mortem bite marks on her breasts. (At trial, a forensic odontologist testified that such bite marks are often present in sexually-related crimes.) In addition, initial reports indicated that traces of semen believed to have come from Drake were found on a slide

from the female victim's rectal cavity. Shortly before trial, however, the prosecutor learned this report was not accurate. When the prosecutor informed the forensic odontologist that semen evidence did not exist, the odontologist recommended that the prosecutor consult a "prison psychologist" in Michigan. The prosecutor did so two weeks before trial. After an hour long call, the "expert" said he needed to think about the case before he could give an opinion. He later informed the prosecutor he believed "picquerism" was involved, which he explained was a syndrome or criminal profile in which the perpetrator realizes sexual satisfaction from penetrating a victim by sniper activity or by stab or bite wounds. The prosecutor waited until the day before the expert testified to notify the defense of the intent to call him. This late notice prevented defense counsel from finding a competing expert and preparing for cross-examination. In his testimony, the expert gave a long list of impressive credentials. He then testified that he had been provided with information only the day before and immediately formed his opinion, which was this was a clear case of picquerism. The defense requested a two-week continuance to allow time to find a rebuttal expert, but this request was denied. After Drake's convictions were affirmed, he discovered that the expert had exaggerated and lied about his credentials. In a federal deposition, the extent of his untruthfulness was revealed. It was also established that he had given false testimony about the extent and timing of contact he had with the prosecution about the case. Clearly established Supreme Court precedent applicable to this case required Drake to show that the prosecutor actually knew that the expert's testimony was false. The district court's finding that Drake failed to show the requisite knowledge was clearly erroneous. The prosecutor had to have known that the expert's statements about the contact the two had was not true. And the prosecutor knew that, contrary to the expert's trial testimony, the expert had not initially arrived at an opinion. Even without the depositions, the prosecutor's delayed notice to the defense about the expert and the prosecutor's resistance to a continuance led to an inference of knowing complicity in the false testimony. The record also strongly suggested that the prosecutor knew that the expert's testimony about his scholarship was intentionally misleading. The prosecutor's notes revealed that he knew the expert had not "published" any papers so he asked the expert instead if he had "written" any papers. (Notably, the prosecutor asked another expert about writing and publication.) The false testimony was material because the expert's deception about how quickly he had arrived at his conclusion, and his lie about what case information he had been exposed to, permitted him to offer testimony that appeared credible. In fact, the expert "had two weeks to conjure up his quackery. His direct testimony on picquerism, which spans twelve pages of trial transcript, consisted largely of uninterrupted and prolix exposition, weaving the complicated facts of the case into a seemingly coherent narrative, all pointing to the symptoms of the fictive syndrome called picquerism." The false testimony went directly to the only issue in the case, which was intent, and the Court could not conclude that there was no reasonable likelihood the false testimony could have affected the judgment of the jury.

United States v. Banks,
546 F.3d 507 (7th Cir. 2008)

In cocaine possession case, government's withholding of evidence impeaching government

chemist's expert testimony with evidence she misused her government credit card warranted granting defendant's new trial motion. Although presence of cocaine not at issue given that another chemist "allegedly tested" substance and concluded it was cocaine and there was "great deal of evidence" presented against defendant that included police surveillance, the accusations of expert's misappropriation of funds and pending disciplinary proceedings against her were relevant to bias. While "acquittal may have been less likely than conviction" even if impeachment evidence had been disclosed, district court did not abuse discretion in finding evidence about government witness material.

United States v. Triumph Capital Group, Inc.,
544 F.3d 149 (2nd Cir. 2008)

In racketeering, racketeering conspiracy, bribery, wire fraud and obstruction of justice case, district court abused its discretion by denying motion for new trial where prosecution failed to disclose notes taken by FBI special agent during attorney proffer and the notes supported an alternative version of an important conversation that was entirely at odds with the government's theory of the case at trial. Defendant could have used the proffer notes not merely to support his version of the conversation with the witness, but also to impeach the witness's credibility.

Toliver v. McCautry,
539 F.3d 766 (7th Cir. 2008)

Where petitioner was convicted of first degree intentional murder based on brother's murder of roommate, *Brady* was violated when state failed to disclose letter received before trial that "tended to show" petitioner's brother acted alone when shooting victim and petitioner attempted to stop his brother from killing roommate. Letter's author, Smith, offered to testify at petitioner's trial about contents of letter if prosecutor would ask Smith's prosecutor about favorable treatment on Smith's pending charges. Smith would have testified that two witnesses to the murder told him petitioner tried to stop his brother's actions, and when he asked why petitioner was being charged, a witness said prosecutor wanted to prosecute both brothers, and told witnesses if they did not cooperate, they would be charged with murder. Smith said prosecutor replied to letter, stating he could not help Smith because Smith's pending prosecution was in another county, and Smith's information "did not shed any new light" on case. State court denial of relief unreasonable application of clearly established law because undisputed evidence "would have bolstered...defense" and "enhanced significantly ... chances of jury's accepting" petitioner's account of facts, and might have created reasonable doubt on whether petitioner "intentionally aided and abetted in murder" or "attempted to prevent it."

***Jells v. Mitchell,**
538 F.3d 478 (6th Cir. 2008)

Denial of habeas relief on *Brady* claim reversed in case where petitioner convicted of felony murder and sentenced to death on theory that petitioner randomly kidnapped victim and her

child, and later killed victim. Although case was under AEDPA, *Brady* claim reviewed de novo because state court failed to address merits of four items of evidence the suppression of which petitioner had properly raised in state court. (Other items were not raised in state court and were not considered by the federal court.) The withheld evidence involved: (1) victim visited long-time friend on night of her murder, victim had a drink and was tipsy, friend walked victim to van, saw victim's son in the van but could not see person driving, (2) victim's sister stated victim would not take ride from stranger, and victim drinking when sister last saw her on night murdered, (3) victim's boyfriend who indicated victim arrived at bar around 11:00 p.m. to retrieve key to apartment, and appeared to have been drinking and "was high," and (4) police report from anonymous person later identified who called twice within 30-minutes, stating she and father saw man grabbing female and young boy about 11:00 p.m. Withheld documents refuted prosecution's theory of random kidnapping and duress, and impeached credibility of witness who believed altercation with victim was abduction, but admitted in telephone call she couldn't see man well. Impeachment of that witness, together with information that victim voluntarily accompanied petitioner, bolstered credibility of another witness who testified witnessed incident but did not call police because he believed victim and man knew each other. Evidence victim intoxicated undercut aggravating factor three-judge panel found supporting death: that petitioner deprived victim of freedom in methodical manner. Petitioner entitled to habeas relief as to his death sentence.

Mahler v. Kaylo,
537 F.3d. 494 (5th Cir. 2008)

In manslaughter case, reversing denial of habeas relief because prosecution violated *Brady* when it failed to provide defense with pretrial witness statements that supported defense and could have been used to impeach several witnesses' trial testimony about fight between two groups of people. State post-conviction court unreasonably applied clearly established federal law when it found statements not material. Although state court applied right standard, it "focused solely and unreasonably" on whether trial testimony provided jury "sense that 'a struggle' or 'a series of struggles'" occurred at some time between two groups. But "heart of" defense was whether struggle was ongoing or had ended and victim had turned away from petitioner when shooting occurred. State's case against petitioner "depended on reliability of the very witnesses whose pretrial statements were suppressed," and those statements directly undermined the prosecution witnesses' testimony that struggle had ended, and victim turned away when petitioner shot him.

United States v. Aviles-Colon,
536 F.3d 1 (1st Cir. 2008)

Reversing denial of new trial motion in drug conspiracy case where prosecution withheld DEA reports that could have been important for impeachment purposes at trial by helping defendant advance his defense that he was not part of a certain drug conspiracy but rather a member of a rival conspiracy.

United States v. Chapman,
524 F.3d 1073 (9th Cir. 2008)

In securities-related case, district court did not abuse its discretion by dismissing indictment following flagrant prosecutorial misconduct, i.e., reckless discovery violations and misrepresentations to the court.

White v. McKinley,
519 F.3d 806 (6th Cir. 2008)

In §1983 action initiated against former wife and investigating police officer following plaintiff's prosecution, conviction, and later acquittal of allegedly molesting his daughter, plaintiff had right under *Brady* to disclosure by police officer of his romantic relationship with plaintiff's wife and to preservation of potentially exculpatory evidence contained in plaintiff's daughter's diary. "[N]o reasonable police officer" under these circumstances "could have believed he could deliberately misrepresent the nature and length of his relationship with [plaintiff's wife], or that he could deliberately fail to preserve a child victim's diary containing potentially exculpatory information."

***Tassin v. Cain,**
517 F.3d 770 (5th Cir. 2008)

Petitioner who was sentenced to death for capital murder committed during armed robbery was entitled to habeas relief based upon prosecution's failure to disclose prosecution witness's plea bargain. Petitioner denied plan to rob two men who, along with a third person, were looking for drugs. Petitioner's wife, indicted on same charges, pleaded guilty and received 10-year sentence. At petitioner's trial, wife testified petitioner planned robbery. Defense requested disclosure of deals for lenient treatment in exchange for wife's testimony, but State denied any deal, wife testified no promises were made in exchange for her testimony, and State argued wife had no reason to lie because she faced potential 99-year sentence. Petitioner learned of deal post-conviction when inmate forwarded him letter wife wrote to another inmate discussing possible sentencing deal. Wife's attorney later averred judge "indicated" would sentence wife to 15 years, and possibly only 10, if she waived marital privilege. Wife testified in post-conviction proceedings she believed she would receive 10-year sentence. Relief denied by state court because trial judge, defendant's wife and the wife's attorney denied a final agreement existed. Federal court found that state court ruling requiring petitioner prove judge "promised" wife lenient sentence was contrary to clearly established Supreme Court law because "suppressed bargain need not have been [] firm promise" in order to mislead jury about wife's credibility, and State never disclosed bargain. State had duty to disclose witness's expected financial treatment even absent a "firm promise," and "nondisclosure of the understandings" violated *Brady*.

***Jackson v. Brown,**
513 F.3d 1057 (9th Cir. 2008)

Affirming grant of habeas relief as to special circumstance (death eligibility) finding and death sentence where prosecutor violated *Napue* by failing to correct false testimony by jailhouse informants about expected benefits from testifying against petitioner. The “materiality” element of *Napue* was satisfied with respect to the jury’s special circumstances finding given importance of informant’s testimony on question of whether petitioner acted with the requisite “intent to cause death.”

United States v. Garner,
507 F.3d 399 (6th Cir. 2007)

In carjacking case, prosecution violated *Brady* by failing to timely turn over records from the victim’s cell phone which was used to make and receive calls by the hijacker or hijackers. The records supported defendant’s theory that he had been framed by the codefendant, the codefendant’s friend, and the codefendant’s ex-girlfriend. Because of the late disclosure, defense counsel did not have time to investigate records to determine their value.

U.S. v. Jernigan,
492 F.3d 1050 (9th Cir. 2007) (en banc)

Reversing denial of motion for new trial in case where defendant was convicted of robbing three banks and prosecution had failed to reveal that while defendant was awaiting trial, two more banks in area were robbed by a woman bearing an “uncanny physical resemblance” to defendant. The defense had been misidentification and the reliability of a surveillance video was contested. (The appeals court agreed that the video failed to identify defendant as the robber.) The suppressed evidence was material because it “substantially erode[d] the already questionable value of eyewitness identifications,” there was a “similar modus operandi in all” robberies, and the suppressed evidence magnified the “significance of gaps and inconsistencies” in the prosecution’s case, which lacked any physical evidence tying defendant to the crimes. “[C]onsidered collectively” the withheld evidence was material and defendant was denied fair trial.

***Graves v. Dretke,**
442 F.3d 334 (5th Cir.), cert. denied, 549 U.S. 943 (2006)

Prosecution violated *Brady* by failing to disclose statements by its critical witness, the alleged co-perpetrator, one of which also implicated the witness’s wife in the murders, and the other of which exonerated Graves. (The only statement disclosed to Graves was one implicating both the witness and Graves. Graves had also been informed that the witness was found to have lied during a polygraph exam when he denied that his wife was involved in the crime.) The statement by the witness claiming to have committed the offense by himself would have undercut the

prosecution's explanation for the witness's failure to implicate Graves before the grand jury – that Graves had threatened the witness. Even more egregious than the suppression was the fact that the prosecutor knowingly elicited false and misleading testimony from the witness and a police investigator that the witness had always implicated Graves except in his grand jury testimony where he'd denied either men had been involved in the crimes. That Graves was aware of the polygraph results did not establish that he failed to exercise due diligence in seeking out the statement implicating the witness's wife in the murder since Graves had no reason to believe such a statement had been made. Further, the prosecutor's questioning of the witness at trial, as well as the prosecution's discovery responses, reinforced defense counsel's view that if the wife was involved at all, it was only after the fact. The statement about the wife's involvement was exculpatory because it fit with the defense theory that two people committed the offense, not three as the prosecution theorized. It also provided a basis for arguing that the witness was blaming Graves in order to save his wife. The statements were material because they would have allowed defense counsel to argue persuasively that (1) the murders were committed by the witness alone or with his wife and (2) the witness's plan from the beginning was to exonerate his wife but since a story that he acted alone was not believable, he falsely implicated Graves. That the statements did not fit completely with the defense that was presented at trial did not render them immaterial because counsel may have acted differently had the statements not been suppressed.

***Silva v. Brown,**
416 F.3d 980 (9th Cir. 2005)

In pre-AEDPA capital case, prosecution violated *Brady* where although it disclosed that murder charges had been dropped against the co-defendant in exchange for his testimony against Silva, it did not reveal that part of the deal was that the co-defendant, who had previously been in a motorcycle accident and sustained severe brain damage, would forgo a psychiatric evaluation. The primary evidence against Silva was the testimony of the co-defendant. Although the co-defendant's story was corroborated in some respects, it was his testimony alone that provided proof that Silva was the triggerman. The suppressed evidence was material given that the co-defendant's testimony was crucial, and the fact that the prosecutor was concerned about the jury finding out about the witness's mental state was evidence of the weakness of the remainder of the case. The suppressed evidence was not cumulative to other impeachment evidence. While evidence of dropped charges offered an incentive to testify falsely, it did not offer a possible explanation for the co-defendant's confused account of events. The suppressed evidence would have diminished the credibility of the witness, and the prosecution's desire to hide the evidence would have diminished the overall credibility of its case. Finally, the fact that the jury acquitted Silva of one of the two charged murders did not indicate that impeachment of the co-defendant had been effective.

Conley v. United States,
415 F.3d 183 (1st Cir. 2005)

Prosecution violated *Brady* by failing to disclose evidence that the primary witness had expressed a desire to have his memory hypnotically enhanced, which went to his ability to recall the events. The petitioner was a police officer who was charged with perjury for his testimony about the circumstances surrounding the brutal beating of an undercover officer who had been mistaken for a fleeing suspect. The witness at issue, another police officer, had originally told internal affairs that he had seen the undercover officer chasing the actual suspect, as well as an unidentified police officer behind the undercover agent. (This contradicted the petitioner's account whereby he claimed to have chased and captured the suspect without ever seeing the undercover agent or his beating.) Later, the witness recanted his statement that he had seen a police officer behind the undercover agent. In his grand jury testimony, which was disclosed to the defense, he explained that he had made the earlier statement about seeing someone behind the undercover agent because he felt guilty about not having seen everything and felt like he should have. What was not disclosed was a statement to the FBI where the witness said that he knew and liked the undercover agent, felt badly that he could not say what had happened, and so he convinced himself he'd seen something. He then expressed a desire to have his memory hypnotically refreshed in order to "truly recall" the events preceding the beating. This evidence was material and not cumulative of the witness's retraction to the grand jury because the grand jury statement impeached his motive, not his ability to recall. Counsel's choice not to impeach the witness with his grand jury testimony was supported by an independent strategy and was not proof counsel would not have relied on the hypnosis statement. Finally, the other evidence at trial was weak – the government admitted the victim's testimony was likely impaired by the head trauma he sustained in the beating, and the actual fleeing suspect's testimony was impeached with his felony convictions.

***Hayes v. Brown,**
399 F.3d 972 (9th Cir. 2005) (en banc)

The prosecution's knowing presentation of false evidence and failure to correct the record violated Hayes's due process rights. *Napue* applies to false evidence, not just perjured testimony. The constitutional prohibition against presenting false, rather than perjured, evidence was not a new rule under *Teague*. The false evidence regarding whether a deal had been made with the key prosecution witness was material because there was a reasonable likelihood the false testimony affected the jury's verdicts as to first degree murder and the death sentence. Once materiality is established, there is no need to apply *Brecht*.

Slutzker v. Johnson,
393 F.3d 373 (3rd Cir. 2004)

Brady violation found where prosecution suppressed a police report recounting a statement by the neighbor of the victim that she saw someone other than petitioner speaking with the victim's wife outside the victim's home after the murder. At trial, she testified that it was petitioner, who had been having an affair with the victim's wife, who she saw after the murder. The trial prosecutor's testimony that it was her normal practice to turn over all documents was insufficient to overcome

the testimonial and circumstantial evidence indicating that the defense was not provided with the report. The evidence was exculpatory and material because the neighbor was the most credible of the witnesses against petitioner. Although the claim had been procedurally defaulted because it was never presented to the state court, cause was found to overcome the default because there was no procedurally viable way for the petitioner to exhaust the claim once the suppressed material was discovered during federal habeas proceedings. (The ability to have federal proceedings stayed while new claims were exhausted was uncertain at the relevant time and, therefore, petitioner risked losing his right to adjudication of his exhausted federal claims if his federal petition was dismissed without prejudice while he returned to state court to exhaust the *Brady* claim.)

United States v. Sipe,
388 F.3d 471 (5th Cir. 2004)

In case involving border control agent's conviction for use of excessive force and infliction of bodily injury during arrest, district court did not err in granting new trial based on *Brady* violations. The cumulative impact of the suppressed evidence satisfied the materiality prong of *Brady*. The suppressed evidence involved: (1) a statement by the government's star witness indicating a personal dislike for the defendant, which was somewhat inconsistent with the witness's subsequent testimony; (2) benefits provided to testifying aliens that were more substantial than the benefits the defense was told about; and (3) a prior charge against a witness of filing a false police report which the witness was acquitted of.

United States v. Rivas,
377 F.3d 195 (2nd Cir. 2004)

A *Brady* violation occurred in this narcotics smuggling case where the prosecution failed to disclose until after the guilty verdict that its chief witness, the defendant's fellow seaman who testified that defendant concealed drugs in defendant's cabin, had told the government that he, not defendant, had brought the package of drugs on board the vessel, purportedly believing that it contained alcohol meant for defendant. Although this revelation was arguably consistent with the witness's trial testimony that the drugs belonged to defendant, it could have led the jury to question the witness's credibility and bolstered the defendant's theory that the witness rather than defendant was engaged in smuggling.

Mathis v. Berghuis,
90 Fed.Appx. 101, 2004 WL 187552 (6th Cir. 2004) (unpublished)

Grant of habeas relief affirmed in rape case where state failed to disclose that complainant had twice made false reports to the police claiming to have been the victim of violent crimes, including rape and armed robbery. The state court's requirement that petitioner show that the prosecutor was aware of the undisclosed police reports was "clearly contrary to Supreme Court precedent."

Norton v. Spencer,
351 F.3d 1 (1st Cir. 2003)

In Massachusetts child sexual assault case where the alleged victim, Fuentes, was the sole witness, the appeals court affirms the grant of relief on petitioner's *Brady* claim. After trial, petitioner discovered evidence that the prosecution had likely been off by several months in its contention about when the assaults allegedly occurred, and petitioner had not been at the house at the relevant time. Petitioner also learned that another alleged victim, Noel, who had been found incompetent to testify, admitted to having fabricated the charges against petitioner at the insistence of Fuentes. Noel further stated that Fuentes had made up his allegations and that the prosecutor repeatedly told Noel and Fuentes how to testify even after being informed by Noel that none of the claims were true. The state court's denial of relief involved both an unreasonable determination of the facts and an unreasonable application of clearly established federal law.

Castleberry v. Brigano,
349 F.3d 286 (6th Cir. 2003)

Prosecution committed *Brady* violation during petitioner's robbery-murder trial by withholding: (1) a description of the assailant by the victim which differed from petitioner's appearance; (2) a statement by a witness claiming to have heard the prosecution's key witness plotting the robbery of the victim; and (3) witness accounts of suspicious persons in the vicinity of the killing, including descriptions of "thin" individuals. (Petitioner was 5'9", 221 pounds at the time of the crime.) Although the suppressed evidence would not have contradicted all of the testimony received at trial, it was enough to create a reasonable probability of a different outcome at trial had the *Brady* information been available. The state court decision denying relief was contrary to Supreme Court precedent in that the state court analyzed the suppressed evidence for materiality item by item rather than cumulatively.

Hall v. Washington,
343 F.3d 976 (9th Cir. 2003)

In California murder case, false and material evidence was admitted in violation of petitioner's due process rights. The false evidence took the form of a series of handwritten questions and answers allegedly exchanged between petitioner and a jailhouse informant. These notes were admitted at trial as adoptive admissions, without the testimony of the informant. In post-trial proceedings, petitioner presented evidence – including an admission from the informant and testimony from document experts – that the informant fabricated the jailhouse notes by changing the questions after petitioner had written his answers.

Goldstein v. Harris,
82 Fed. Appx. 592, 2003 WL 22883652 (9th Cir. 2003) (unpublished)

Appeals court affirms grant of habeas relief in murder case where the prosecution suppressed

evidence related to the credibility of its two key witnesses. First, it failed to disclose a deal with the jailhouse informant. Second, it did not reveal that police investigators were impermissibly suggestive during the eyewitness's identification of petitioner in a photo lineup, or that it advised the eyewitness that he need not retake the stand to clarify his testimony after he realized that he may have recognized petitioner because he had met him prior to the murder. Further, the prosecution violated *Napue v. Illinois* by failing to correct the informant's false testimony about not having received benefits for his assistance in this and other cases.

Bailey v. Rae,
339 F.3d 1107 (9th Cir. 2003)

In case involving convictions for sexual abuse and sexual penetration, the prosecution violated *Brady* by failing to disclose therapy reports concerning the victim's mental capacity. The reports were "exculpatory" because the crimes for which petitioner was charged required that the victim be incapable of consent due to a mental defect and the reports indicated that the victim understood both what type of physical contact was not okay and that she could say "no." Unhelpful passages in the reports did not negate their exculpatory nature since, taken as a whole, they were favorable to the defense. The state post-conviction court's finding that the reports were not exculpatory was an unreasonable application of Supreme Court precedent. The suppressed evidence was material despite the fact that the victim's trial testimony was consistent with the findings in the report. "Cumulative evidence is one thing. Unique and relevant evidence offered by a disinterested expert is quite another. By summarily dismissing the Ford reports as cumulative, the state court fundamentally mischaracterized their nature and significance. Setting aside for a moment the substance of the reports, it is implausible that one could equate a statement made by a teenage complainant whom the State has labeled intellectually deficient with a clinical assessment provided by a disinterested professional therapist who had been treating the victim over a period of years." The state court's denial of the *Brady* claim on materiality grounds was both "contrary to" and an "unreasonable application of" clearly established Supreme Court precedent. It was contrary to Supreme Court precedent because it required that the suppressed evidence "be such as will probably change the result if a new trial is granted." The state court's denial of the *Brady* claim was also objectively "unreasonable" in that "the state court's analysis of prejudice amounted to little more than a blanket assumption that, because [the] reports were cumulative, they would have had little impact on the trial's outcome." The appeals court "conclude[s] that the Supreme Court's *Brady* jurisprudence requires more than simply labeling the evidence as cumulative without placing it in context."

Monroe v. Angelone,
323 F.3d 286 (4th Cir. 2003)

In evaluating a *Brady* claim in a post-AEDPA case, deference to the state court's rejection of the claim is only required as to the suppressed evidence that the state court considered. *Brady* material that was discovered for the first time in federal court is subject to *de novo* analysis. And because materiality is assessed collectively, rather than on an item-by-item basis, the federal

court "must make an independent assessment of whether the suppression of exculpatory evidence--including the evidence previously presented to the state courts--materially affected Monroe's first-degree murder conviction." Given the thin, circumstantial case against defendant, the prosecution committed reversible error under *Brady* when it failed to disclose information that could have been used to impeach its key witness, as well as other witnesses, and information that could have supported the defense theory that someone else killed the victim. (The district court found, among other things, that the prosecution suppressed evidence that its key witness was offered assistance in obtaining a sentence reduction in an unrelated case and that this witness had previously supplied information to the police.) As for respondent's contention that there was no duty to disclose the material because the "substantive equivalent" was heard by the jury, the court states: "the prosecution has a duty to disclose material even if it may seem redundant. Redundancy may be factored into the materiality analysis, but it does not excuse disclosure obligations."

***Scott v. Mullin,**
303 F.3d 1222 (10th Cir. 2002)

State's suppression of evidence of a third party's confession to the capital murder provided cause to overcome the default of petitioner's *Brady* claim by the state court, and petitioner was entitled to relief on the claim. The first two prongs of *Brady* were satisfied because the suppressed evidence was known by police investigators prior to trial and it was clearly favorable to petitioner. The third prong - a reasonable likelihood of a more favorable result - was also satisfied even if, as the government contended, the confession could only have been used to impeach the third party. Had the third party's credibility been called into question by the confession, doubt about the testimony of other prosecution witnesses who claimed to be with the third party at the time of the killing could have been raised.

Mendez v. Artuz,
303 F.3d 411 (2nd Cir. 2002), cert. denied, 537 U.S. 1245 (2003)

Petitioner who was convicted of, among other things, the attempted murder of Johnny Rodriguez, was entitled to habeas relief based on the prosecution's failure to disclose evidence that another individual had placed a contract on the life of Johnny Rodriguez prior to the shooting. The evidence was "favorable" because it directly contradicted the motive theory testified to by the prosecution witnesses. That the evidence did not suggest an alternative shooter did not mean it was not favorable, given the absence of evidence connecting petitioner to the individual who allegedly took out the contract. And although Johnny Rodriguez identified petitioner as the shooter, trial evidence raised questions about the identification. Materiality is further established by the fact that the suppressed information could have been used by petitioner "to challenge the thoroughness and adequacy of the police investigation."

Sawyer v. Hofbauer,
299 F.3d 605 (6th Cir. 2002)

In sexual assault case, the state court unreasonably applied *Brady* by failing to correctly identify the evidence that was suppressed. Petitioner was entitled to relief on his *Brady* claim given the State's failure to reveal test results establishing that petitioner was not the source of a semen stain on the victim's underwear. This was material given evidence in the record suggesting that the perpetrator could have cleaned himself with the victim's underwear following oral sex.

United States v. Gil,
297 F.3d 93 (2nd Cir. 2002)

In mail fraud case, conviction vacated under *Brady* where the government withheld a memorandum indicating that the defendant was authorized to obtain payment for his extra-contractual work by submitting inflated subcontractor invoices, thus showing that he did not deceive or defraud municipal entity.

***Jamison v. Collins,**
291 F.3d 380 (6th Cir. 2002)

Brady violation occurred both in the suppression of exculpatory evidence by the prosecution, and in the failure of the prosecutor to weigh the evidence for purposes of *Brady* disclosure which was the result of an Ohio police policy to withhold potentially exculpatory information from the prosecutor. The following suppressed items are found, collectively, to be material to petitioner's defense requiring the grant of habeas relief as to the capital conviction: (1) a positive identification of different suspects by an eyewitness to the crime; (2) prior statements by the accomplice (who was also the key prosecution witness) that omitted dramatic details provided during the accomplice's trial testimony; (3) an eyewitness account that could have impeached the accomplice's testimony; (4) descriptions of the suspects that undermined the accomplice's claim that he and petitioner committed the crime together and supported petitioner's argument that other suspects were overlooked; (5) evidence pointing to another suspect's involvement in the crime; and (6) an offense report indicating that the victim of a similar robbery had been unable to identify her attacker at the time of the offense.

***Benn v. Lambert,**
283 F.3d 1040 (9th Cir.), cert. denied, 123 S.Ct. 341 (2002)

In case under AEDPA, the panel unanimously affirms the grant of habeas relief to Washington death row inmate based on *Brady* violations. The prosecution failed to disclose numerous pieces of impeachment information that could have undermined the credibility of the jailhouse informant who was the key prosecution witness as to premeditation, the aggravating circumstance of common scheme or plan, and motive. The withheld evidence related to: (1) the

witness's history of misconduct while acting as an informant; (2) the witness made a false allegation implicating petitioner in a notorious unsolved murder; (3) the witness's exposure to prosecution in other cases; and (4) the witness's history as an informant. An independent basis for habeas relief is the prosecution's failure to disclose evidence that a fire at petitioner's trailer was accidental. This was material because the prosecution's theory was that the trailer fire was arson, and that the capital murders were related to insurance fraud connected to the arson.

Killian v. Poole,
282 F.3d 1204 (9th Cir. 2002), cert. denied, 123 S.Ct. 992 (2003)

State court unreasonably applied the law to the facts in determining that petitioner was not prejudiced by the suppression of evidence, some of which came into existence post-trial, where the evidence exposed the motivation of the key prosecution witness to lie and tended to show that he did in fact lie at petitioner's trial.

DiLosa v. Cain,
279 F.3d. 259 (5th Cir. 2002)

State court applied a rule of law contrary to Supreme Court precedent when it assessed the materiality of suppressed evidence by weighing the existing evidence against the excluded evidence, rather than asking whether the excluded evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Further, the state court's ultimate legal conclusion cannot be reconciled with *Kyles* and *Brady*. Given that the defense to the murder charge was that unknown intruders killed petitioner's wife, and the prosecutor highlighted the absence of evidence corroborating petitioner's account, the State's failure to reveal evidence potentially pointing to intruders in the house and statements indicating potential intruders in the neighborhood undermines confidence in the verdict.

Boss v. Pierce,
263 F.3d 734 (7th Cir. 2001)

State appellate court's apparent assumption that suppressed evidence must be exculpatory to satisfy the requirements of *Brady*, rather than merely impeaching, was contrary to clearly established Supreme Court precedent. State court unreasonably applied *Brady* in finding that defense counsel would have discovered the suppressed information by exercising due diligence given that the source was a defense witness, where nothing about the witness's role in the case (an alibi witness) suggested that she had knowledge about statements made by the key prosecution witness around the neighborhood. "Holding that reasonable diligence requires defense counsel to ask witnesses about matters of which counsel could not have reasonably expected a witness to have knowledge is inconsistent with the aim of *Brady* and its progeny." State court unreasonably applied *Brady* in finding that evidence uncovered after disclosure of the witness's statement was simply cumulative, where: (1) the new witnesses were neutral and

disinterested, in contrast to the defense witnesses at trial; and (2) the new witnesses recounted confessions by the key prosecution witness, which was significantly different than the eyewitness testimony of trial witnesses.

***Mitchell v. Gibson,**
262 F.3d 1036 (10th Cir. 2001)

In case where the government did not dispute the district court's finding that petitioner's rape and sodomy convictions were constitutionally infirm due to the prosecution's failure to disclose exculpatory test results, and its presentation of false testimony by Oklahoma City police chemist, Joyce Gilchrist, the Tenth Circuit concluded that petitioner was also entitled to habeas relief as to his death sentence. The district court erred in using standard of *Romano v. Oklahoma* is assessing whether the *Brady* violation required vacated of death sentence. (The appeals court noted, however, that because the *Brady* violation in this case deprived petitioner of his right to cross-examination and to present mitigating evidence, petitioner would still be entitled to relief under *Romano* without having to demonstrate that the entire sentencing was rendered fundamentally unfair.) Applying *Kyles*, the appeals court found that petitioner was entitled to relief even though there may have been sufficient evidence to justify the jury's death verdict, given that the rape and sodomy convictions "impacted all three of the aggravating circumstances found by the jury: that the murder was heinous, atrocious and cruel; that it was committed to avoid arrest for the rape and sodomy; and that Mr. Mitchell posed a continuing threat to society." Further, the defense presented considerable mitigating evidence.

Leka v. Portuondo,
257 F.3d 89 (2nd Cir. 2001)

In this non-capital New York murder case, the Second Circuit granted relief, finding that the prosecution's failure to disclose the name of a crucial eyewitness with information favorable to the defense "until three business days before trial," and failure to disclose the substance of the witness' knowledge at all, violated *Brady*. Petitioner was convicted strictly on the questionable testimony of two eyewitnesses, each of whom gave post-trial statements recanting, to varying degrees, their identifications of petitioner. The suppressed evidence consisted of the eyewitness account of an off-duty police officer, who saw the shooting from above, and gave an account which differed in important respects from that of the witnesses who testified at trial. In finding the suppressed evidence "material," the Second Circuit observed that "[i]t is likely that [the witness'] testimony at trial would have had seismic impact." And in concluding that the prosecution suppressed the information notwithstanding the fact that it disclosed the witness' name three days before trial, the court explained that "the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use."

Boyette v. LeFevre,
246 F.3d 76, 93 (2nd Cir. 2001)

The Second Circuit reversed the district court's denial of relief in this New York robbery, arson and attempted murder case, finding that the prosecution violated *Brady* in failing to disclose several documents. The prosecution's case rested solely on the victim's identification of petitioner, the credibility of which was bolstered at trial by the victim's claim that she recognized her attacker immediately. The undisclosed documents revealed that the victim had not, in fact, identified the perpetrator immediately, and tended to undermine the credibility of her memory by contradicting her claim that her attacker had smeared some type of fire accelerant on her face. Petitioner's first trial ended when the jury hung 9-3 in favor of acquittal, and his defense at both trials centered on a relatively strong alibi supported by the testimony of multiple witnesses who placed petitioner out-of-state at the time of the crime. The court summed up its conclusion that petitioner was entitled to relief as follows: "Because this very close case depended solely on [the victim's] credibility, the [state appellate court] applied *Kyles* in an objectively unreasonable way when it concluded - without any analysis - that [petitioner] was not prejudiced."

Finley v. Johnson,
243 F.3d 215 (5th Cir. 2001)

In this Texas kidnapping case, petitioner made a sufficient showing of actual innocence to permit him to overcome procedural default of his *Brady* claim by showing that the *Brady* material in his case - evidence that a restraining order was issued against his kidnapping victim two days after the kidnapping - was highly probative of petitioner's defense of "necessity," because it supported his claim that his actions were immediately necessary to protect others from being harmed by the kidnapping victim, and if accepted by the jury, would have resulted in petitioner's acquittal.

Paradis v. Arave,
240 F.3d 1169 (9th Cir. 2001)

The Ninth Circuit affirmed the district court's grant of relief in this former Idaho capital case (death sentence commuted to life) on petitioner's claim that the state violated *Brady v. Maryland* by failing to disclose a prosecutor's notes taken at a meeting with law enforcement and the medical examiner. The notes contained, among other things, information regarding the condition of the victim, time of death, and the medical examiner's opinions based on that information, all of which would have been useful to petitioner in impeaching the medical examiner's testimony indicating that the victim died in Idaho, rather than in Washington. If successful, this would have negated Idaho's jurisdiction to prosecute petitioner for murder.

***Nuckols v. Gibson,**
233 F.3d 1261 (10th Cir. 2000)

The Tenth Circuit granted relief in this Oklahoma capital case, finding that the state failed to disclose material evidence impeaching a key prosecution witness. The undisclosed evidence indicated that the witness - a deputy sheriff whose testimony provided the only support for the admissibility of petitioner's confession, which itself was the only piece of evidence linking

petitioner to the crime - had been strongly suspected of stealing from the sheriff's office, and had been tangentially involved in a second murder, for which petitioner was also under arrest at the time of his confession. The evidence was impeaching and material because it would have allowed petitioner to raise questions about the witness' motivation for testifying that petitioner reinitiated questioning which led to his confession, thereby turning what had been a close credibility contest between petitioner and the witness in petitioner's favor, and securing the suppression of petitioner's confession.

White v. Helling,
194 F.3d 937 (8th Cir. 1999)

The Eighth Circuit granted relief in this 27 year old robbery/murder case due to the state's nondisclosure of several documents strongly suggesting that a witness whose testimony severely undermined petitioner's defense of coercion had initially identified someone other than petitioner as the person who took his wallet during the crime, and that the witness had been coached to such an extent that, had the evidence been revealed earlier, the trial might have excluded the witness' testimony altogether.

Spicer v. Roxbury,
194 F.3d 547 (4th Cir. 1999)

A majority of the Fourth Circuit panel affirmed the district court's grant of habeas relief in this post-AEDPA, non-capital habeas case from Maryland. The majority agreed with the district court's conclusion that the prosecutor violated *Brady v. Maryland* by failing to appreciate and disclose to the defense a serious discrepancy between the descriptions of a key witness' knowledge as told to the prosecutor by the witness himself, and as told to the prosecutor by the witness' lawyer, who had contacted the prosecutor about the witness' knowledge in hopes of working out a plea deal. While the witness told his lawyer several times that he had not seen petitioner on the day petitioner allegedly attacked a bar owner, and the lawyer communicated this information to the prosecutor, the witness himself subsequently told the prosecutor, and later petitioner's jury, that he had seen petitioner on the day of the attack, and that petitioner was running away from the crime scene while being chased by an employee of the victim's restaurant.

Love v. Freeman,
1999 WL 671939 (4th Cir. Aug. 30, 1999) (unpublished)

The Fourth Circuit granted federal habeas corpus relief in this North Carolina child sexual assault case, finding that the state violated *Brady* by failing to disclose: evidence that the alleged victim twice denied she had been sexually abused; numerous inconsistencies in the alleged victim's account of the sexual assault; evidence of the alleged victim's "perhaps pathological lying history" and self-destructive and attention-seeking behavior; a tape recording and transcript of a social worker's interview of the alleged victim, during which the social worker utilized suggestive interviewing techniques and supplied the alleged victim with information that

subsequently became part of her story; complete records of the alleged victim's hymenal examination; information suggesting the alleged victim's mother ceased supporting petitioner's claim of innocence as a result of coercion by the department of social services; and information indicating that the alleged victim had previously been raped by two boys.

Crivens v. Roth,
172 F.3d 991 (7th Cir. 1999)

The Seventh Circuit granted relief in this non-capital murder case on the ground that the state violated *Brady* by failing to disclose the entire criminal record of its key witness. In so holding, the court rejected the state's contention that no *Brady* violation occurred because the nondisclosure was not deliberate, but was instead a result of the witness having used aliases, thereby making parts of his criminal record more difficult to locate. The court reasoned: "Criminals often use aliases, but the police are able to link the various names to a single individual through a variety of means. If the state indeed asked for the criminal history records . . ., we find it difficult to accept that the Chicago Police Department had not or could not have discovered [that the witness had been arrested under more than one name]." The court further concluded that, in light of the witness' demonstrated propensity to lie, the fact that petitioner had been afforded an opportunity to question him concerning his criminal record was not enough to render the state's nondisclosure immaterial. Finally, the court characterized the state's failure to disclose the witness' record in the face of a direct request and a court order "inexcusable," and concluded that "[t]he atmosphere created by such tactics is one in which we highly doubt a defendant whose life or liberty is at stake can receive a fair trial."

Schledwitz v. United States,
169 F.3d 1003 (6th Cir. 1999)

The government violated *Brady* by failing to disclose that its key witness, who was portrayed as a neutral and disinterested expert during petitioner's fraud prosecution, had for years actually been actively involved in investigating petitioner and interviewing witnesses against him. In granting relief, the court noted that, although "[t]aken individually, none of the [undisclosed evidence, which included items other than the nature of the expert's involvement] would appear to raise a 'reasonable probability' that [petitioner] was denied a fair trial," this evidence, viewed collectively, entitled petitioner to relief.

United States v. Scheer,
168 F.3d 445 (11th Cir. 1999)

The court granted relief in this bank fraud case on the ground that the government violated *Brady* by failing to disclose that the lead prosecutor in the case had made a statement to a key prosecution witness, who was himself on probation as a result of a conviction arising out of the same set of facts, "that reasonably could be construed as an implicit -- if not explicit -- threat regarding the nature of [the witness'] upcoming testimony . . ." 168 F.3d at 452. In granting

relief, the court made clear that, to succeed, the appellant was not required to prove that the witness actually changed his testimony as a result of the prosecutor's threat, nor was he required to establish that, had evidence of the threat been disclosed, the remaining untainted evidence would have been insufficient to support his conviction.

Seiber v. Coyle,
1998 WL 465899 (6th Cir. July 27, 1998) (unpublished)

The court granted relief on petitioner's claim that the state violated *Brady* in two instances. The first violation resulted from the state's failure to disclose that a member of the prosecution team had promised one of two key witnesses that his probation would be transferred to another jurisdiction after his testimony against petitioner. The second violation arose out of the state's nondisclosure of a preliminary crime scene report indicating that the perpetrator of the burglary for which petitioner was later convicted was approximately half petitioner's age, and that no other information identifying the perpetrator was known. The contents of this report sharply contradicted the testimony of the prosecution's only other key witness, a police officer who described the perpetrator in minute detail at trial, and identified petitioner as fitting the description.

United States v. Service Deli, Inc.,
151 F.3d 938 (9th Cir. 1998)

The court reversed the defendant government contractor's conviction for filing a false statement with the United States Defense Commissary Agency because the government failed to disclose notes taken by one of its attorneys during an interview with the state's most important witness. The notes contained "three key pieces of information" useful in impeaching the witness: (1) the witness' story had changed; (2) the change may have been brought on by the threat of imprisonment; and (3) that the witness explained his inconsistent stories by claiming that he had suffered "a stroke which affected his memory." This information was material, the court explained, because "the government's entire case rested on [the] testimony" of the witness who was the subject of the undisclosed notes, and that witness' credibility "essentially was the only issue that mattered." Finally, the court rejected the government's contention that the undisclosed impeachment evidence was merely cumulative because the defendant had gone into the same areas on cross examination of the witness. The court explained: "It makes little sense to argue that because [defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government."

Singh v. Prunty,
142 F.3d 1157 (9th Cir.), cert. denied, 525 U.S. 956 (1998)

The court granted habeas relief in this murder-for-hire case on the ground that the prosecution violated *Brady* by failing to disclose an agreement with its star witness, pursuant to which the witness avoided prosecution on several charges, and received significantly reduced sentences on other charges. The undisclosed information was material, in the court's view, because "[i]t is likely the jury had to believe [the witness'] testimony in order to believe the prosecution's theory. For these reasons, [the witness] was the key witness who linked [petitioner] to the murder-for-hire scheme," and his "credibility was vital to the prosecution's case."

***Clemmons v. Delo,
124 F.3d 944 (8th Cir. 1997), cert. denied, 523 U.S. 1088 (1998)**

Petitioner was convicted of murder and sentenced to death for the killing of a fellow prison inmate. Habeas relief granted as to conviction based on prosecution's failure to disclose an internal prison memo generated the day of the incident which indicated that someone saw a second inmate commit the murder. While petitioner did present other inmates to testify at trial that this second inmate committed the murder, the prosecution argued that these witnesses were not believable because the person they were implicating was "conveniently dead," thus the outcome of the proceeding was sufficiently undermined.

***East v. Johnson,
123 F.3d 235 (5th Cir. 1997)**

Habeas relief granted as to death sentence where prosecution failed to disclose the criminal record of key witness used to establish future dangerousness with testimony that petitioner had raped and robbed her. If this witness' prior record had been disclosed, defense would have discovered a mental competency evaluation which reflected that the witness suffered from bizarre sexual hallucinations. District court erred in applying a sufficiency of the evidence test rather than considering whether impeachment of the witness would have undermined the jury's sentencing recommendation.

**United States v. Vozzella,
124 F.3d 389 (2nd Cir. 1997)**

Conviction for conspiring to extend extortionate loans reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove a conspiracy.

***Carriger v. Stewart,
132 F.3d 463 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133**

Habeas relief granted as to conviction and death sentence where prosecution withheld from defense the Department of Correction file of the state's star witness. Because the witness had a long criminal history, the prosecution had the duty to turn over all information bearing on his credibility. The DOC file contained not only information that the witness had a long history of burglaries (the crime the witness was now blaming on the defendant), but also that he had a long history of lying to the police and blaming others to cover up his own guilt.

United States v. Fisher,

106 F.3d 622 (5th Cir. 1997), abrogated on other grounds by Ohler v. United States, 529 U.S. 753 (2000)

New trial ordered where government failed to disclose FBI report directly contradicting testimony of a key government witness on bank fraud charge. Because the witness' credibility was crucial to the government's case, there was a reasonable probability that the result would have been different if the report had been disclosed.

Duran v. Thurman,

106 F.3d 407 (9th Cir. 1997) (unpublished)

Habeas corpus relief granted where state prosecutor told murder defendant's counsel that charges against state's key witness had been dismissed, when witness actually had a pending misdemeanor charge. The court rejected the state's contention that defense counsel should have known about the pending charge, stating counsel was entitled to believe the prosecution's representations to be truthful. The undisclosed charge was material because the witness provided the only testimony contradicting petitioner's theory of self-defense, and his credibility would have been lessened had the jury known that charges were pending against him.

United States v. Pelullo,

105 F.3d 117 (3rd Cir. 1997)

Denial of § 2255 motion reversed where government failed to disclose surveillance tapes and raw notes of FBI and IRS agents. The notes contained information supporting defendant's version of events and impeaching the testimony of the government agents, who provided the key testimony at defendant's trial for wire fraud and other charges.

United States v. Steinberg,

99 F.3d 1486 (9th Cir. 1996), disapproved on other grounds, 165 F.3d 689 (9th Cir. 1999) (en banc)

New trial ordered where prosecution failed to disclose information indicating that its key witness, an informant, was involved in two different illegal transactions around the time he was working as a CI, and that the informant owed the defendant money, thus giving him incentive to send the

defendant to prison. Although the prosecutor did not know about the exculpatory information until months after the trial, nondisclosure to the defense of this material evidence required a new trial.

Guerra v. Johnson,
90 F.3d 1075 (5th Cir. 1996)

Grant of habeas relief affirmed where district court made detailed, legally relevant factual findings indicating that police had intimidated key witnesses to murder of police officer and failed to disclose material information regarding who was seen carrying the murder weapon moments after the shooting.

United States v. Cuffie,
80 F.3d 514 (D.C. Cir. 1996)

Undisclosed evidence that prosecution witness, who testified that defendant paid him to keep drugs in his apartment, had previously lied under oath in proceeding involving same conspiracy was material where witness was impeached on basis that he was a cocaine addict and snitch, but not on basis of perjury, and where his testimony provided only connection between defendant and drugs found in witness' apartment.

United States v. Smith,
77 F.3d 511 (D.C.Cir. 1996)

Dismissal of state court charges against prosecution witness, as part of plea agreement in federal court, was material and should have been disclosed under due process clause, even though prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether or not witness was intentionally concealing agreement. Armed with full disclosure, defense could have pursued devastating cross-exam, challenging witness' assertion that he was testifying only to "get a fresh start" and suggesting that witness might have concealed other favors from government.

United States v. Lloyd,
71 F.3d 408 (D.C.Cir. 1995)

Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution: (1) withheld, without wrongdoing, tax return of defendant's client for year which defendant did not prepare returns; and (2) failed to disclose prior tax returns for four of defendant's clients. The first item would probably have changed the result of the trial, and the second group of items were exculpatory material evidence.

United States v. David,
70 F.3d 1280 (9th Cir. 1995) (unpublished)

New trial ordered where defendant had been convicted of operating a continuing criminal enterprise solely on the strength of testimony of two prisoners serving life sentences in the Philippines. Subsequent to the conviction, these two prisoners were released, and defendant discovered previously undisclosed evidence of a deal between the government and the two prisoners.

United States v. O'Connor,
64 F.3d 355 (8th Cir. 1995), cert. denied, 116 S.Ct. 1581 (1996)

Brady violation occurring when government failed to inform defendant of threats by one government witness against another and attempts to influence second government witness' testimony was reversible error with respect to convictions on those substantive drug counts and conspiracy counts where testimony of those government witnesses provided only evidence; evidence of threats, combined with undisclosed statements from interview reports, could have caused jury to disbelieve government witnesses.

United States v. Boyd,
55 F.3d 239 (7th Cir. 1995)

Trial court did not abuse discretion by granting new trial based on government's failure to reveal to defense either drug use and dealing by prisoner witnesses during trial or "continuous stream of unlawful" favors prosecution gave those witnesses.

***Banks v. Reynolds,**
54 F.3d 1508 (10th Cir. 1995)

Habeas relief granted to capital murder petitioner where failure of prosecution to disclose to defendant that another individual had been arrested for the same crime violated defendant's right to a fair trial. Relief is granted on the *Brady* claim despite possible knowledge by defense counsel of withheld material because "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge."

Smith v. Secretary of New Mexico Dept. of Corrections,
50 F.3d 801 (10th Cir.), cert. denied, 116 S.Ct. 272 (1995)

Habeas granted where material evidence relating to a third person/suspect was not disclosed, prosecutor's lack of actual knowledge was irrelevant because police knew, and prosecution's "open file" was not sufficient to discharge its duty under *Brady*.

United States v. Alzate,
47 F.3d 1103 (11th Cir. 1995)

Failure of prosecutor to correct representations he made to the jury which were damaging to defendant's duress defense, despite having learned of their falsehood during the course of the trial, was *Brady* violation and required granting of new trial motion.

United States v. Robinson,
39 F.3d 1115 (10th Cir. 1994)

District court did not abuse discretion in ordering new trial where, in violation of *Brady*, government failed to disclose evidence tending to identify former codefendant as drug courier; conviction was based largely on testimony of codefendants and defendant had strong alibi evidence.

United States v. Kelly,
35 F.3d 929 (4th Cir. 1994)

Kidnapping conviction reversed where government failed to furnish an affidavit in support of an application for a warrant to search key witness's house just before trial, and failed to disclose a letter written by same witness which would have seriously undermined her credibility.

United States v. Young,
17 F.3d 1201 (9th Cir. 1994)

New trial granted where detective's testimony regarding location of incriminating notebooks was false, regardless of whether government presented the evidence unwittingly. Reasonable probability existed that result would have been different absent the false testimony, which was highly prejudicial in light of government's otherwise weak case.

Demjanjuk v. Petrovsky,
10 F.3d 338 (6th Cir.), cert. denied, 115 S.Ct. 295 (1994)

Prosecutorial misconduct where government attorneys failed to disclose to petitioner and court exculpatory materials during denaturalization and extradition proceedings of alleged "Ivan the Terrible." They acted with "reckless disregard."

United State v. Udechukwu,
11 F.3d 1101 (1st Cir. 1993)

New trial granted to remedy prosecutorial misconduct of failing to disclose salient information concerning defendant's theory that she had been coerced into being a drug courier. Prosecutor argued during closing that there was no evidence to support defendant's claim when in fact he

knew that source defendant named existed and was a prominent drug trafficker.

United States v. Kalfayan,
8 F.3d 1315 (9th Cir. 1993)

Where defense counsel had made *Brady* request about whether key witness had signed cooperation agreement, and later request for missing witness instruction foundered because defense counsel did not know of the deal, *Brady* required government to disclose its existence.

Ballinger v. Kerby,
3 F.3d 1371 (10th Cir. 1993)

Failure to produce exculpatory photograph, which would have undermined co-defendant's already flimsy credibility, violated Due Process.

United States v. Brumel-Alvarez,
991 F.2d 1452 (9th Cir. 1993)

Brady violation where government failed to disclose memo indicating that informant lied to DEA, had undue influence over DEA agents, and thwarted investigation of evidence crucial to his credibility.

United States v. Kojavan,
8 F.3d 1315 (9th Cir. 1992)

Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, *Brady* required disclosure.

United States v. Gregory,
983 F.2d 1069 (6th Cir. 1992) (unpublished)

Government suppressed audio from a videotape of marijuana plants being destroyed. The information in the audio would have significantly reduced defendant's sentence. This was a *Brady* violation.

Hudson v. Whitley,
979 F.2d 1058 (5th Cir. 1992)

Habeas petitioner, in fourth petition, claimed that state suppressed crucial evidence that its only eyewitness had originally identified a third party, and that third party had been arrested. Petitioner demonstrated "good cause" because state failed to disclose the info despite repeated

requests.

Thomas v. Goldsmith,
979 F.2d 746 (9th Cir. 1992)

State obliged to turn over to petitioner any exculpatory semen evidence for use in federal habeas proceeding in which petitioner sought to overcome state procedural default through miscarriage of justice exception, for colorable showing of actual innocence, and duty was not extinguished by petitioner's failure to argue existence of such obligation in district court; due to obvious exculpatory nature of semen evidence in sexual assault case, neither specific request nor claim of right by petitioner was required to trigger duty of disclosure.

United States v. Brooks,
966 F.2d 1500 (D.C. Cir. 1992)

Prosecution's *Brady* obligation extends to search of files in possession of police department and internal affairs division.

United States v. Minsky,
963 F.2d 870 (6th Cir. 1992)

Government improperly refused to disclose statements of witness that he did not make at trial. Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. Spagnuolo,
960 F.2d 990 (11th Cir. 1992)

New trial ordered on basis of *Brady* violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

Jacobs v. Singletary,
952 F.2d 1282 (11th Cir. 1992)

Brady violated where state failed to disclose statements of witness to polygraph examiner which contradicted her trial testimony.

Brown v. Borg,
951 F.2d 1011 (9th Cir. 1991)

Brady violated where prosecutor knew her theory of the case was wrong but misled the jury to think the opposite was true through her presentation of testimony.

Jean v. Rice,
945 F.2d 82 (4th Cir. 1991)

Audio tapes and reports relating to hypnosis of rape victim and investigating officer were material under *Brady*, and should have been disclosed to defense where they had strong impeachment potential and could have altered case.

Quimette v. Moran,
942 F.2d 1 (1st Cir. 1991)

Due process violated by state's failure to disclose long criminal record of, and deals with, state's chief witness where evidence against petitioner came almost entirely from this witness.

Campbell v. Henman,
931 F.2d 1212 (7th Cir. 1991)

Inmates do not forfeit right to exculpatory material before disciplinary proceeding simply because they forego option of assistance of staff representative who would have access to such material.

United States v. Tincher,
907 F.2d 600 (6th Cir. 1990)

Prosecutor's response to Jencks Act and *Brady* request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

United States v. Wayne,
903 F.2d 1188 (8th Cir. 1990)

Government's failure to disclose *Brady* material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tincher,
907 F.2d 600 (6th Cir. 1989)

"Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or *Brady* material and prosecutor responded that none existed. Convictions reversed.

Reutter v. Solem,
888 F.2d 578 (8th Cir. 1989)

Prosecution's failure to inform defense that key witness had applied for commutation and been scheduled to appear before parole board a few days after his testimony required habeas relief. Violation was compounded by prosecution's statement to the jury that the witness had no possible reason to lie.

United States v. Weintraub,
871 F.2d 1257 (5th Cir. 1989)

Impeachment evidence which was withheld would have allowed defendant to challenge evidence presented as to amount of narcotics sold, was material to sentencing and required remand for new sentencing hearing.

McDowell v. Dixon,
858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)

Black petitioner's due process rights violated where state suppressed key witness's initial statement that attacker was white and prosecutor added to the deception at trial by allowing witness to testify that she "had always described her attacker as a black man."

Jones v. City of Chicago,
856 F.2d 985 (7th Cir. 1988) [Civil case]

In successful § 1983 action against police officers by plaintiff who had been charged with murder, court notes that while *Brady* does not require police to keep written records of all their investigatory activities, attempts to circumvent the rule by keeping records in clandestine files deliberately concealed from prosecutors and defense, which contain exculpatory evidence, cannot be tolerated.

United States v. Strifler,
851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989)

Information in government witness' probation file was relevant to witness' credibility and should have been released as *Brady* material. Criminal record of witness could not be made unavailable by being part of probation file. District court's failure to release these materials required reversal.

Miller v. Angliker,
848 F.2d 1312 (2nd Cir.), cert. denied, 488 U.S. 890 (1988)

Habeas granted where state withheld evidence which indicated that another person had committed the crimes with which petitioner was charged. Same standard for *Brady* claim evaluation applies for defendant who pled not guilty by reason of insanity as for defendant who pled guilty.

Carter v. Rafferty,
826 F.2d 1299 (3rd Cir. 1987), **cert. denied,** 484 U.S. 1011 (1988)

Lie detector reports of test given to important prosecution witness were material where witness' testimony was the only direct evidence placing petitioner at scene of crime. Fact that other contradictory statements of the witness had been disclosed did not remove the "materiality" of the lie detector results.

***Bowen v. Maynard,**
799 F.2d 593 (10th Cir.), **cert. denied,** 479 U.S. 962 (1986)

Violation where prosecution failed to disclose that they considered Crowe a suspect when Crowe better fit the description of eyewitnesses, was suspected by law enforcement in another state of being a hit man, and carried the same weapon and unusual ammunition used in the murders. This met even the strictest standard under *Agurs*.

United States v. Severdija,
790 F.2d 1556 (11th Cir. 1986)

Written statement defendant made to coast guard boarding party should have been disclosed under *Brady*, and failure to disclose warranted new trial. The statement tended to negate the defendant's intent, which was the critical issue before the jury.

Brown v. Wainwright,
785 F.2d 1457 (11th Cir. 1986)

Habeas granted under *Giglio* where prosecution allowed its key witness to testify falsely, failed to correct the testimony, and exploited it in closing argument. Standard is whether false testimony could in any reasonable likelihood have affected the judgment of the jury.

Lindsey v. King,
769 F.2d 1034 (5th Cir. 1985)

Brady violated where prosecution, after a specific request, suppressed initial statement of eyewitness to police in which he said he could not make an ID because he never saw the murderer's face. His story changed after he found out there was a reward.

United States v. Fairman,
769 F.2d 386 (7th Cir. 1985)

Prosecutor's ignorance of existence of ballistic's worksheet indicating gun defendant was accused of firing was inoperable does not excuse failure to disclose.

Walter v. Lockhart,
763 F.2d 942 (8th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986)

State held, for over twenty years, a transcript of a conversation tending to exculpate petitioner insofar as it supported his claim that the cop shot at him first.

United States v. Alexander,
748 F.2d 185 (4th Cir. 1984), cert. denied, 472 U.S. 1027 (1985)

Government's equivocation in making critical factual representations to defense counsel and to district court regarding its possession of Brady materials requested in connection with new trial motion fatally compromised integrity of proceedings on the motion so that district court's denial of the motion could not stand.

***Chaney v. Brown,**
730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984)

Conviction affirmed but death sentence reversed where evidence, admissible under *Eddings*, which contradicted prosecution's theory of the murder and placed petitioner 110 miles from the scene, was withheld by prosecution.

United States v. Holmes,
722 F.2d 37 (3rd Cir. 1983)

District court abused its discretion by denying defendant's request for adjournment to permit counsel to complete examination of Jencks Act material, which was a stack of paper at least eight inches thick provided on the morning of the day before trial.

Anderson v. State of South Carolina,
709 F.2d 887 (4th Cir. 1983)

Habeas relief granted where prosecution withheld police reports despite general and specific requests from defense counsel, and failed to furnish autopsy reports upon counsel's request. There is no general "public records" exception to the *Brady* rule.

United States v. Muse,
708 F.2d 513 (10th Cir. 1983)

Prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.

Chavis v. North Carolina,
637 F.2d 213 (4th Cir. 1980)

Habeas relief granted where prosecution suppressed an amended statement by a key witness, information concerning the witness's favorable treatment by authorities, and records of the witness's mental deficiencies.

United States v. Auten,
632 F.2d 478 (5th Cir. 1980)

Prosecutor's lack of knowledge of witness's criminal record was no excuse for *Brady* violation.

Martinez v. Wainwright,
621 F.2d 184 (5th Cir. 1980)

In homicide prosecution, deceased's rap sheet, which prosecution failed to provide to defense pursuant to defense request, was "material" within meaning of *Brady* to the extent it served to corroborate petitioner's testimony with respect to shooting incident. That the rap sheet was in possession of the medical examiner, not the prosecutor, did not defeat the claim.

DuBose v. Lefevre,
619 F.2d 973 (2nd Cir. 1980)

Habeas relief granted where state encouraged witness to believe that favorable testimony would result in leniency toward the witness. Failure to disclose was not justified by fact that promise of state had not taken a specific form. Questions about a deal arose during examination of the witness, but nothing about the deal was disclosed.

United States v. Gaston,
608 F.2d 607 (5th Cir. 1979)

Reversed where trial court failed to conduct an in camera review of *Brady* material despite defendant's request for specific documents relating to interviews of two named witnesses, no evidentiary hearing was conducted, nor were the documents produced. The reports were sought not only for impeachment, but for substantive exculpatory use.

Monroe v. Blackburn,
607 F.2d 148 (5th Cir. 1979)

Habeas relief granted in armed robbery case where, despite specific request by petitioner, prosecutor withheld a statement given by the victim to police which could have been useful in attacking victim's testimony at trial. Because the request was specific, the standard of review was "no reasonable likelihood that evidence would have affected judgment of the jury."

United States v. Antone,
603 F.2d 566 (5th Cir. 1979), cert. denied, 446 U.S. 957 (1980)

For *Brady* analysis, no distinction is drawn between different agencies under the same government --- all are part of the "prosecution team."

Campbell v. Reed,
594 F.2d 4 (4th Cir. 1979)

Where co-defendant denied existence of agreement with prosecution during testimony, prosecution had a duty to correct. Jury was entitled to know about it and prosecution's deliberate deception was fundamentally unjust.

United States v. Herberman,
583 F.2d 222 (5th Cir. 1978)

Testimony presented to grand jury contradicting testimony of government witnesses was *Brady* material subject to disclosure to the defense.

United States v. Beasley,
576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979)

Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways.

Jones v. Jago,
575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978)

Habeas granted under *Brady* and *Agurs* where state withheld, despite defense request, a statement from coindictee who, prior to trial, had been declared material witness for prosecution, and against whom all charges were then dropped. State's claim that witness' statement made no express reference to petitioner and was therefore neutral was unsuccessful.

United States v. Butler,
567 F.2d 885 (9th Cir. 1978)

New trial required where government failed to disclose whether the witness had been promised a dismissal of the charges against him, and the witness testified falsely in this regard. The standard is whether the false testimony could in any reasonable likelihood have affected the judgment of the jury.

Annunziato v. Manson,
566 F.2d 410 (2nd Cir. 1977)

Habeas granted where one of two key prosecution witnesses testified falsely that he received no promise of leniency when in fact he had made a deal to avoid prison on pending charges, and prosecutor knew or should have known of this fact.

United States v. Sutton,
542 F.2d 1239 (4th Cir. 1976)

Reversed where prosecutor concealed evidence that key prosecution witness was coerced into testifying against defendant, and then went on to falsely assure the jury that no one had threatened the witness.

Boone v. Paderick,
541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977)

Petitioner prejudiced where prosecutor failed to disclose deal with accomplice/witness for leniency. Prosecutor knew or should have known that false evidence was being presented where witness denied deal at trial.

Norris v. Slayton,
540 F.2d 1241 (4th Cir. 1976)

Habeas granted where state failed to furnish to rape defendant's counsel copy of lab report showing no hair or fiber evidence in petitioner's undershorts or in victim's bed.

United States v. Pope,
529 F.2d 112 (9th Cir. 1976)

Conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for testimony and compounded the violation by arguing to the jury that the witness had no reason to lie.

Washington v. Vincent,
525 F.2d 262 (2nd Cir. 1975), cert. denied, 424 U.S. 934 (1976)

Habeas relief granted where key prosecution witness lied about his deal with the state, and prosecutor took no action to correct what he knew was false testimony. Petitioner was entitled to relief despite the fact that there was evidence that petitioner and his counsel knew of the perjury as it happened but took no steps to object.

United States v. Gerard,
491 F.2d 1300 (9th Cir. 1974)

Convictions reversed where defendants were deprived of all evidence of promise of leniency by prosecutor, and prosecutor failed to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Deutsch,
475 F.2d 55 (5th Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1984)

Prosecution found to be in possession of information which was in the files of the Postal Service. Availability of information is not measured by how difficult it is to get, but simply whether it is in possession of some arm of the state.

United States ex. rel. Raymond v. Illinois,
455 F.2d 62 (7th Cir.), cert. denied, 409 U.S. 885 (1972)

Defendant entitled to new trial even though exculpatory evidence had been revealed to defendant himself, but not to defense counsel.

Jackson v. Wainwright,
390 F.2d 288 (5th Cir. 1968)

In racial misidentification case, failure of prosecutor to reveal misidentification requires habeas relief even though defense counsel had name and address of the witness.

Barbee v. Warden,
331 F.2d 842 (4th Cir. 1964)

In A.W.I.K. and unauthorized use of automobile case, wherein defendant's gun was offered for ID purposes only and several witnesses made partial ID of gun as being used in shooting, reports of ballistics and fingerprint tests made by police, which tended to show that different gun was used and to exculpate defendant, were relevant and prosecution should have disclosed their existence.

***United States ex rel. Thompson v. Dye,**
221 F.2d 763 (3rd Cir.), cert. denied, 350 U.S. 815 (1955)

Habeas relief granted where state failed to inform defense counsel that arresting officer smelled alcohol on petitioner at the time of arrest. Absent state's deceit, jury may have believed defendant's physical and mental state evidence.

III. UNITED STATES DISTRICT COURTS

Floyd v. Vannoy,
2017 WL 1837676 (E.D. La., May 8, 2017), **warden’s appeal pending**, (5th Cir. 17-30421)

In post-AEPDA second degree murder case, district court grants habeas corpus relief on *Brady* claim. Petitioner Floyd was charged with two murders of homosexual men, and he had confessed to both crimes, but after a bench trial the court found Floyd guilty only of one of the murders because the evidence showed that the other had been committed by a black man with Type A blood; Floyd is white with Type B blood. 2017 WL 1837676 at *3. The Louisiana Supreme Court did not cite *Brady* in denying Floyd’s claim that material exculpatory evidence had been suppressed. The district court finds that the state court’s denial of Floyd’s *Brady* claim was an unreasonable application of federal law because among the suppressed items were test results for fingerprints located in one of the victims’ hotel room and in his car that indicated that the prints were NOT Floyd’s and not the victim’s, but a third party’s, “an obvious alternative suspect that the defense may point to as the true killer.” 2017 WL 1837676 at *9. The district court considers this evidence material, even though Floyd was in fact acquitted of the murder of that victim, because Floyd’s confession to that victim’s homicide was very similar to his confession to the homicide of the other victim, there was no physical evidence linking Floyd to either crime, there were fingerprints of a third party found at the scene involving the other victim, Floyd had been drinking when he made his confessions, the interrogating officers beat him, and Floyd was susceptible to coercion. The similarity of the two murders also suggests that one person committed both crimes. “Evidence tending to show that an unknown third party—and not Floyd—killed [one victim] therefore also points to the same unknown third party—and not Floyd—as [the other victim’s] killer.” 2017 WL 1837676 at *11. The district court also finds that a statement that a witness provided to a detective but not disclosed to the defense was favorable and material—the detective reported that the witness said that one of the victims had sex with both black and white men, but the witness actually said the victim had sex with black men, and did not mention white men. This information was favorable because it suggested that the killer was black and because it impeached the detective’s testimony that the victim had sex with black and white men. “Considering the full trial record, the Court finds that the withheld fingerprint results are—standing on their own—material to Floyd’s guilt, and that no reasonable application of clearly established federal law could support a contrary conclusion. Even if the prints alone were not enough, [the witness’s] statement to [the detective] provides additional exculpatory evidence.” 2017 WL 1837676 at *16.

United States v. McClellon,
___ F.Supp.3d ___, 2017 WL 2115681 (S.D. Mich, May 16, 2017), **appeal dismissed**, 2017 WL 4317149 (6th Cir. 2017)

District court grants McClellon’s motion for new trial following a conviction for felon in possession of a firearm and possession of a stolen firearm, where prosecution failed to disclose that officer who testified against him (and was the prosecution’s principal witness) was suspended by the Detroit Police Department the day after he testified against McClellon pending investigation

into charges that the officer made false reports of felony charges for weapons possession, and that the officer was criminally charged for this misconduct. McClellon's attorney learned about the charges and asked the government's attorney for "*Giglio* materials" and the government's attorney informed counsel that the officer's disciplinary records were clear, but the government's attorney later learned that pending internal disciplinary investigations were confidential, so he had not been informed of the investigation against the officer. The court holds that although the government's attorney "cannot be faulted here for nondisclosure," because he did not actively suppress the information against the officer, nevertheless, the government's attorney had a duty to learn of any favorable evidence, and the officer himself clearly knew that he had been suspended with investigation into his misconduct, and this information is imputed to the prosecutor. The withheld information about the officer was favorable to McClellon because it impeached the testifying officer's credibility. The information was material, because the officer had testified at McClellon's trial that he had pursued McClellon on foot during which he saw a handgun tucked into McClellon's waistband and the officer was the only one who testified that he saw McClellon pull out the gun and toss it away. The officer's "testimony is the only basis that clearly connected the dots between . . . circumstances to make an unassailable presentation," and "[i]f that testimony is placed in serious doubt, then the case is put into a much different light." 2017 WL 2115681 at *3. Although there was other evidence to support a conviction, "sufficiency of the evidence" is not the touchstone. *Id.* at *4 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 n.8 (1995)).

Castellanos v. Kirkpatrick

2017 WL 2817048 (E.D.N.Y., June 29, 2017), warden's appeal pending, (2nd Cir. 17-2341)

In post-AEDPA case involving conviction for committing a criminal sexual act in the first degree and sexual abuse in the first degree, district court grants habeas relief on *Brady* claim. Following Castellanos's conviction, the defense obtained materials related to the interrogating officer who obtained Castellanos's confession, including documents containing information that the officer had obtained a confession in another case from a suspect in which a different individual later confessed to the crime, and the officer's internal affairs tracking sheet showing that the officer had been investigated on six different occasions. The state court denied relief on the grounds that defense counsel obtained some of the information about the officer independently from another case file, therefore it was not suppressed, and that the information was irrelevant because Castellanos did not allege that the officer physically mistreated him in order to secure the confession. The state court's decision was an unreasonable application of clearly established federal law. In an earlier order, the district court had determined that Castellanos met the first and second prong of *Brady* (suppression and favorability) but had not had sufficient facts to determine materiality/prejudice. In the instant opinion, the district court bases the materiality conclusion on its *in camera* review of the suppressed documents, as well as the officer's personnel file. The court concludes that trial counsel could have impeached the testimony of the officer with his prior bad acts contained in the materials, and also that the withheld documents were relevant to the defense theory that the confession was false. The fact that trial counsel may have had information about the officer's misconduct from another case (a fact that counsel denied) did not defeat Castellanos's claim because there were additional withheld documents that also strengthened the inference of the defense theory that the confession was false. The suppression of the documents related to the

officer's history for coercing and falsifying confessions was prejudicial to Castellanos because they could have been used to attack the validity of Castellanos's confession. The six-year-old alleged victim's statements and unsworn testimony alleging that Castellanos sexually abused him were insufficient alone to support the conviction, the medical findings did not establish that Castellanos sexually abused the child, and the only remaining evidence was Castellanos's confession.

Williams v. Williams,

232 F.Supp.3d 1318 (S.D. Ga. 2017), warden's appeal pending (11th Cir. 17-10988)

Adopting Magistrate Judge's Report and Recommendation to grant habeas relief on *Brady/Giglio* claims in case involving, inter alia, felony-murder committed by two assailants. At trial, Williams's co-defendant was identified as one of the shooters by three eyewitnesses, none of whom identified Williams as the second shooter. There was additional testimony, however, concerning a prior identification of Williams made through a photo lineup by one of these eyewitnesses – Fitzgerald. There was also testimony about Fitzgerald's fear of telling authorities what had happened and intimidation of Fitzgerald by Williams. Although Fitzgerald had a pending drug and firearm case, he denied that he had received a plea offer in exchange for his testimony. Undisclosed to the defense was the fact that the prosecutor had told Fitzgerald that if he testified against Williams, she would inform the ADA in the drug/firearm case of Fitzgerald's cooperation and the ADA could consider that in making a plea offer to him. Following Williams's conviction, the prosecutor made good on her promise. She sent an email to the ADA in charge of Fitzgerald's prosecution asking her to take into consideration Fitzgerald's testimony in Williams's case, which was given in spite of threats against him, and informing the ADA that she "didn't think there would have been a conviction against Williams had [Fitzgerald] not testified." In subsequent dealings with Fitzgerald's defense attorney, the ADA expressly referenced Fitzgerald's cooperation in Williams's prosecution when providing favorable offers on Fitzgerald's case. The failure of Williams's prosecutor to disclose the promise she had made with Fitzgerald and to correct his false testimony about the absence of an incentive to testify violated *Brady* and *Giglio*. The state court's finding of no deal and no materiality was unreasonable. The prosecutor's failure to disclose the "leniency incentive" she provided to Fitzgerald undermines confidence in the verdict even though some other circumstantial evidence linking Williams to the shooting existed.

Alvarado v. Warden, Ohio State Penitentiary

2017 WL 878686 (N.D. Ohio, Feb. 7, 2017), adopting R&R, 2017 WL 843997 (N.D. Ohio, March 3, 2017)

Magistrate recommends that Alvarado's motion to stay his mixed petition be granted under *Rhines v. Weber*, 544 U.S. 269, 275 (2005), in order for him to exhaust his *Brady* and *Giglio* claims in state court. Alvarado was convicted of murder in state court in Ohio and sentenced to 15 years to life. Alvarado demonstrated good cause for his failure to exhaust the claim in state court prior to filing his federal habeas petition because the basis for his *Brady* claim is primarily the recantation affidavit of a witness who at trial identified Alvarado as the person who killed a victim during a bar fight, but in his affidavit, obtained two years after conviction, indicated that the prosecution told him who to identify (coached him and persuaded him to lie on the stand) and promised him

leniency in his own case in exchange. Although recantation affidavits are viewed with skepticism, this witness was the key witness against Alvarado, and the court cannot say that the *Brady* and *Giglio* claims are plainly meritless. There is no evidence that Alvarado has engaged in dilatory tactics because he filed his petition one month after the witness executed his recantation affidavit.

Garcia v. Hudak et al.
156 F. Supp. 3d 907 (N.D. Ill. 2016)

Plaintiff's conviction for possession of cocaine with intent to deliver was reversed and plaintiff brought action under 42 U.S.C. § 1983, alleging that defendant officers violated his right to due process by failing to disclose material, exculpatory evidence before he pleaded guilty. District court holds that plaintiff stated a claim under *Brady* because he alleged that the state suppressed evidence that the officers had fabricated the evidence used to prosecute him (they planted drugs on him), and this evidence was favorable to him because it demonstrated his innocence—that he was not in possession of narcotics when he was arrested. “The Individual Defendants did not falsely testify about the facts in the criminal matter. Instead, they fabricated a new reality—one in which Plaintiff possessed narcotics with the intent to distribute them—and then testified accordingly. This alleged behavior deprived Plaintiff of his right to receive *Brady* material and consequently, the Individual Defendants are not entitled to absolute immunity for their role as witnesses in Plaintiff's criminal case.” 156 F. Supp. 3d at 917.

Bailey v. Lafler
209 F. Supp. 3d 955 (W.D. Mich. 2016), cross-appeals pending, (6th Cir. 16-2474 & 16-2429)

In post-AEDPA murder case, district court grants habeas relief on *Brady* claim. Petitioner Bailey was charged with first-degree premeditated murder and first degree felony murder arising from killing of 79-year old woman. An FBI profile report was prepared linking this murder with a murder that occurred years earlier, concluding that one individual was likely responsible for both because of “signature” similarities between the crimes, including that both victims were elderly, white females who lived alone in the same general area of a small town and left the door unlocked; both suffered multiple stab wounds and fractures; both had an electrical cord around the neck or head that did not appear to cause death or injury; the murder weapons were from the victims' homes; no apparent theft motive in either case; no evidence of sexual assault of either. Bailey sought to introduce the report to demonstrate that he was not likely the perpetrator of either murder, as he had been only 10 years old at the time of the earlier murder, but the trial court excluded the report and all references to the earlier murder. On appeal, the state argued that the excluded profile report was not exculpatory and in fact supported a conclusion that Bailey was responsible for both murders, including the one that occurred when he was 10. But the prosecution possessed, and failed to disclose, information that latent prints at the earlier murder scene excluded Bailey as the perpetrator. The state court's decision that the suppressed fingerprint report from the earlier murder was irrelevant and the connection between it and the crime for which Bailey was convicted is speculative is based on an unreasonable determination of the facts and contrary to clearly established federal law. A *Brady* analysis requires the court to analyze whether the withheld evidence puts the whole case, not part of a case, in a different light. Here, the fingerprint

analysis and the FBI profile reports together are directly exculpatory as to both murders, because together, they lead to the conclusion that a third person—not Bailey—is likely responsible for both. The suppression of the fingerprint evidence denied Bailey a meaningful opportunity to present a complete defense. The prosecution’s case was based largely on circumstantial evidence that was not cumulatively strong.

***Sears v. Chatman**

2016 WL 1417818 (N.D. Ga., Apr. 8, 2016) (unpublished)

District court finds that Sears has established cause and prejudice to overcome procedural bars to merits consideration of his *Brady* claim. Sears was convicted by a Georgia jury of capital murder, kidnapping with bodily injury, and armed robbery in connection with the death of victim Wilbur, and sentenced to death. While Sears’ federal habeas corpus petition was pending, the U.S. Supreme Court granted cert from the denial of state habeas corpus relief, vacated the state habeas court ruling, and remanded for further proceedings. The state court once again denied relief, finding Sears’ *Brady* claim procedurally defaulted. Sears concedes that the claim is defaulted but argues there is cause for the default and he will suffer prejudice if the court does not excuse it. The prosecution knew but did not disclose that the primary witness against Sears, Williams, had been convicted of battery for a premeditated assault while incarcerated, despite Sears’ repeated requests for Williams’ criminal history. Because Sears was entitled to rely upon the prosecution’s “open file policy” to conclude that no more adverse information about Williams existed, and because the suppressed records may have allowed Sears to undermine Williams’ testimony that Sears initiated the kidnapping that resulted in the murder, and may have discredited testimony of an officer that Sears rather than Williams was the worst inmate at the detention center, cause and prejudice is established. Court permits Sears to proceed in federal habeas on this claim.

United States v. Hampton

109 F. Supp. 3d 431 (D. Mass. 2015), appeal dismissed (1st Cir. 15-1836, Jan. 20, 2016)

Hampton pleaded guilty to one count of knowingly and intentionally conspiring to distribute 50 or more grams of cocaine base. Before the plea hearing, the government provided him with certificates of analysis reflecting that the substances recovered from controlled purchases in which he was involved contained cocaine base. At the plea hearing, Hampton did not plead to any particular transaction or amount of cocaine base; at sentencing, based on an agreement with the prosecution, he was sentenced to the mandatory minimum of 10 years followed by 60 months of supervised release, based on the government’s calculation that the substance attributable to Hampton exceeded 280 grams. The lab chemist, Annie Dookhan, who tested 14 of 18 samples of the drugs seized from Hampton, was discovered to have taken evidence from a safe, removed drug samples from the lab, and forged a coworker’s initials on an evidence log, and after she went on administrative leave she was charged and pled guilty to crimes including perjury, obstruction of justice, tampering with evidence, and falsely claiming to hold a degree. Following Hampton’s conviction, he filed a petition to vacate his sentence under 28 U.S.C. § 2255, requesting relief because the prosecutor’s failure to disclose Dookhan’s misconduct violated *Brady* and made his sentencing inherently unreliable. Although other cases involving guilty pleas and Dookhan’s

misconduct have not resulted in vacation of the plea, in this case, “Hampton’s habeas petition is not about his own behavior in making a plea but is about the actual evidentiary basis provided by the government for the imposition of a mandatory minimum” *sentence*. 109 F. Supp. 3d at 437. Although there is no evidence that Dookhan tampered with evidence in Hampton’s case, the fact that the trial judge reluctantly imposed the sentence based on the mandatory minimum corresponding to 280 grams (and mandatory minimums are now unconstitutional) demonstrates that there is a reasonable probability that if the judge had known of the Dookhan scandal, the outcome of sentencing would have been different. The court determined that it is reasonable to “infer that, in the unique circumstances of this unusual case, [that] Dookhan was a member of the prosecution team” “in light of the government’s refusal to confront the issue by way of evidence or even briefing.” 109 F. Supp. 3d at 440. (The court made this determination because when it asked the government to retest and see whether the 280 grams was actually the correct weight, the government refused.)

United States v. Christian
2015 WL 13228001 (E.D.N.Y., Dec. 18, 2015)

District court orders disclosure of materials that are potentially discoverable under *Brady* to the court for *in camera* review. Christian was convicted of racketeering crimes, include the murder of victim Estella, based in part through testimony of cooperating witnesses. Christian had repeatedly requested intelligence records from the NYPD and FBI suggesting that the victim was killed at the instruction of the Wu Tang Clan, a noted rap music group, rather than by order of Christian and his racketeering organization. The court concludes that no documents provided at trial demonstrated this, but that by way of a 1999 FBI report that defendant received in response to a FOIA request, the defense has made sufficient showing that there may be material in the broader investigative files that was not previously disclosed that show that the murder was at the direction of people not related to Christian’s criminal enterprise. The government seeks to avoid disclosure by arguing that the defense has not sufficiently identified materials it seeks, and the court, in balancing interests, orders the government “to conduct a comprehensive review of relevant files under its control and submit for the Court’s *in camera* review material relating to reported connected between the Wu Tang Clan and [the cooperating witnesses] with respect to their actions in targeting either [the victim in another case] or Estella with the Wu Tang Clan.” 2015 WL 1322800 at *4.

United States v. Beech
307 F.R.D. 437 (W.D. Pa. 2015)

This discovery order includes helpful language about the timing of disclosure of *Brady* material in federal cases:

[C]ases by the Third Circuit have reiterated and encouraged adherence to the long-standing policy of promoting the early production of all types of *Brady* material, including impeachment and so-called *Higgs* [*United States v. Higgs*, 713 F.2d 39 (3d Cir. 1983)] materials. [Citations omitted.] The government’s early production of *Higgs*-type impeachment materials may well overlap with its subsequent production under the Jencks

Act and provide defendant with ‘advanced’ notice of certain witnesses the government intends to use at trial. Nevertheless, the court notes that after disclosure is made defense counsel can more fully advise his client regarding the appropriate development of the case, including consideration of any plea agreement offered by the government. In light of all of the circumstances, the government is encouraged to disclose all *Brady* impeachment material without further delay, and in any event it will be ordered to produce all such material no later than ten business days prior to trial. 307 F.R.D. at 442.

Johnson v. Han et al.

2015 WL 4397360 (D. Mass., July 17, 2015) (unpublished)

District court denies defendant-lab chemist supervisor’s motion to dismiss plaintiff-defendant’s § 1983 claim that she permitted her staff to fail to disclose exculpatory test results. Court holds that the state-employed lab chemists were members of the prosecution team with respect to the tests they conducted in Johnson’s criminal case and that a supervisor of the offending chemists may be liable for failing to disclose *Brady* materials.

Caminata v. County of Wexford

2015 WL 6472645 (W.D. Mich., Oct. 27, 2015) (unpublished)

District court denies defendant-officers’ motions for summary judgment on plaintiff-exoneree’s § 1983 lawsuit based on their suppression of material exculpatory evidence demonstrating that exoneree was not responsible for setting a fire that destroyed his girlfriend’s home (arson of a dwelling house). Evidence alleged to have been withheld included missing photographs that “clearly contradicted [prosecution expert’s] theory that a board covered a thimble hole at the time of the fire” and that the investigating officers were aware that the photographs directly contradicted the validity of the prosecution expert’s reconstruction of the location of the fire and cause thereof.

United States v. Jones

2015 WL 6872358 (W.D.N.Y., Nov. 9, 2015) (unpublished)

This discovery order includes helpful language about the timing of disclosure of *Brady*/Jencks materials in federal cases:

This Court believes that fundamental fairness and the constitutional due process requirements which underlie *Brady* mandate that the Court have some discretion with respect to the timing of the disclosure of such information, even if it may be considered combined *Brady*/Jencks material. Indeed, even with respect to purely Jencks Act materials, the Second Circuit has stated that “pretrial disclosure will redound to the benefit of all parties, counsel and the court, . . . sound trial management would seem to dictate that Jencks Act material should be submitted prior to trial . . . so that those abhorrent lengthy pauses at trial to examine documents can be avoided.” *U.S. v. Percevault*, 490 F.3d 126 (2d Cir. 1974); *U.S. v. Green*, 144 F.R.D. 631 (W.D.N.Y. 1992).

Here, the Court concludes that disclosure of such inculpatory [sic] and impeachment material, if any exists, in accordance with the common practice in this district (prior to trial so long as it is disclosed in sufficient time for the defendants to have a fair opportunity to utilize the information at trial) is sufficient. 2015 WL 6872358 at *2.

Robinson v. Morrow

2015 WL 5773422 (M.D. Tenn., Sept. 30, 2015) (unpublished)

District court grants summary judgment and relief on Robinson’s claim in his 28 U.S.C. § 2254 habeas corpus petition that the prosecution violated *Brady* when it withheld evidence in connection with DNA testing conducted on the knife used to kill the victim. Robinson was convicted of first-degree premeditated murder in Tennessee and sentenced to life in prison. He presented a defense at trial that although he did stab the victim and inflict the fatal wounds, he did not intend to kill her and stabbed her after she cut him with the knife first. After rejecting other claims procedurally defaulted by the state court, the district court addresses the *Brady* claim as a claim “that arise[s] from facts learned through discovery in this action,” and which the court holds is not defaulted. (Later in the opinion, the court notes that Robinson has established cause and prejudice for not raising the claim in state court—the cause was the suppression, and prejudice is that the suppressed evidence was favorable and material, satisfying the elements of the *Brady* claim itself and also overcoming the statute of limitations and procedural default.) Prior to trial, the prosecution sent the butcher knife for DNA testing, but the prosecution provided no specific instructions for the testing, and the analyst assumed the purpose of the testing was to determine whether the butcher knife was used to stab the victim. She tested only one small spot on the knife, away from the cutting edge, and determined that the spot contained the victim’s blood. Had she known that it was important to test for the defendant’s blood as well, she would have tested more areas on the knife. The report disclosed to Robinson at trial stated only that the blood tested matched the victim’s; it did not also include the information that only one spot was tested and that it was not on the cutting edge of the knife. At trial, the prosecution’s theory was that Robinson’s claim that the victim had cut him was false and that instead he had cut himself with another knife after cutting the victim. The prosecutor argued that Robinson’s blood was not on the butcher knife. After Robinson’s conviction, during proceedings on his federal habeas corpus petition, the federal court granted discovery and Robinson obtained the documentation stating that only one spot on the knife was tested. The federal court granted Robinson’s motion to conduct further DNA testing, which proved that Robinson’s blood was on the tip of the knife on both sides, mixed with the victim’s blood, and was the major contributor of DNA on one side of the knife tip. The evidence was suppressed because the analyst knew that only one spot was tested and that knowledge is imputed to the prosecutor. Robinson properly relied on the prosecutor’s express statement that there was no exculpatory evidence that had not been disclosed, and was not required to request or conduct additional testing on the knife with the limited information provided to him. The withheld evidence was favorable because it both impeached the testimony of the analyst by calling into question the thoroughness of her analysis and because it undercut the prosecution’s theory that Robinson lied about being attacked by the victim. It was material because it undercut the erroneous construction of the DNA report as proof that Robinson’s blood was not on the knife, which “was one of the lynchpins of the prosecutor’s premeditation theory at trial and was an

important factor in the state court decisions that followed.” 2015 WL 5773422 at *25.

United States v. Blankenship

2015 WL 3687864 (S.D. W.Va., July 12, 2015) (unpublished)

In this discovery order, district court finds that government “does not comply with the requirement of *Brady* by merely including all known *Brady* material within the four million plus pages of discovery” and orders the government to “specifically designate any known *Brady* material as such and disclose the same to defense counsel.” 2015 WL 3687864 at *6.

***Washington v. Beard,**

2015 WL 234719 (E.D. Penn., Jan. 16, 2015), appeal withdrawn, (3rd Cir. 15-99001, Dec. 1, 2015)

This capital habeas petitioner was entitled to relief on a *Brady* claim, and on grounds that the prosecutor’s improper argument violated *Bruton v. United States*, 391 U.S. 123 (1968). Petitioner was convicted and sentenced to death for the murder of an unarmed security guard who was shot and killed during an armed robbery at a Save-A-Lot store in Philadelphia. Witnesses to the crime recounted that two men came into the store and purchased a bag of potato chips; one of the men pulled out a gun and demanded money; and then the two assailants ran away followed by the security guard. Witnesses heard shots fired outside but did not witness the shooting. Two witnesses positively identified petitioner’s co-defendant, Derek Teagle, as the robber with the gun. Teagle’s fingerprints were also found on the bag of potato chips left on the counter. Teagle gave a statement to law enforcement in which he implicated petitioner as the other robber and suggested that petitioner was the shooter. Neither petitioner nor Teagle testified at their joint trial. Over petitioner’s objection, Teagle’s statement was read into evidence and petitioner’s name was replaced with the word “Blank.” The trial court instructed the jury not to use this statement against petitioner. First, the State violated *Brady* by failing to disclose witnesses’ descriptions of the robbers recorded shortly after the crime and evidence that witnesses inside the store failed to identify petitioner from a photo array. The state conceded that none of these items were disclosed to the defense prior to trial. This evidence was material because the identity of the shooter was contested; the withheld evidence went directly to the issue of the shooter’s identity; and, the withheld evidence was consistent with Teagle being the only assailant seen with a gun. The undisclosed evidence would have supported the defense theory at trial and bolstered petitioner’s motion to sever his trial from Teagle’s. Moreover, the prosecutor committed misconduct by “trash[ing]” the trial court’s instructions during his closing argument by repeatedly referring to Teagle’s statement and specifically filling in the “blanks” with references to Petitioner. *Washington*, 2015 WL 234719 at *16. The trial judge’s attempt to fix this error with a curative instruction was “tantamount to the wizard telling Dorothy to pay no attention to the man behind the curtain.” *Id.* Apart from Teagle’s statement, there was no evidence that petitioner was armed. The prosecutor’s improper argument most certainly had a substantial and injurious effect on the outcome of the case, and petitioner was entitled to relief on this ground as well.

Johnson v. Cain,
68 F.Supp.3d 593 (E.D. 2014)

This non-capital petitioner was entitled to relief under *Brady* and *Giglio* as a result of the State's misconduct prior to his murder trial for the shooting death of Richard McClarity during an argument at a swimming pool. Petitioner admitted to shooting McClarity but claimed he acted in self-defense or, at a minimum, heat of passion when he shot at Ira Bodere, who was attacking petitioner's brother, and the bullet aimed at Bodere accidentally struck McClarity. The state suppressed a statement given by Ira Bodere to the police shortly after the shooting. At trial, the state relied heavily on Bodere's testimony that after he hit petitioner's brother during an argument, petitioner got out of his car and shot at him. Bodere claimed that he fell to the ground and pretended to be hit, but petitioner came over and started kicking him while he was laying on the ground. Bodere further asserted that McClarity attempted to help him up off the ground when petitioner started to leave, but then petitioner returned and shot twice. Bodere added that petitioner said to another witness nearby, "[i]f I had more bullets, John, I would kill you too." *Johnson*, at 611. In its closing argument, the State emphasized Bodere's testimony as evidence of petitioner's specific intent to kill. Bodere's suppressed statement, however, flatly contradicted his trial testimony and would have been useful for supporting petitioner's defense instead. In a police report recorded on the day of the shooting, Bodere told police that he punched petitioner's brother in the mouth; petitioner jumped out of his car and started shooting; Bodere fell to the ground and then heard two more shots. In this version of events, petitioner did not kick Bodere while he was on the ground, nor did petitioner return to shoot McClarity while he was trying to assist Bodere. Thus, Bodere's suppressed statement was favorable and resulted in prejudice to petitioner, particularly considering that: (1) the jury deliberated overnight and initially informed the judge that they were unable to come to a consensus; (2) the jury made several requests for additional instructions on specific intent; and, (3) the state relied exclusively on Bodere's testimony to support its argument on that very point. (The claim was considered *de novo* because it was rejected on procedural grounds by the state court. The procedural default did not preclude federal review given that the state court's ruling that the claim was untimely under state law was erroneous.)

***Bridges v. Beard,**
941 F.Supp.2d 584 (E.D. Pa. 2013), aff'd, ___ Fed.Appx. ___ (3rd Cir. Sep. 1, 2017)

The district court granted relief in this Pennsylvania capital case, finding that the prosecution violated *Brady v. Maryland* by failing to disclose impeachment evidence concerning a key guilt-or-innocence witness. Petitioner was convicted under an accomplice liability theory, along with two co-defendants, for the murder of Gregory and Damon Banks, whom petitioner believed were responsible for an armed robbery at his home while his girlfriend was present. Petitioner admitted going to the Banks' home to confront them about the robbery, but maintained that he had not intended to kill them and was surprised when a co-defendant began shooting. To counter that claim, the prosecution presented the testimony of one George Robles, who claimed that prior to the homicides petitioner had displayed a handgun and said he was going to kill the Banks because they went into his house and put guns to his girlfriend's head. The jury accepted the prosecution's theory, convicted petitioner, and sentenced him to death. Petitioner made an

unsuccessful bid for state post-conviction relief – including a failed attempt at access to information about Robles – then sought federal habeas relief, and was permitted to conduct discovery. Through that mechanism he acquired a series of police reports showing that Robles was a suspected drug dealer who had multiple run-ins with police, and regularly offered to provide information in exchange for leniency. After the state court declined to review this new information on the ground that his *Brady* claim had already been litigated in a prior proceeding, petitioner returned to federal court. Observing that the procedural posture of petitioner’s claim was “analogous to *Cone v. Bell*, 556 U.S. 449, 472 (2009),” the district court declined to apply § 2254(d). 941 F.Supp.2d at 602. Examining the merits de novo, the district court held that petitioner was entitled to relief because: the police records were clearly impeaching, and thus favorable, in that they suggested Robles’ “motivation to lie to curry favor with the police to protect his drug business and to stay out of police custody,” *id.* at 605; the reports were generated by police agencies and not disclosed to the defense; and “the cumulative prejudicial effect of the numerous suppressed police reports about Robles shows that they are ‘material’ under *Brady*.” *Id.* at 607. “Robles’ testimony,” the court explained, “constituted the only evidence that the prosecution presented to show that [petitioner] had the intent to kill,” and the prosecution “repeatedly emphasized Robles’ trustworthiness . . . [and] describe[d] Robles as a reluctant witness.” *Id.* Without the withheld evidence, petitioner could not meaningfully challenge these claims. Finally, the withheld evidence “could have led [petitioner’s] attorneys to other witnesses who could have testified about Robles’ activities and his character.” *Id.* at 608.

***Keenan v. Bagley,**

2012 WL 1424751 (N.D. Ohio April 24, 2012)

The district court granted relief in this Ohio capital case, finding that the prosecution committed multiple *Brady v. Maryland* violations. Petitioner was convicted of killing Anthony Klann after his codefendant, Edward Espinoza, testified that he witnessed petitioner slash Klann’s throat with a knife, push him into a creek, and then tell another co-defendant, Joseph D’Ambrosio, to “[f]inish him.” 2012 WL 1424751 at *2. Petitioner unsuccessfully pursued four applications for state post-conviction relief, raising some *Brady* claims, but much of the evidence at issue in his federal proceedings did not come to light until after his co-defendant, D’Ambrosio, obtained discovery and ultimately won relief on a *Brady* claim in his own federal habeas proceedings. After determining that § 2254(e)(2) did not bar expansion of the record, the district court noted that all of Keenan’s *Brady* claims were procedurally defaulted (either because he failed to raise them in state court or because the state court dismissed them as untimely), and proceeded to assess the merits and cause and prejudice simultaneously. Based on a review of the evidence, the court determined that Keenan had proved suppression of material evidence in the following categories: (1) evidence that another man, Paul Lewis, had motive to kill Klann because Klann had information that Lewis committed a rape for which Lewis faced charges at the time of Klann’s murder, and evidence the Lewis had information regarding the crime that was not publicly known and had asked the police to help resolve a DUI charge against him in exchange for his testimony; (2) evidence that police investigators believed that Klann’s murder occurred in some other location and his body was subsequently dumped in the creek bed because there was

no blood or evidence of a struggle near the creek where his body was found; (3) police reports concerning, and a cassette tape containing, conversations between an informant and an inmate who once lived with Klann in which the inmate may have implicated other persons in Klann's murder; (4) evidence that two of the state's witnesses had asked the police to assist them in relocating because they had been threatened by members of D'Ambrosio's family; and, (5) witness reports indicating that the crime took place at a date and time inconsistent with the state's theory at trial and implicating Lewis, not petitioner, in the events of the crime. The district court determined that each of these categories individually satisfied the first two prongs of *Brady* and thereby established cause and prejudice to excuse the procedural default. The court then conducted the *Brady* prejudice analysis by looking cumulatively at all of the withheld evidence and concluded that Keenan could have used this information in three ways. "First, Keenan could have used the evidence to impeach Espinoza, and, because Espinoza was the state's sole witness to the crime and the only evidence linking Keenan to the murder, thereby undercut the state's entire case." *Id.* at *43. Second, "Keenan could have used the *Brady* material ... to impeach the police and call into question the thoroughness and integrity of their investigation." *Id.* at *44. And third, he "could have used the suppressed information ... to implicate others in the murder, at a minimum creating a reasonable doubt regarding his participation in the crime." *Id.* Viewed collectively, the court concluded that there was a reasonable probability that the suppressed evidence would have produced a different verdict sufficient to undermine confidence in the outcome of petitioner's trial.

Bies v. Bagley,

2012 WL 1203529 (S.D.Ohio April 10, 2012), aff'd, 775 F.3d 386 (6th Cir. 2014)

The district court granted relief on petitioner's *Brady v. Maryland* claim in this formerly capital Ohio murder case (petitioner's death sentence was previously set aside by a state court under *Atkins v. Virginia*). Petitioner had been convicted and sentenced to death for the kidnapping, attempted rape, and aggravated murder of a ten-year-old boy. The evidence supporting the *Brady* claim did not come to light until after petitioner's federal habeas proceedings began, and his effort to exhaust the claim in state court was turned away as procedurally barred. After determining that the procedural bar was excused because the state's misconduct had been the cause of petitioner's delay in discovering and asserting the claim, the district court examined the merits. The court held that the state violated *Brady* by withholding evidence that another suspect confessed to multiple people that he had killed the victim, that two other suspects had also confessed to the crime, and that some of these suspects as well as several other sex offenders had been known to frequent the abandoned building where the victim's body was found. The court further determined that this evidence, viewed collectively, was material, particularly in light of the state's weak case against Bies. The state had no physical evidence connecting him to the crime, and had instead relied on a sighting of Bies at a park near the abandoned building where the victim was found and Bies' alleged confession to the police and a jailhouse informant. The district court noted that "[t]he strength of the confession to police is undermined by the fact that Bies is a mentally retarded man who repeatedly denied involvement in the murder prior to his final unrecorded statement to police," and that "the credibility of the jailhouse informant also can

be attacked on several bases.” 2012 WL 1203529 at *20. The court went on to reject the “stringent evidentiary standard suggested by Magistrate Judge Merz,” under which Bies would have been required to prove that the withheld exculpatory material would have led to admissible evidence at trial by offering admissible affidavits from the witnesses discussed in the police reports. *Id.* at *21 (citing *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002), *Castleberry v. Brigano*, 349 F.3d 286 (6th Cir. 2003), and *D’Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008)). The court also noted that Bies’ co-defendant had recently won relief on substantially the same *Brady* claim in *Gumm v. Mitchell*, 2011 WL 1237572 (S.D. Ohio. Mar. 29, 2011).

Hash v. Johnson,
845 F.Supp.2d 711 (W.D. Va. 2012)

Petitioner Hash was entitled to habeas relief from his capital murder conviction due to the prosecution’s presentation of false testimony by a jailhouse informant concerning expected benefits from his testimony against Hash. The claim was analyzed de novo after a concession by respondent that Hash established cause and prejudice to overcome the default. (Much of the supporting evidence was obtained through federal discovery.) The inmate falsely denied that one of the State investigators had agreed to speak with the U.S. Attorney on the inmate’s behalf concerning reduction of a federal sentence and the Commonwealth’s Attorney admittedly made false and misleading statements in his closing argument about the absence of any agreement to assist the inmate in federal court. In finding a reasonable likelihood that the jury would have reached a result more favorable to Hash had the false testimony not been presented, it was noted that no physical evidence connected Hash to the crime and testimony by other witnesses implicating Hash was contradictory. (Habeas relief was also granted on other claims, including prosecutorial and police misconduct. It was found, inter alia, that the Commonwealth failed to disclose exculpatory evidence. Because of the conclusion that the assorted misconduct amounted to a due process violation, it was not determined whether a *Brady* violation also occurred.)

Gillispie v. Timmerman-Cooper,
835 F.Supp.2d 482 (S.D. Ohio 2011)

In case involving two separate instances of kidnapping and rape, petitioner was entitled to habeas relief based on the prosecution’s suppression of evidence concerning petitioner’s elimination as a suspect by the initial investigating officers and the reasons for their conclusion that petitioner was not a viable suspect. (The reasons included a belief that a photo of petitioner did not resemble the composite sketches of the assailant, that petitioner did not match the profile of the assailant developed by the police, petitioner did not appear to be able to fit the pants size the assailant was seen to have worn, and the person who raised petitioner as a possible suspect had been exposed to the composite sketches of the assailant for a significant amount of time but only came to the police with his suspicions about petitioner after he had a nasty fight with petitioner.) Although the investigating officers opinions did not go directly to petitioner’s guilt or innocence, “they clearly go to the quality of the investigation” that took place subsequent to their investigation. In light of the total record, which included a complete absence of physical

evidence tying petitioner to the crimes, the use by the replacement investigating officer of a photo line-up almost two years after the offenses with a photo of petitioner styled differently than the other photos, and an initial jury deadlock of eight to four in favor of acquittal prior to an Allen charge, the state court's conclusion that the suppressed evidence was not material was not entitled to deference. Although one of the initial investigating officers became a defense investigator for trial counsel on petitioner's case, this did not defeat the *Brady* claim as the record established that the investigator performed only discreet tasks and was unaware that information about his work on the case had not been disclosed to trial counsel. Further, trial counsel had no reason to believe he had not been provided with everything.

Munchinski v. Wilson,

807 F.Supp.2d 242 (W.D. Penn. 2011), aff'd, 694 F.3d 308 (3rd Cir. 2012)

Petitioner was entitled to habeas relief as to his 1986 murder convictions based on the State's suppression of a report that provided the names of individuals who allegedly presented a version of events at the crime scene that was wholly inconsistent with the testimony of the key prosecution witness, who claimed to be an eyewitness to the murders, and omitted petitioner's involvement entirely. Petitioner was also entitled to habeas relief because seven pieces of suppressed evidence when considered in the aggregate presented additional, non-cumulative methods to impeach the key prosecution witness. (The additional suppressed evidence included samples of physical evidence from the crime scene that, when tested, failed to implicate petitioner. The absence of any physical evidence tying petitioner to the murders supported his position at trial that he was not present during the killings.) State court's analysis of petitioner's *Brady* claims unreasonably applied clearly established federal law by imposing a heightened standard of materiality and by failing to consider the suppressed evidence collectively. Petitioner's showing of innocence satisfied the requirements for filing a second or successive habeas petition.

Harris v. Gov't of Virgin Islands,

2011 WL 4357336 (D. Virgin Islands Sept. 16, 2011)

In murder of a police officer case, although defendant did not move for a new trial on the basis that the prosecutor knowingly employed the false testimony of an eyewitness who identified defendant as one of four assailants for the first time in court, a new trial is ordered based on plain error. (Prior to trial, the eyewitness had only been able to identify one of the charged men in a photo lineup, co-defendant Mosby. At trial, the eyewitness surprised everyone by identifying defendant, not Mosby.) Notably, the lower court had found the eyewitness's post-trial recantation credible even though the eyewitness, who had been visited by the prosecutor's investigator prior to the hearing, then repudiated his recantation. The lower court cited to the fact that the eyewitness had approached the prosecutor seven days after the trial ended and disavowed his identification of defendant. In addition, the eyewitness later met with the defense team and signed an affidavit acknowledging that he had been mistaken when identifying defendant at trial. In finding that the identification was false, the court pointed to: (1) the credible recantation; (2)

the two completely inconsistent narratives the eyewitness provided regarding how he came to observe the four assailants; (3) his three initial statements to law enforcement that he did not see any of the four men's faces; (4) his failure to pick defendant out of a photo array before trial; (5) his subsequent failure to identify co-defendant Mosby in person, despite having previously identified his photo; and (6) defendant's testimony regarding his non-involvement in the murder. As for whether the prosecutor knew or should have known that the identification was false, the court stated: "[W]e are certain that a reasonable prosecutor pursuing justice would have recognized the substantial question arising from [the eyewitness's] identification testimony and would have strongly considered the possibility that this identification was made in error. . . . Here the circumstantial evidence that [the prosecutor] knew, or should have known, that [the eyewitness] made a mistake abounds: the government's case against [defendant] was reed-thin; [the eyewitness's] inconsistent narrative and state of mind raised questions about his ability to make an accurate identification; [the prosecutor] failed to inquire into the identification's veracity when the opportunity presented itself at trial; and he subsequently withheld [the eyewitness's] recantation from [defendant's] counsel in violation of *Brady* for 15 months." In addition, the prosecutor was aware that the stress from the events had led the eyewitness to seek psychiatric care. On this record, the court found the prosecutor guilty of "willful blindness" which "satisfie[d] *Agur*'s prosecutorial knowledge element under the plain error standard." It also concluded that defendant met the plain error standard for prejudice.

***Browning v. Workman,**

2011 WL 2604744 (N.D. Okla. June 30, 2011), aff'd sub nom. Browning v. Trammell, 717 F.3d 1092 (10th Cir. 2013)

The district court granted guilt-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Oklahoma capital case. Petitioner "was convicted of attempting to kill his pregnant ex-girlfriend; Cenessa Tackett; killing Ms. Tackett's parents; and setting fire to their home." 2011 WL 2604744 at *1. His defense was that "his co-defendant Shane Pethel planned and committed these acts with Ms. Tackett, who possessed a financial motive to commit the crimes." *Id.* "Physical evidence linking [petitioner] to the crime was virtually non-existent." *Id.* Instead, the state's case rested on Tackett, who "was the key witness and sole eyewitness in the prosecution's case." *Id.* Prior to trial, petitioner moved the prosecution to produce Ms. Tackett's mental health records. After an in camera review of the records, the trial court found "that they contained no exculpatory material that must be disclosed, absent a waiver [of the psychotherapist-patient privilege] from Ms. Tackett." *Id.* The trial court then placed the documents under seal. Petitioner was convicted and sentenced to death in state court. On direct appeal, the Oklahoma Court of Criminal Appeals (OCCA) also reviewed the sealed documents and found that they contained "nothing material to either guilt or punishment" and "nothing favorable to the defendant." *Id.* at *4. Petitioner then sought federal habeas relief, asserting that "the trial court's refusal to order disclosure of Ms. Tackett's mental health records, which were in the possession of the prosecution deprived him of his right to access exculpatory evidence under the Due Process Clause of the Fourteenth Amendment and *Brady v. Maryland*, 373 U.S. 83 (1963), and denied him the rights to cross-examination and confrontation under the Sixth Amendment." *Id.* at *3.

Because the district court granted relief on the due process claim, it did not reach the Sixth Amendment claims. The district court found that the documents showed Ms. Tackett: (1) “was suffering from severe mental illness;” *id.* at *6; (2) “suffered from memory deficits, poor judgment, trouble distinguishing reality from fantasy, was manipulative and was potentially a danger to others,” *id.*; (3) “exhibited a pronounced disposition to lie,” *id.* at *7; and, (4) was “dramatically impaired [in] her ability to perceive and tell the truth.” *Id.* The district court held that the OCCA had “identified the correct legal principles by citing *Kyles*, *Bagley* and *Brady*,” *id.* at *6 (internal citations omitted), but had unreasonably applied that law in two respects. First, the district court held, “[t]here is no reasonable argument or theory that could support the OCCA’s conclusion that the sealed material contained nothing favorable to [petitioner’s] defense.” *Id.* at *7. “Second, the OCCA’s conclusion that the sealed mental health records contain nothing material either to guilt or punishment was an unreasonable application of Supreme Court law to the facts of this case.” *Id.* Given that Ms. Tackett was the sole witness against petitioner at trial, and that “her credibility and veracity were already shown to be suspect” due to inconsistent statements and admissions she made at trial, the district court held that the state court’s decision was unreasonable because “a fair minded jurist could determine that the withheld favorable evidence put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at *9.

Andazola v. Woodford,
2011 WL 1225979 (N.D. Cal. March 31, 2011)

In attempted murder case, habeas relief granted due to prosecution’s failure to disclose impeachment evidence regarding the investigating officer who testified for the prosecution that a witness had identified petitioner as the shooter. The victim was an acquaintance of petitioner. The victim testified that he went to petitioner’s home to clear the air after learning that petitioner suspected him of having stolen a CD player. The victim lifted weights and smoked marijuana in petitioner’s garage with petitioner. Several other people were present. The victim was told to leave the garage by another acquaintance after the victim denied having stolen the CD player. The victim initially moved towards petitioner to shake his hand but turned away when he saw petitioner’s angry look. As he turned, he blacked out and when he regained consciousness he realized he had been shot. Although the victim had told the investigating officers that the other acquaintance had been behind him when he was shot in the back, he testified he was “pretty sure” it was petitioner. The victim also stated, however, that he never saw a gun in petitioner’s hand. Other witnesses provided conflicting reports. Police officer Salgado testified that witness Delgado informed him that she saw petitioner shoot the victim but Delgado later denied making any such statement. Officer Salgado further testified that following her denial, Delgado privately repeated to him that she had indeed seen petitioner shoot the victim. At trial, Delgado admitted being present in the garage but denied seeing the shooting occur. Petitioner’s cousin acknowledged in his testimony that he had implicated petitioner as the shooter during a police interview but claimed he did so only because Salgado had “threatened to arrest him if he did not implicate someone as the shooter.” Two other witnesses testified that Andazola told them he had shot somebody. Petitioner was entitled to habeas relief because of the prosecution’s suppression

of evidence showing Salgado's "pattern of falsifying police reports" and a later "criminal investigation" undertaken "into [Salgado's] conduct." This evidence was material given the prosecutor's characterization of Salgado's testimony "as the 'lynchpin' in her closing argument." The state courts' denial of the misconduct claim was "contrary to, or involved an unreasonable application of clearly established federal law."

Gumm v. Mitchell,

2011 WL 1237572 (S.D. Ohio Mar. 29, 2011), aff'd, 775 F.3d 345 (6th Cir. 2014)

The district court granted relief in this previously capital (petitioner's death sentence was set aside pursuant to *Atkins v. Virginia*) Ohio murder case, finding that the prosecution violated *Brady v. Maryland*, petitioner's due process rights were violated by the admission of irrelevant prior bad act evidence, and the prosecutor's misconduct deprived petitioner of a fair trial. Based largely on his confession, petitioner was originally convicted and sentenced to death for the aggravated murder, kidnapping, and attempted rape of a 10-year-old boy. After securing relief from his death sentence under *Atkins*, petitioner pursued federal habeas relief from his conviction, and the district court concluded that he was entitled to relief on three grounds. First, the court found that the state had failed to turn over an array of *Brady* material, including: (a) inculpatory statements by three other suspects; (b) information concerning local sex offenders who were questioned about the victim's death; (c) information concerning other individuals seen in the area at the time of the crime; (d) information about others who were with the victim on the night of the crime; (e) information that would have called into question the testimony of a state witness who claimed that the victim never played in the vacant building where his body was found; (f) evidence that was inconsistent with the prosecution's theory about what time the victim was killed; and, (g) information that gym shoes belonging to another suspect matched the gym shoe marks found on the victim's body. While the state court found that the undisclosed evidence was not material and did not undermine confidence in the verdict, the district court held that this conclusion involved an unreasonable application of clearly established federal law. The court explained that although much of the undisclosed evidence was not itself admissible, it could have led defense counsel to admissible evidence. The court went on to add that "[t]here was no physical evidence linking petitioner to the crime. The police officers had only petitioner's confession which, because of his mental retardation and his heightened susceptibility to police coercion, must be viewed with some skepticism." *Id.* at *8. Second, the district court held that petitioner was entitled to relief on his claim that the prosecution's introduction of evidence that petitioner once told his neighbor that he had "fucked a horse" violated his right to a fundamentally fair trial. The state courts held that even if this evidence should have been excluded, the prosecutor did not dwell on it and, on the whole, petitioner received a fair trial. The district court held that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. Although the neighbor's testimony on this issue was brief, it was "egregiously unreliable" and "among the most outrageously inflammatory evidence this Court has ever read in a capital case transcript." *Id.* at *9. Additionally, the district court held that petitioner's due process and confrontation rights were violated by the erroneous introduction of hearsay statements from his medical records which, also recounted irrelevant prior bad acts,

such as the fact that petitioner lied, became rowdy when he drank, was cruel to animals, solicited oral sex from someone, tried to rape his sister's friend, and burned a boy with a hot spoon. The state court held that the records, including the hearsay statements they contained, were admissible because petitioner's expert witness had reviewed them in formulating his opinion. The district court concluded that the fact that the expert reviewed the documents did not make the hearsay statements admissible and the admission of this evidence deprived petitioner of a fair trial. Finally, the district court held that the prosecutor's improper pattern of misconduct, evidenced primarily by the *Brady* violation and the introduction of inadmissible prior bad act evidence, deprived petitioner of a fundamentally fair trial. The state court's conclusions that petitioner received a fair trial and that any errors were harmless were contrary to, or involved an unreasonable application of, clearly established federal law.

Merritt v. Hoke,

2011 WL 198104 (N.D.W.Va. Jan. 18, 2011)

Petitioner was denied a fair trial by the State's failure to disclose its agreement with Thacker, the driver in the robbery petitioner was convicted of committing, that if she invoked the Fifth Amendment the State would request immunity for her. Disclosure of the State's "tacit pre-trial immunity agreement" with Thacker "would have been favorable for its impeachment value." Although the prosecutor told defense counsel the day of Thacker's testimony that he intended to request immunity for her if she invoked her Fifth Amendment rights, the defense was unaware of the pre-trial discussions about immunity. The nondisclosure was material for two reasons. First, an "undeniable difference" exists "between the way a juror perceives the credibility of a witness ordered to testify against her will versus a witness" following "a pre-orchestrated plan" between the prosecution and the witness' counsel. In the former, a juror could reasonably "attribute more credibility to a witness forced to testify against her will" because it would "only be human nature for a juror to expect truthful testimony from an unwilling witness." But in the latter, a "reasonable probability" exists that "a juror would allow" the prosecution's involvement, including the immunity request, to "cast at least some shadow of doubt on the witness' motivation to testify consistent with the State's theory...." Second, Thacker's testimony was the only "particularly incriminating" evidence presented. No physical evidence implicated petitioner: no fingerprints or disguises discovered, and no money recovered. The prosecutor "compounded the *Brady* violation and further undermined confidence" in the outcome by arguing "'in effect' that the State had nothing to do with the deal," and the deal had "come solely from" the trial judge. That argument was "misleading, at best, and untrue at worst." The State's "*Brady* violation" undermined "confidence in the outcome," was material, and petitioner was entitled to habeas relief.

Valentin v. Mazzuca,

2011 WL 65759 (W.D.N.Y. Jan. 10, 2011)

The district court granted relief in this New York robbery case, finding that the prosecution violated *Brady v. Maryland* when it failed to disclose the criminal history of the only testifying

eyewitness to the robbery. After agreeing with the state court's determination that the evidence was favorable and had been suppressed, see 2011 WL 65759 at *17-18, the district court held that the state court had "erroneously and unreasonably performed a 'sufficiency of the evidence' review in deciding the materiality issue." *Id.* at *20. The court went on to explain that the prosecution's case for guilt was "more akin to a house of cards than a foundationally sound structure, and that it was more than reasonably possible that the only eyewitness's criminal record "could have been the card that toppled the house." 2011 WL 65759 at *21.

***Hodges v. Epps,**

2010 WL 3655851 (N.D. Miss. Sept. 13, 2010), aff'd on other grounds, 648 F.3d 283 (5th Cir. 2011)

Mississippi death row inmate entitled to habeas relief as to his sentence on numerous grounds, including claim that the prosecution presented false evidence at the penalty phase about sentencing proceedings in Hodges' prior burglary case. The murder victim, Isaac, was the brother of Hodges' ex-girlfriend, Cora. Hodges had previously pleaded guilty to repeatedly breaking into Cora's mother's home to see Cora. At the time of Hodges' plea, Cora's mother provided a victim impact statement asserting she did not feel safe with Hodges in her family's life. At Hodges' sentencing, the DA told the judge that although Cora's mother believed Hodges should be punished, "her anger had subsided." Finding that the State made no sentencing recommendation, and Cora's mother did not want Hodges incarcerated for a lengthy period, Hodges was sentenced to a 7-year prison term but was only incarcerated for about six months. Three weeks after Hodges' release, Hodges broke into Cora's home where he encountered Isaac and shot and killed him. At the capital sentencing proceeding, the prosecutor asked Hodges and his mother about Cora's mother's actions to keep Hodges out of prison on his earlier burglary charge. Both denied knowledge of any such action. An assistant district attorney testified that he had requested a 15-year prison term but that Cora's mother told him she did not want Hodges sent to prison. In his closing argument, the prosecutor argued that despite Hodges' refusal to acknowledge it, Cora's mother had bestowed on him "a huge measure of grace" and yet he killed her son after he was given a second chance of monumental proportions. On appeal, the earlier plea hearing transcript was ordered and it showed the prosecution made no recommendation on Hodges' sentence, and Cora's mother never requested Hodges receive probation or leniency. The state court, however, refused to consider the transcript because it was not part of the trial court record and the court had denied Hodges' motion to expand the record to include it. The state court also found the false evidence issue barred due to Hodges' failure to object during his cross-examination and the questioning of his mother. Finally, without consideration of the plea transcript, the state court found the requisite evidentiary basis for the questioning in the assistant district attorney's testimony. The state post-conviction court later barred the claim as *res judicata*. The federal district court expressed skepticism about the State's argument that the claim was barred due to the lack of a contemporaneous objection, observing that trial counsel "had no reason to believe" they needed "an actual transcript" of the earlier burglary plea "to correct the State's presentation of false evidence." But if "cause and prejudice" were required to overcome a procedural default, Hodges established both. The court also found Hodges was improperly

denied a fair opportunity to present his claim by a “Catch-22”: the state court failed to consider the plea transcript on direct appeal, and then on post-conviction review, the state court determined the issue was “res judicata.” Considering the prior plea transcript and testimony from an evidentiary hearing ordered by the district court, the court concluded the testimony of then assistant district attorney (now Judge) Kitchens – that, although not on the record, the State sought a 15-year imprisonment term, Cora’s mother “did not want [Hodges] to go to prison” and her “wishes were relayed to the judge” – was “factually at odds” with the record, and the State “should have known” Kitchens’ testimony at the capital trial “was false.” The record showed the State made no recommendation, and nothing indicated Hodges’ attorney spoke to Cora’s mother or that Cora’s mother told him she did not want Hodges sent to prison. The court concluded that the “State seemingly unconcerned with the accuracy of the testimony to be given in a trial where the result could be death, provided the jury with false information” “elicited to show” Hodges “is a remorseless liar who was shown kindness that he refused to acknowledge and which he repaid by murdering the son of the woman who extended it.” Concluding the state court decision was based on “an unreasonable determination of the facts,” and an unreasonable application of clearly established law, and that the facts showed a reasonable probability that “the testimony affected the jury’s judgment,” the court concluded the State’s actions undermined confidence in the verdict, and Hodges was entitled to a new sentencing hearing.

***Guzman v. Department of Corrections,**
698 F.Supp.2d. 1317 (M.D. Fla. 2010), aff’d, 663 F.3d 1336 (11th Cir. 2011)

Death row inmate entitled to habeas relief where prosecution unwittingly presented false testimony from the key prosecution witness and the lead detective regarding whether the witness had received benefits for testifying against petitioner. The key witness, Cronin, lived with petitioner at the time of the capital crime. Cronin initially denied any knowledge about the murder but later told the lead detective that petitioner had confessed to her. At the time of the disclosure, Cronin had an outstanding arrest warrant for a probation violation and she sought a “deal.” Although the state attorney handling the case instructed the detective to arrest Cronin, the detective disregarded the directive and instead took her to a hotel where she was provided with food paid for by the police department. Cronin subsequently left the hotel without permission and law enforcement lost contact with her while she engaged in prostitution and crack cocaine use. She was twice arrested before testifying against petitioner before the grand jury and at his trial. She denied receiving any benefits in exchange for the testimony but did acknowledge being placed in a hotel room for “protection.” The lead detective denied that law enforcement or the State Attorney’s office had offered Cronin any deals in exchange for her testimony. During post-conviction proceedings it was learned that Cronin had received a payment. The detective then conceded that she delivered a \$500 money order payable to Cronin to the jail where Cronin was housed eight days before Cronin’s grand jury testimony. This was a reward that had been publicized in the media and Cronin’s mother had contacted the detective asking if the detective could get it to Cronin. Although the detective and the prosecuting attorney further testified that the prosecuting attorney had not been informed that Cronin received a reward, the false testimony was nonetheless imputed to the prosecution. The state court’s finding that the false testimony was not material was contrary to or involved an unreasonable application of Supreme Court

precedent and was based on an unreasonable determination of the facts. That Cronin's credibility was significantly challenged at trial did not render the false testimony immaterial given her importance as a witness, that exposure of the detective's false testimony could have cast doubt on the entire investigation, and the other evidence of guilt was not overwhelming. Petitioner was entitled to relief under both *Brady* and *Giglio* even if the *Brecht* standard applied.

Blumberg v. Garcia,
687 F.Supp.2d 1074 (C.D. Cal. 2010)

Habeas relief granted in case involving convictions for attempted murder, conspiracy to commit murder and assault with a semiautomatic firearm, with a finding that the crimes were committed for the benefit of a criminal street gang, where key prosecution witnesses (police officer Hewitt, deputy sheriff Foss, and purported former gang member Reyes) provided false testimony and important impeachment and exculpatory evidence was suppressed. The prosecution theory was that petitioner and his brother had conspired to kill a rival gang member. The defense theory was that petitioner was no longer an active gang member, was unaware that his brother was armed and was surprised when his brother shot the victim. To establish motive and intent, the prosecution presented testimony from Foss linking petitioner to present gang membership. Foss's opinions were based in part on information he had received from the Los Angeles Police Department (LAPD) CRASH division. The prosecution also called Reyes who claimed that petitioner was the shooter in an incident in a park that followed a confrontation with members of the shooting victim's gang to which Reyes had belonged. According to Reyes, he quit the gang after the park shooting, which occurred 11 days before the shooting in this case. In addition, Hewitt described an incident some two years before the crime in this case where petitioner and his brother had been arrested in a rival gang's territory with weapons in the car. Petitioner had been the driver and Hewitt stated he had observed the person in the front passenger seat pass a handgun to petitioner's brother in the back seat. Hewitt also testified that the car had a hidden compartment. (Petitioner denied knowing any weapons were in the car and that there was a hidden compartment.) At the time of the arrest, Hewitt was part of LAPD's CRASH division. After petitioner was convicted, evidence surfaced that Hewitt was terminated by LAPD for excessive force and other charges for which he was under an internal investigation at the time of petitioner's trial. It was also learned that LAPD investigators had been told that Hewitt was well known to fabricate probable cause to arrest, plant evidence and falsify reports. At least one other officer from CRASH who Foss had relied on regarding gang information was also implicated in a corruption scandal. Also discovered after trial was evidence that Reyes had been an active gang member at the time of trial, contrary to his testimony. In granting relief, the district court found that Hewitt had "falsely testified" that he found two handguns in a "false compartment" in petitioner's car. This false testimony was material under *Napue v. Illinois*, 360 U.S. 264 (1959), because the prosecutor relied on that testimony, repeatedly telling the jury that given Hewitt's testimony alone, it proved petitioner lied to the jury "about everything." The false testimony "directly undermined the core" of petitioner's mere presence defense. The state court's finding that the false testimony was not material because Hewitt's testimony was merely rebutting petitioner's claim that he was no longer an active gang member was an unreasonable

determination of the facts in light of the evidence and argument at trial. Also unreasonable was the state court's conclusion that Hewitt's testimony was merely cumulative to the otherwise "overwhelming" evidence of petitioner's active gang membership at the time of the charged offense. The state court's ultimate finding of no materiality was an unreasonable application of *Napue* on the law and the facts. Foss's reliance on information from Hewitt and other later discredited CRASH officers provided an "additional consideration which undermines confidence in the jury's decision," notwithstanding testimony by Foss that his opinions would not have changed absent the tainted information. Regarding Reyes, the district court found by clear and convincing evidence that he provided false testimony when he claimed he quit being a gang member after the park shooting and that the prosecution knew or should have known of the falsity of his testimony. The district court also found a *Napue* violation involving Reyes's testimony identifying petitioner as the park shooter. Although petitioner had not established the testimony was clearly false, the prosecution had been on notice of the real possibility that it was untrue and yet pressed ahead without attempting to resolve the issue. Further undermining confidence in the outcome of the trial was testimony by Foss that misled the jury into believing that Reyes was the only percipient source of information about the shooting when in fact Reyes's nephew had told Foss it was too dark that night to make an identification of the shooter. "[C]ombined effect of multiple errors" violated due process and warranted habeas relief.

United States v. McDuffie,
2009 WL 2512194 (E.D. Wash. 2009), aff'd, 454 Fed.Appx. 624 (9th Cir. 2011)

District Court granted motion for new trial in drug case due to the Government's failure to disclose, prior to a fingerprint expert's testimony during trial, the presence of a detective's fingerprints on an electronic scale recovered from the defendant's apartment at the time of his arrest. The defense had asserted the scale was new and the presence of cocaine on the scale was because the evidence had been tampered with by the detective in order to pressure the defendant into providing favorable testimony in an unrelated murder case. The fingerprint evidence was material because it would have supported the defense, especially because the detective in question, who was arguably the prosecution's key witness, was not present in the defendant's apartment at the time of the arrest or search. Because it was not disclosed until during the trial itself, the defense was limited to unprepared cross of the expert and unsupported and speculative arguments. If the evidence had been disclosed prior to trial, the defense could have presented "affirmative evidence regarding standard police procedures that might have supported the tampering theory."

Cardoso v. United States,
642 F. Supp. 2d 251 (S.D.N.Y. 2009), aff'd sub nom United States v. Solano, 402 Fed.Appx. 569 (2nd Cir. 2010)

New sentencing ordered in §2255 proceeding due to government's failure to disclose impeachment evidence relevant to a cooperating witness in drug conspiracy case. The court relied on this witness' testimony in sentencing by finding the defendant was "a supervisor" and

adjusting her advisory offence level upwards by 3. The court also relied on this testimony in rejecting the defense argument that she was a minor participant and was eligible for a point reduction. Because of the “supervisor” finding, which disqualified her for consideration for the statutory “safety valve,” the court did not hear argument on the request to sentence the defendant below the statutory minimum. Prior to sentencing, the government discovered, but did not disclose, that the cooperating witness was actively involved in drug trafficking and actively lying to law enforcement at the time of events in this case. Because the court had relied on this witness’ testimony in making findings in sentence, new sentencing was ordered, even though the defendant had been sentenced well below the guidelines range the first time.

United States v. Jiles,
2009 WL 2212152 (W.D. Va. July 24, 2009)

Motion for new trial granted in assaulting federal officer case due to the government’s failure to disclose six disciplinary actions against one of the four officer witnesses. The disciplinary actions, including misuse of a government credit card and making false statements, directly concerned the officer’s credibility. The defendant asserted his actions were justified and taken in self-defense. The evidence was material, especially in light of the government’s prior disclosure of evidence affecting the credibility of one of the other three officers.

United States v. Gaitan-Ayala,
2009 WL 901522 (D. Hawaii April 2, 2009), aff’d, 454 Fed.Appx. 538 (9th Cir. 2010)

A portion of the convictions for conspiracy and distribution reversed following government’s post-trial disclosure of evidence that a cooperating witness had purchased large quantities of methamphetamine and cocaine during the period he was a cooperating witness in this case. The defendant’s motion for new trial on some counts granted where the witness’ testimony was material because the witness, while freely admitting his long history of using and dealing drugs prior to his cooperation, denied continued use and dealing during his cooperation.

United States v. Friedlander,
2009 WL 320861 (M.D. Fla. Feb. 6, 2009)

Enticing a child to engage in sexual acts conviction vacated on motion for new trial due to Napue violation. The defendant presented a psychiatrist specializing in sexual disorders. He testified based on the DSM IV TR published in 2000. The prosecutor cross-examined him extensively in an attempt to establish that he was relying on an outdated version of the DSM when, in fact, the prosecutor was relying on a version published in 1994. Following the trial, the prosecutor gave notice that she had been mistaken and the defendant filed a motion for new trial. Although this was not a case involving the knowing use of false or perjured testimony, the prosecutor’s cross still put false and material evidence before the jury and this evidence effectively destroyed the credibility of the defense expert. Despite “compelling and overwhelming” evidence of guilt, the court granted the motion for new trial because of the court’s observation of “the jury’s reaction to

the embarrassing and humiliating cross” of the defense expert, which made it impossible for the court “to say without any confidence, that beyond a reasonable doubt” the error “did not contribute” to the conviction.

United States v. Fitzgerald,
615 F. Supp. 2d 1156 (S.D. Cal. 2009)

District court dismissed indictment with prejudice following grant of motion for new trial due to *Brady* violation. The defendant, a CPA, was convicted of aiding and abetting a doctor in filing false income tax returns over a two year period. The doctor was the primary witness against the defendant. The jury acquitted the defendant on one charge and convicted on the other. The court granted a motion for new trial because the government failed to disclose the transcripts or taped conversations of the doctor talking to his tax attorney, which were made after the doctor became a cooperating witness. *United States v. Fitzgerald*, 2007 WL 1704943 (S.D. Cal. 2007), *aff'd*, 279 Fed. Appx. 444 (9th Cir. 2008) (unpublished). These tapes revealed that the tax attorney believed the returns were valid, which was also part of the defendant’s defense. By the time these tapes were disclosed to the defense, the doctor had died. The court found that the government, at minimum, recklessly disregarded its discovery obligations. Thus, the court found the proper remedy for the *Brady* violation was dismissal of the indictment with prejudice.

U.S. v. Stanford,
2008 WL 4790782 (D.S.D. Oct. 31, 2008)

New trial granted to three defendants in drug case where prosecution did not disclose that a key prosecution witness provided law enforcement with inaccurate information about another drug transaction, and that the witness was involved in controlled buys in order to “work” off potential charges against her. Witness’ “seriously misleading” testimony was material, and although other incriminating evidence against defendants existed, there was “a reasonable probability that the suppressed impeachment evidence would have put the case in a different light.” Although witness did not testify about one of the defendants, her “misleading testimony bolstered the integrity of the entire conspiracy investigation,” creating “a spillover effect” prejudicing that defendant.

***Breakiron v. Horn,**
2008 WL 4412057 (W.D. Pa. Sept. 24, 2008), rev'd in part, 642 F.3d 126 (3rd Cir. 2011) (finding Brady violation also required grant of relief on robbery conviction)

Habeas relief granted to death row inmate on murder conviction where prosecution withheld favorable evidence that could have been used to impeach testimony of jailhouse snitch. Although claim was procedurally defaulted, the suppression of the evidence by the State provided cause to overcome the default. And because the claim was never raised in state court, review was de novo. At trial, jury was charged on 1st, 2nd and 3rd degree murder and voluntary manslaughter, and defense “effectively conceded” guilt of 3rd degree murder when it presented

defense that petitioner was too intoxicated to form specific intent to kill. Jailhouse snitch testified petitioner admitted murder and described incriminating details that contradicted petitioner's testimony about his impaired recollection of the killing. Inmate admitted prior assault conviction, but denied that the crime was really attempted murder and denied receiving any benefits for testimony. Prosecutor relied on inmate's testimony, arguing inmate credible and received no bargain, deal or money for testimony. In fact, inmate wrote prosecutor requesting benefits in exchange for his testimony against petitioner, i.e., relief from pending convictions not yet final. At the time of the letters, the inmate was also a suspect in another case. State's contention it had no duty to disclose letters because it made no "deal" with inmate erroneous. Inmate received requested relief when state did not appeal decision granting inmate post-trial relief from the conviction. In addition, no charges were filed in the other case. The inmate's letters "had impeachment value," and, importantly, the trial prosecutor acknowledged that the letters would have been disclosed had they been in the file when he took over the case. The prosecution also violated *Brady* by failing to disclose that the inmate's prior conviction was for assault with intent to rob while armed, not simply assault. Even if the prosecution was unaware of the actual nature of inmate's conviction, it had a duty to learn the information. (The state court's default of this allegation as untimely was not adequate to bar federal review.) By "failing to disclose impeachment evidence," petitioner's first degree murder conviction was rendered "unworthy of confidence" given that inmate's testimony about petitioner's premeditation and planning "undeniably added strength" to first degree murder case and suppressed evidence was relevant to: (1) inmate's veracity when he testified had nothing to gain; and (2) prosecution's assertion that inmate had no reason to be biased in favor of prosecution.

U.S. v. Hector,
2008 WL 2025069 (C.D. Cal. May 8, 2008)

New trial granted where government's failure to investigate and disclose impeachment material "constituted flagrant misconduct." Despite defendant's "numerous specific requests seeking information," and judge's "abundantly clear" concerns that Government had "not sufficiently complied with its *Brady* obligations," including telling Government it had "an obligation to affirmatively find out information" relating "to [its] informant that you can reasonable acquire," government "failed to make even basic inquiries about the credibility of its primary witnesses." Although knowing informant had lengthy criminal record, government did not speak to officers involved in another case where informant was involved, and did not investigate informant's "history of informing" for over 20 years, attempts to "manipulate officials" and willingness "to lie to help himself." Because government's conduct was "egregious," defendant needed only show "flagrant conduct had 'at least some impact on the verdict.'" If jury heard other law enforcement officials considered informant "manipulative and willing to lie," "it would have been less likely to believe him." Court "seriously considered dismissing indictment," but instead granted new trial where Government will conduct "more thorough investigation...." Given its "compromised" "credibility," Government must "independently research this (and any other) informant."

***Tassin v Cain,**

482 F.Supp.2d 764 (E.D. La. 2007), aff'd, 517 F.3d 770 (5th Cir. 2008)

Habeas relief granted as to capital conviction and death sentence where critical prosecution witness provided misleading and uncorrected testimony about the sentence she was to receive as part of her plea agreement. She testified that she could be sentenced up to 99 years, that she did not know whether her testimony would affect her sentencing, and that she had been made no promises concerning her testimony. In fact, as established in state post-conviction proceedings, the witness had been informed by her attorney that the judge had told him the witness should expect a 10 year sentence if she testified, based on the consistency of her testimony. The state court had denied relief because Tassin had failed to establish that an actual promise had been made to the witness. This decision was contrary to *Brady* by applying “a more stringent standard than the one established by Supreme Court precedent.” Materiality is found because the witness’s testimony was crucial to the State’s case in that it provided the only evidence of a plan to commit armed robbery.

Perez v. United States,

502 F.Supp.2d 301 (N.D.N.Y 2006)

In case involving prosecution for illegal reentry into the U.S., the prosecution violated *Brady* because it had constructive knowledge that the defendant was a U.S. citizen at the time he was originally deported and at the time of reentry but failed to disclose it. (The defendant had been unaware that he automatically had become a naturalized U.S. citizen derivatively through his mother’s successful naturalization.)

***Wilson v. Beard,**

2006 WL 2346277 (E.D. Pa. Aug. 9, 2006), aff'd, 589 F.3d 651 (3rd Cir. 2009)

In barroom shooting case where the prosecution’s evidence centered on two eyewitnesses and one long-time police informant, the prosecution violated *Brady* by withholding impeachment evidence. It failed to disclose evidence that one eyewitness had a lengthy criminal history, including impersonating a police officer, and an extensive psychiatric history as a result of several head injuries. The prosecution further withheld evidence that the other eyewitness had an extensive psychiatric history, including medication with antipsychotic drugs. Also not disclosed to petitioner was that during his trial, this witness was transported by a detective from the prosecutor’s office for emergency psychiatric care whereupon he was diagnosed with schizophrenia. Regarding the informant witness, petitioner was not told that the officer who took his statement had been giving the witness interest free loans for some time. This same officer at trial had denied providing anything to the informant. (The claim was considered de novo by the federal court because the state court had refused to reach the merits on waiver grounds but the waiver rule was not adequate to preclude federal rule.)

***Powell v. Mullin,**
2006 WL 249632 (W.D. Okla. Jan. 31, 2006), aff'd, 560 F.3d 1156 (10th Cir. 2009)

Prosecution violated petitioner's constitutional rights by suppressing evidence concerning benefits provided to the sole identification witness and leaving uncorrected false testimony about the absence of benefits. During habeas proceedings, petitioner offered evidence that the prosecutor had written a letter to the parole board requesting leniency following the witness's testimony in petitioner's co-defendant's case, produced a letter from the witness to his mother regarding deal negotiations, and introduced testimony regarding a phone call between the witness's mother and a member of the prosecution team about benefits to the witness. The prosecutor's testimony that he sought benefits for the witness without being asked and without alerting the witness he had done so was rejected. (Note that co-defendant, whose trial preceded the letter to the parole board, was denied relief. *Douglas v. Mullin*, 2006 WL 249663 (W.D. Okla., Jan. 31, 2006). Although this was a post-AEDPA case, de novo review of the claim was conducted because the state court rejected the claim based on a procedural bar that the federal court determined was not adequate to preclude federal review.)

***United States v. Hammer,**
404 F.Supp.2d 676 (M.D. Pa. 2005), appeals dismissed, 564 F.3d 628 (3rd Cir. 2009)

Petitioner was entitled to sentencing phase relief under § 2255 based on prosecution's suppression of evidence supporting petitioner's version of how the murder of his cellmate occurred. The cellmate was tied to his bed with braided sheets and strangled. Prosecution theorized that the cellmate agreed to be tied up as part of a hostage ruse that would get him transferred to a different prison. Petitioner pled guilty, but specifically denied the hostage ruse scenario and that he had braided the sheets for this purpose. Prosecution failed to disclose third party statements indicating that petitioner regularly engaged in sexual activity with other inmates involving tying inmates down with braided sheets. Guilt-phase relief was denied because petitioner specifically denied the sheets/hostage ruse elements of the prosecution's case at his plea, and yet pled guilty anyway. Penalty phase relief was appropriate because the prosecution had relied primarily on the fact of the braided sheet tie-down scenario to prove the substantial planning and premeditation aggravator, one of only two found by the jury, among many mitigating circumstances.

Ramsey v. Belleque,
2005 WL 1502875 (D. Or. June 10, 2005)

In robbery and assault case, prosecution violated *Brady* by suppressing evidence of unrelated drug sales by Ramsey's alleged victim to a confidential informant which would have impeached the victim's testimony at Ramsey's trial. The victim had claimed that he and Ramsey were former drug dealing partners and that after their partnership ended, Ramsey robbed him and shot him in the leg. The victim claimed he was no longer dealing drugs at the time of the incident. The suppressed evidence, which was discovered shortly after Ramsey's conviction when drug dealing

charges were brought against the victim, could have supported Ramsey's defense that the victim had fronted drugs to Ramsey and that the victim was accidentally shot after pulling a gun on Ramsey during a dispute about payment for the drugs. Notably, the prosecutor had argued to the jurors that to find for Ramsey, they would have to believe that the victim was still dealing drugs. By refusing to grant Ramsey a new trial, the state court unreasonably applied clearly established federal law.

***Bell v. Haley,**
437 F.Supp.2d 1278 (M.D. Ala. 2005)

Habeas relief granted as to death sentence in robbery-murder case based on suppression of evidence that could have impeached the key witnesses against Bell. The victim's body was never found, nor was a weapon or any forensic evidence recovered. The case against Bell was largely based on the testimony of two witnesses, one who claimed to have been present at the murder scene but not a participant, and another who said that Bell came to his house following the murder and showed him the robbery proceeds. This witness also corroborated some elements of the first witness's story. The district court found three *Brady* violations. First, the State suppressed a prior statement of the second witness that was inconsistent with his trial testimony. Second, the State failed to disclose that the prosecutor threatened the second witness with a habitual offender prosecution if he did not testify. Third, the State suppressed a tacit agreement with the first witness not to prosecute him for his involvement in the case. The court found that while evidence in the case was sufficient to show that Bell was involved in some way in the crime, the *Brady* evidence was enough to establish a reasonable probability of a different outcome at sentencing.

Eastridge v. United States,
372 F.Supp.2d 26 (D.D.C. 2005)

In case involving numerous gang members charged with killing a man, the prosecution violated *Brady* by failing to disclose a grand jury transcript where two unindicted gang members falsely denied being present at the club where the altercation began on the night of the killing. A witness at trial had testified that he and the petitioner were not among the group that chased and killed the victim, which was consistent with the petitioners's account. This witness's version of events included the presence of the two unindicted gang members. Had the false denials by the unindicted gang members been revealed, the testimony of the supporting witness would have been more credible.

***Simmons v. Beard,**
356 F.Supp.2d 548 (W.D. Pa. 2005), aff'd, 590 F.3d 223 (3rd Cir. 2009)

There was a reasonable probability of a more favorable result at Simmons's capital trial had the prosecution not suppressed evidence that would have further impeached the two main prosecution witnesses. Simmons was charged with raping and killing an elderly woman. The

primary evidence against him came from another elderly woman who alleged that Simmons attacked her and said, “if you don’t shut your [expletive] mouth, you’ll get the same thing [victim] got,” and Simmons’s girlfriend who testified about Simmons’s behavior around the time of the crime. The prosecution suppressed evidence that (1) the girlfriend had been threatened with charges if she did not cooperate in wiretapping Simmons; (2) the elderly woman had purchased a gun following her assault, in violation of felon in possession of gun law, and charges were dismissed by investigators in Simmons’s case; (3) the elderly woman perjured herself on the gun application forms; (4) lab reports found no blood or semen on the elderly woman’s clothes, and found hair consistent only with the victim and inconsistent with Simmons; and (5) the elderly woman had failed to identify Simmons in a mug book. (The State had affirmatively denied that a mug book procedure had taken place.) Evidence regarding intimidation of the girlfriend, and disposition of gun charges against the elderly woman provided a motive for their having lied, which was missing in the impeachment at trial. Lab reports further undermined the elderly woman’s story, even though they did not point to another suspect. And had the defense known about the elderly woman’s inability to identify Simmons in a mug book, it would not have pursued a strategy of in-person identification. Cumulatively, this led to a reasonable probability of a different outcome. The state court’s conclusion that no single piece of evidence would have changed the outcome was an unreasonable application of *Kyles*.

United States v. Lyons,
352 F.Supp.2d 1231 (M.D. Fla. 2004)

Brady and *Giglio* violations admitted to by the government which related to a drug conspiracy count also materially tainted the remaining counts because impeachable testimony as to the drug conspiracy counts affected the jury’s ability to assess the character and credibility of the defendant’s testimony about the other counts. Dismissal with prejudice of remaining counts in the indictment was appropriate where the defendant was prejudiced by the government’s numerous and flagrant *Brady* and *Giglio* violations, and its later denials and delay.

United States v. Hernandez,
347 F.Supp.2d 375 (S.D. Tex. 2004)

Defendant’s motion to dismiss an indictment charging him with assaulting, interfering with, and resisting a border control agent was granted where the government acted in bad faith by allowing the defendant’s niece to plead to a superseding indictment without notice to the defendant and then deporting her while knowing that she was the only witness who would support the defendant’s claim of self-defense. The Government’s action violated due process and compulsory process by impeding the defense’s access to exculpatory and material evidence.

United States v. Koubriti,
336 F.Supp.2d 676 (E.D.Mich. 2004)

Court grants government’s motion to dismiss terrorism-related charges and grants defendants’

motion for a new trial on document fraud charges where the government post-trial confessed that *Brady* violations had occurred and an independent review of the suppressed documents by the court confirmed that defendants' constitutional rights were violated.

Conley v. United States,

332 F.Supp.2d 302 (D.Mass. 2004), aff'd, 415 F.3d 183 (1st Cir. 2005)

Petitioner was entitled to habeas relief based on the prosecution's failure to disclose an FBI memorandum which contained significant data bearing on a key prosecution witness's inability to recall crucial events. The court rejects the government's argument that the memorandum wasn't material because defense counsel at trial embraced aspects of the witness's testimony.

Turner v. Schriver,

327 F.Supp.2d 174 (E.D.N.Y. 2004)

In robbery case where the alleged victim was the sole witness, the prosecutor's representation that the victim had no criminal record, both to defense counsel and to the jury, when in fact he did, violated petitioner's due process rights under *Brady v. Maryland*. In addition, there was also a violation of due process based upon the admission of perjured testimony which the prosecutor should have known was false.

United States v. Park,

319 F.Supp.2d 1177 (D. Guam 2004)

In case where the government conceded that information obtained from an interview was material to guilt, the prosecutor could not satisfy its *Brady* obligation by providing a summary of the interview. "[W]here a prosecutor obtains exculpatory information from an interview with a government witness and where the prosecutor takes notes during the interview, the government is obligated under *Brady* to produce such notes."

Government of Virgin Islands v. Fahie,

304 F.Supp.2d 669 (D.V.I. 2004)

In case involving a charge of possession of an unlicensed firearm, the prosecution violated *Brady* by failing to reveal prior to trial a gun trace report that showed the weapon belonged to someone else. The prosecution's case was one of constructive possession in that the gun was found in a car that defendant had been driving. The gun trace report was consistent with defendant's claim that the gun was not his. Had the prosecution timely revealed the report, defense counsel may have been able to link the true owner of the gun to one of the passengers that had been in the vehicle

before the gun was found by police. Because information about the report only came out during cross-examination of a witness, defendant "had no meaningful opportunity to utilize the evidence that someone else owned the weapon to his advantage." The trial court abused its discretion, however, in dismissing the case with prejudice as a sanction for the constitutional violation.

***Willis v. Cockrell,**
2004 WL 1812698 (W.D.Tex. Aug. 2004)

Brady violation found in Texas capital case where prosecution failed to disclose that its mental health expert had evaluated petitioner regarding future dangerousness and had written a report with two hypothetical scenarios, one of which was favorable, one of which was not, and the favorable scenario fit with petitioner's absence of a history of violence. State appellate court's finding that no *Brady* error occurred by the prosecution's failure to disclose the report was contrary to and involved an unreasonable application of clearly established federal law because the state court applied a sufficiency of the evidence test for materiality, erroneously stated that the brief nature of the evidence presented at the penalty phase undermined, rather than supported, a finding of materiality, and failed to consider that disclosure of the report would have led to the favorable testimony of the expert.

St. Germain v. United States,
2004 WL 1171403 (S.D.N.Y. 2004)

Defendant was entitled to a new trial where the government failed, whether deliberately or inadvertently, to disclose material exculpatory evidence in sufficient time for the defense to make use of it. In finding that the evidence was "suppressed," the court notes, among other things, that the evidence was not disclosed until the eve of trial and it was in the misleading guise of Jencks Act material. The court rejects the government's argument that the suppressed evidence was not material because defendant could be found guilty under an alternative theory that was consistent with the new evidence. Materiality is evaluated based on the prosecution theory that was actually presented at trial.

United States v. Rodriguez,
2003 WL 22290957 (E.D.Pa. 2003)

In federal drug case, the prosecution violated *Brady* by failing to disclose numerous statements made by the co-defendant at two proffer sessions that were favorable to the defense. First, while the government's theory was that the defendant, who was the co-defendant's uncle, was involved in a conspiracy with the co-defendant in which the defendant was the source of the heroin and brought the co-defendant and the drugs to some of the transactions, the information from the proffer sessions called that theory into question. Notably, the co-defendant had provided detailed information about a drug distribution network that did not involve the defendant. Second, contrary to the prosecution's representation at trial, the co-defendant had implicated other family members while denying that defendant was involved in drug dealing. Because the prosecution

had falsely claimed that the co-defendant protected all family members in his statements, the defense had declined to admit into evidence the co-defendant's statement that defendant was not involved. (This statement from the proffer session had been disclosed to defendant.) Finally, had defense counsel been given the complete information from the proffer sessions, he would have been able to conduct a further investigation about the sources of the co-defendant's drugs that may have resulted in additional exculpatory evidence.

United States v. Washington,

263 F.Supp.2d 413 (D. Conn. 2003), on reconsideration, new trial again granted based on Brady violation, 294 F.Supp.2d 246 (D. Conn. 2003)

In case involving a charge that defendant was a felon in possession of a gun where the key evidence was a taped 911 call by a person who was deceased by the time of trial, the prosecution violated *Brady* by its belated disclosure of the caller's prior conviction for falsely reporting a crime to law enforcement. Although the conviction was revealed at the close of evidence on the first day of the short trial, the late disclosure denied the defense the opportunity to weave the conviction into its overall trial strategy.

Norton v. Spencer,

253 F.Supp.2d 65 (D. Mass. 2003), aff'd, 351 F.3d 1 (1st Cir. 2003)

In sexual assault and battery case, petitioner is to be granted habeas relief on his allegations of *Brady* error unless respondent requests an evidentiary hearing. (Relief is ultimately ordered in 256 F.Supp.2d 120 (D. Mass. 2003), after respondent failed to request an evidentiary hearing.) Because the state court failed to address the federal claim, *de novo* review is applied irrespective of *Early v. Packer*, 123 S.Ct. 362 (2002). The court also finds that petitioner is entitled to relief even if AEDPA is applied. Assuming the truth of petitioner's affidavits, the prosecutor violated *Brady* by failing to reveal that the alleged victim's cousin informed the prosecutor that he made up allegations against petitioner at the insistence of the alleged victim, and that the alleged victim had admitted to his cousin that his accusations against petitioner were fabricated. (The cousin had refused to answer some questions at a pretrial hearing, resulting in the dismissal of charges against petitioner related to the alleged sexual assault on the cousin.)

United States v. Gurrola,

2002 WL 31941469 (D. Kansas Dec. 16, 2002)

New trial granted based on *Brady* violation where FBI agent testified that the defendant's daughter had informed him that defendant was distributing methamphetamine, which defendant's daughter denied, and the prosecution failed to disclose the agent's reports of his interviews with the defendant's daughter which contained no mention of defendant. Fact that prosecution had revealed to defense counsel prior to trial that it was not producing unrelated reports that pertained to persons other than defendant did not "adequately put defense counsel on notice that the government possessed reports favorable to the defendant." The suppressed evidence was material

given that a key issue at trial was whether the defendant "knowingly" possessed the methamphetamine found in her home.

Mathis v. Berghuis,

202 F.Supp.2d 715 (E.D. Mich. 2002), aff'd, 90 Fed.Appx. 101, 2004 WL 187552 (6th Cir. 2004) (unpublished)

State's failure to disclose prior police reports suggesting rape complainant had made false accusations of rape and armed robbery in the past mandated habeas relief. In denying relief, state court unreasonably applied clearly established federal law.

Beintema v. Everett,

2001 WL 630512 (D.Wyo. April 23, 2001)

The district court granted habeas corpus relief in this "delivering marijuana" case on the ground that the prosecution's failure to disclose that a police officer had threatened the state's primary witness that his family would be prosecuted if he refused to cooperate violated *Brady*. Disagreeing with the Wyoming Supreme Court's conclusion that the evidence was not "material," the district court observed that petitioner's "trial was dependent almost entirely upon the testimony of a single witness, . . . and as such, impeachment evidence [petitioner]'s counsel could have used to attempt to discredit that witness or question the veracity of that witness would be material." In concluding that 28 U.S.C. §2254(d)(1) did not bar relief on petitioner's claim, the district court explained that "[t]he Wyoming Supreme Court's opinion includes repeated references stating that certain evidence was not material. This suggests that 'cumulative materiality' was not the touchstone of the [state] court's opinion and that it was rather a series of independent materiality evaluations, contrary to the requirements of *Bagley*. This is . . . and unreasonable application of clearly established law . . ."

Faulkner v. Cain,

133 F.Supp.2d 449 (E.D.La. 2001)

The district court granted habeas corpus relief in this murder case on the ground that the prosecution violated *Brady* by suppressing the names of police officers who were first on the murder scene, and evidence that homosexual pornography and rubber gloves were found at the scene. This information was favorable and material because petitioner's defense was that his codefendant became belligerent and struck the victim in response to an unwanted homosexual sexual advance, not pursuant to a plan with which petitioner had been involved. The victim's sexual orientation and the codefendant's claim of self-defense were key issues at trial with regard to, inter alia, petitioner's mens rea with respect to first degree murder as a principal. The state court's finding that the suppressed evidence was not material because petitioner and the codefendant could have fled after the alleged unwarranted sexual advance was unreasonable in that petitioner's failure to run for assistance did not negate the defense that he did not harbor the requisite intent to commit murder. (The habeas petition in this case was a successor petition that

had been authorized by the Fifth Circuit.)

Bragg v. Norris,
128 F.Supp.2d 587 (E.D.Ark. 2000)

The district court granted relief and ordered petitioner's immediate release in this "delivery of a controlled substance" case, in which petitioner established "actual innocence" to permit merits review of his *Napue* and *Brady* claims, and further established his entitlement to relief on the merits of those claims. Both claims arose out of "highly reliable" evidence that a police drug agent falsified notes and back-dated reports in order to build an otherwise nonexistent case against petitioner for selling crack. The officer's identification of petitioner as the person who sold him crack was the only evidence supporting the conviction. Petitioner proved, however, that: the officer's claim that he identified petitioner by running his license plate through a state records check could not be true, because the plate number in question was not issued to petitioner by the state until several weeks after the officer claimed to have run his check; the officer's claim that he confirmed his identification by viewing a police photograph of petitioner could not have been true because the police had no photographs of him until months after the identification allegedly occurred; and, although the officer testified at petitioner's trial that he had excluded another suspect who shared a first name with petitioner by looking at photographs of that suspect, an undisclosed set of notes written by the officer indicate the officer's belief that the other suspect and petitioner were, in fact, the same person. In granting relief on petitioner's *Napue* claim, the court acknowledged that the prosecuting attorneys may not have intentionally elicited false testimony from the officer, but found that knowledge of the contents of the officer's notes should be imputed to the prosecutor, thereby establishing a violation of *Napue*. Additionally, citing the testimony of two other prosecutors that "the case would have been over" if the defense had been given access to the information about the officer's activities, the court concluded that this evidence was "material" for purposes of petitioner's *Brady* claim, such that relief was required. Finally, the court ordered petitioner's immediate release, and allowed petitioner to be accompanied back to the jail by his counsel "to ensure he is out-processed as rapidly as possible" in order to satisfy the court's desire that he "be released from custody . . . this day."

United States v. Peterson,
116 F.Supp.2d 366 (N.D.N.Y. 2000)

The district court granted a new trial in this federal prosecution, finding that the prosecution violated the Jencks Act by inadvertently suppressing investigators' notes which, if disclosed, would have revealed discrepancies with the government's trial testimony relating to petitioner's statement. These discrepancies created a significant possibility that the jury would have had a reasonable doubt as to defendant's guilt.

***Benn v. Wood**,
2000 WL 1031361 (W.D. Wash. 2000), aff'd 283 F.3d 1040 (9th Cir.), cert. denied 123 S.Ct. 341 (2002)

The district court granted relief from petitioner's conviction and death sentence, finding that although the state had been ordered to search for and disclose evidence of its confidential informant's prior dealings with law enforcement, it failed to conduct the search, and therefore failed to locate and disclose a wealth of impeaching material. The undisclosed information included: evidence that the informant had been a police snitch for fifteen years; "significant evidence of unreliability and dishonesty in [the snitch's] dealings with police; perjury by the snitch in another case; protection by the prosecution from charges for other crimes; use and sale of drugs by the snitch while staying in a hotel at government expense during petitioner's trial. The undisclosed information was material because the snitch, who claimed petitioner had confided in him in jail, provided the only evidence to support the prosecution's theory that petitioner's killing of the victims was premeditated, and was the result of an insurance fraud scheme gone bad. With regard to the insurance fraud scheme, the prosecution also withheld evidence of an official determination that a fire in petitioner's trailer, which the prosecution alleged to be a component of the insurance scheme, had actually started accidentally.

***Jamison v. Collins**,
100 F.Supp.2d 647 (S.D.Ohio 2000), aff'd 291 F.3d 380 (6th Cir. 2002)

In pre-AEDPA case, The court held that the cumulative effect of undisclosed exculpatory evidence in this Ohio capital case raised a reasonable probability that, had it been revealed, petitioner would not have been convicted of capital murder or sentenced to death. The evidence included: statements by a cooperating codefendant that were significantly inconsistent with his testimony at petitioner's trial; statements of eyewitnesses suggesting the perpetrator did not match petitioner's description; and statements of eyewitnesses to robberies admitted as other acts evidence against petitioner. This evidence was material in that it could have been used to direct suspicion to others, including the codefendant, to impeach the codefendant's testimony, and to discredit eyewitness identifications of petitioner in connection with robberies admitted as other bad acts. Although petitioner's *Brady* claims were procedurally defaulted, the court found the fact that the state continued to withhold the evidence during petitioner's state court proceedings constituted "cause," and concluded further that the materiality of the undisclosed evidence under *Brady* and its progeny constituted "prejudice" sufficient to overcome the default.

Watkins v. Miller,
92 F.Supp.2d 824 (S.D.Ind. 2000)

After finding that petitioner's DNA evidence conclusively refuting the prosecution's theory that he alone raped and murdered the victim established a miscarriage of justice sufficient to entitle him to merits review of his procedurally barred *Brady* claims, the court granted relief on those claims. The court found that the state failed to disclose exculpatory evidence indicating that a

witness saw the victim being abducted at a time for which petitioner had a firm alibi, and that another potential suspect had taken and failed a polygraph examination about the victim's murder.

United States v. McLaughlin,
89 F.Supp.2d 617 (E.D.Pa. 2000)

The court granted defendant's motion for a new trial in this federal tax evasion case, finding that the government's nondisclosure of a witness' grand jury testimony contradicting the trial testimony of defendant's accountant on the critical point of whether the accountant had knowledge of defendant's bank account, and nondisclosure of documents supporting defendant's claim that certain income was legitimately entitled to tax deferred status, violated *Brady*.

Reasonover v. Washington,
60 F.Supp.2d 937 (E.D.Mo. 1999)

After finding that petitioner had satisfied the "miscarriage of justice" standard and permitting her to pass through the *Schlup* actual-innocence gateway in order to obtain merits review of her procedurally defaulted claims, the court granted relief in this Missouri murder case in which the state sought, but did not obtain, the death penalty, on the ground that the prosecution committed numerous *Brady* violations, including: failure to disclose two audiotapes, one containing petitioner's conversation with an ex-boyfriend in which she credibly asserted her innocence, and another containing petitioner's conversation with a snitch which is consistent with petitioner's claims of innocence and inconsistent with the snitch's subsequent trial testimony; failure to disclose the existence of an extremely favorable deal between the prosecution and its main snitch, whose testimony was the "linchpin" of the state's case; and failure to disclose a prior deal between the state and its secondary snitch, who testified falsely that she had never before made a deal with the state.

United States v. Locke,
1999 WL 558130 (N.D.Ill. July 27, 1999)

The government violated *Brady* in connection with defendant's federal trial for conspiracy to import heroin by suppressing a statement made by a co-defendant at his change-of-plea hearing, in which the co-defendant indicated that neither he nor defendant had knowledge that their travel abroad with another co-defendant was for the purpose of importing heroin. Noting the weakness of the government's case against defendant at trial, the court found this statement material and granted defendant's motion for new trial. In reaching this conclusion, the court rejected the government's contention that it did not "suppress" the statement since defendant's attorney was free to have attended the co-defendant's change-of-plea hearing, at which he would have heard the statement first hand. The court reasoned that a defendant's counsel had not failed to act with reasonable diligence in not attending the hearing, since such hearings do not ordinarily produce exculpatory evidence for co-defendants.

Cheung v. Maddock,
32 F.Supp.2d 1150, 1159 (N.D.Cal. 1998)

The state violated *Brady* in this attempted manslaughter case by failing to disclose medical records indicating that the victim of the shooting of which petitioner was convicted had a blood alcohol content substantially higher than the victim's testimony acknowledged. This blood alcohol evidence was favorable to petitioner in several ways: it drew into question the victim's identification of petitioner, rather than one of petitioner's two companions, as the shooter; it undermined the victim's credibility, since his claim that he only consumed one drink on the night of the shooting could not possibly have been true in light of his blood alcohol content; and it undermined the credibility of the victim's companions, who testified in corroboration of his claim that he only consumed one drink on the night of the shooting.

Spicer v. Warden, Roxbury Correctional Institute,
31 F.Supp.2d 509, 522 (D.Md. 1998), rev'd in part on other grounds, 194 F.3d 547 (4th Cir. 1999)

The prosecution violated *Brady* by failing to reveal that counsel for one of three eyewitnesses upon whom its case rested had told the prosecutor that the witness would say he had seen petitioner in the days before and after the crime, but not on the actual day of the crime. At trial, however, this witness testified that he had actually seen petitioner running from the scene of the crime. The district court concluded that this development in the incriminating quality of the witness' testimony was sufficiently inconsistent with how his counsel had previously described what he knew as to render nondisclosure of counsel's description to the prosecutor a violation of *Brady*.

United States v. Dollar,
25 F.Supp.2d 1320, 1332 (N.D.Ala. 1998)

The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under *Brady*. These violations centered on nondisclosure of materially inconsistent pre-trial statements of several of the government's key witnesses. The court explained that, "[f]rom the outset of this case, defense counsel have been unrelenting in their effort to obtain *Brady* materials. The United States' general response has been to disclose as little as possible, and as late as possible--even to the point of a post-trial *Brady* disclosure. * * * [A]fter having assured the court that it had produced all *Brady* materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses."

United States v. Colima-Monge,
978 F.Supp. 941 (1997)

Defendant's due process rights would be violated if the INS withheld information concerning the co-defendant which may be relevant to defendant's motion to dismiss. Motion for protective order denied.

United States v. Patrick,
985 F.Supp. 543 (E.D.Pa. 1997), aff'd 156 F.3d 1226 (3rd Cir. 1998)

Motion for a new trial granted when government failed to disclose evidence which would have impeached one of its main witnesses. This evidence could not have been obtained by the defendant through the exercise of due diligence as the government never identified the information that was contained in the withheld documents. Thus, the defendant could not have known of the essential facts that would have permitted him to make use of the evidence.

Ely v. Matesanz,
983 F.Supp. 21 (1997)

After an evidentiary hearing, the district court found that a plea agreement between the state and its witness had not been disclosed to the defense. Additionally, the state failed to correct false testimony presented by the witness that no deal existed. Writ of habeas corpus conditionally granted.

Chamberlain v. Mantello,
954 F. Supp. 499 (N.D.N.Y. 1997)

Relief granted where police officers gave perjured testimony, even though the prosecutor was unaware of the misconduct.

United States v. Fenech, **943 F.Supp. 480 (E.D.Pa. 1996)**

New trial ordered where government's undisclosed file on informant indicated that his motivation for cooperating was monetary, yet prosecution elicited testimony from him at trial that he did not cooperate for the money, but rather because he felt that he was "doing something real good for the world."

Banks v. United States,
920 F.Supp. 688 (E.D.Va. 1996)

Guilty plea successfully challenged where government failed to disclose information regarding conjugal visits government allowed informant to receive; information was useful to attack

credibility of informant and government agents and would probably have convinced defendant to proceed to trial since defendant's actions were only criminal when viewed in context supplied by the agents and the informant.

United States v. Ramming,
915 F.Supp. 854 (S.D.Tex. 1996)

Motion to Dismiss for, inter alia, prosecutorial misconduct granted where, in multi-count bank fraud indictment, government failed to disclose, despite court order to the contrary, numerous items of evidence tending to support defendants' claims of innocence and refute government's theory of the case.

***Williamson v. Reynolds,**
904 F.Supp. 1529 (E.D. Okla. 1995), aff'd on other grounds, 110 F.3d 1508 (10th Cir. 1997), and abrogated on other grounds, Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997)

The prosecution's withholding of a videotaped interview of petitioner following a polygraph examination, in which petitioner denied involvement in the murder, tainted his conviction and death sentence. The crux of the prosecution case was alleged admissions by petitioner. "If the 1983 videotape had been accessible during trial, defense counsel could have countered the prosecution's testimony regarding alleged oral admissions with the powerful tool of visual evidence of Petitioner's denials." Further, the videotape would have allowed defense counsel to conduct a more thorough cross-examination of a police witness who failed to tape some of the alleged admissions. Statements on the tape, which were consistent with petitioner's trial testimony, also would have assisted the case in mitigation, including by allowing defense counsel to suggest that the codefendant played the primary role in the capital murder.

***Rickman v. Dutton,**
864 F.Supp. 686 (M.D.Tenn. 1994), aff'd on other grounds, 131 F.3d 1150 (6th Cir. 1997), cert. denied, 523 U.S. 1133 (1998)

Habeas granted where prosecution permitted witness to falsely testify that he had not been promised favorable treatment including immunity for incriminating statements and preferential treatment during his incarceration.

Jackson v. Calderon,
1994 WL 661061 (N.D.Cal. 1994)

Habeas granted where defendant was denied the opportunity to elicit exculpatory testimony from an anonymous informant whose identity the government failed, in violation of *Brady*, to disclose. Defendant demonstrated a "reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in [his] exoneration."

Xiao v. Reno,
837 F.Supp. 1506 (N.D.Cal. 1993), aff'd 81 F.3d 808 (9th Cir. 1996)

Due process was denied to alien when United States official had alien paroled into United States to be used as witness in heroin conspiracy trial, even though official was aware that prosecutors in Hong Kong declined to prosecute him because he may have been mistreated during interrogations; failure to produce memorandum concerning Hong Kong officials' concerns was flagrant Brady violation. District court permanently enjoined government from returning him to foreign country.

United States v. Burnside,
824 F.Supp. 1215 (N.D. Ill. 1993)

Brady requires disclosure of impeachment information of which government personnel, but not prosecutors personally, are aware. Knowledge of warden and others at facility housing witnesses could be imputed to prosecution.

Bragan v. Morgan,
791 F.Supp. 704 (M.D.Tenn. 1992)

Nondisclosure of plea agreement between prosecution and witness, whether or not it was quid pro quo, required new trial for defendant where witness's testimony that he faced life in prison, and prosecutor's claim in closing argument that witness faced habitual criminal count were false, regardless of a quid pro quo arrangement and the witness was the key prosecution witness.

Ouimette v. Moran,
762 F.Supp. 468 (D.R.I. 1991), aff'd, 942 F.2d 1 (1st Cir. 1991)

Habeas relief granted where failure of prosecutor to disclose to defendant that state's chief witness had 24 more criminal convictions than the four disclosed by the state, or to disclose the inducements, promises, and rewards offered to the witness for his testimony, violated defendant's due process rights.

Hughes v. Bowers,
711 F.Supp. 1574 (N.D.Ga. 1989), aff'd, 896 F.2d 558 (11th Cir. 1990)

Habeas granted where evidence was suppressed that the state's sole eyewitness to the murder stood to benefit from the life insurance policy of the victim if the defendant were shown to be the aggressor. Court evaluated this under the standard for knowing use of perjured testimony, i.e. whether there is any reasonable likelihood that the false testimony could have affected the jury's verdict.

Orndorff v. Lockhart,
707 F.Supp. 1062 (E.D.Ark. 1988), aff'd in part, vacated in part, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 499 U.S. 931 (1991).

Due process and right to confrontation violated where prosecution failed to disclose that witness's memory was hypnotically refreshed during pretrial investigation. Violation was compounded by prosecutor's statement during opening that the jury would be "amazed at the recollections" of the witness.

Silk-Nauni v. Fields,
676 F.Supp. 1076 (W.D.Okla. 1987)

Exculpatory evidence was unconstitutionally withheld when state failed to disclose a statement which would have revealed inconsistencies as to sequence of events leading up to shootings, and directly related to insanity defense by showing that defendant held and acted upon certain beliefs which lacked a foundation in reality.

Troedel v. Wainwright,
667 F.Supp. 1456 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987)

Bagley and *Napue* violated when prosecution pushed expert to say that, in his expert opinion, Troedel fired the gun, despite the fact that his reports and his habeas testimony indicated that he could not tell who really fired it. Prosecutor was found to have misled the jury in his questioning of the expert, and the evidence was material because it was the only thing linking Troedel to the crime.

Carter v. Rafferty,
621 F.Supp. 533 (D.N.J. 1985), aff'd, 826 F.2d 1299 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988)

Habeas relief granted where prosecution failed to comply with a specific request for a polygraph report which substantially undermined witness's testimony which was the "cracked and shaky pillar" supporting the state's case.

Scott v. Foltz,
612 F.Supp. 50 (E.D.Mich. 1985)

Habeas granted where a witness testified falsely that she had not entered into a plea bargain with the prosecution before testifying, and that witness' credibility was a key issue in the case.

United States v. Stifel,
594 F.Supp. 1525 (N.D.Ohio 1984)

Conviction for willfully and knowingly mailing infernal machine with intent to kill another vacated where prosecution failed to disclose evidence implicating another suspect, statement by defendant's girlfriend attesting to his innocence in contradiction to her trial testimony, and results of investigation tending to show that defendant did not buy the switch used in the bomb.

Raines v. Smith,
1983 WL 3310 (N.D.Ala. 1983)

Habeas granted where the police failed to tell prosecution that, while three witnesses identified one suspect, only one---an elderly man whose ability to accurately identify was highly suspect---identified defendant. There was no other evidence linking defendant to the crime.

Sims v. Wyrick,
552 F.Supp. 748 (W.D.Miss. 1982)

Where promises were made to key prosecution witnesses in habeas petitioner's firebombing case, and those promises were unlawfully concealed from petitioner and his counsel, so that petitioner suffered obvious prejudice of being deprived of his right to cross-examine those witnesses, petitioner was deprived of due process and fair trial.

Anderson v. State of South Carolina,
542 F.Supp. 725 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983)

Habeas granted where right to fair trial was denied by prosecution's failure to make autopsy report and investigative notes available to trial counsel, because the withheld materials might well have created reasonable doubt in minds of jurors, who deliberated 32 hours before returning a guilty verdict.

United States v. Tariq,
521 F.Supp. 773 (D.Md. 1981)

Government violates defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process when it acts unilaterally in a manner which interferes with

defendant's ability to discover, to prepare, or to offer exculpatory or relevant evidence, by deporting a witness who is an illegal alien, if the Government knows or has reason to know that the witness' testimony could conceivably benefit defendant and if deportation occurs before defense counsel has had notice and a reasonable opportunity to interview and/or depose the illegal alien.

Blanton v. Blackburn,
494 F.Supp. 895 (M.D.La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981)

New trial ordered where state failed to fully disclose all of agreements and understandings it had with key government witnesses and failed to correct testimony which it knew or should have known was false, even though witnesses' answers to questions concerning agreements were technically direct, and even though no formal plea agreements had been entered into.

Cagle v. Davis,
520 F.Supp. 297 (E.D.Tenn. 1980), aff'd, 663 F.2d 1070 (6th Cir. 1981)

Habeas granted where, despite lack of request by petitioner for exculpatory material, fundamental fairness required prosecutor to disclose the availability of a witness, who was "planted" in petitioner's jail cell soon after his arrest to interview him in violation of his constitutional rights and who could have testified that, prior to petitioner's alleged confession to witness, petitioner had continually denied his involvement in victim's murder.

United States ex rel. Merritt v. Hicks,
492 F.Supp. 99 (D.N.J. 1980)

Habeas granted where failure, despite specific request, to disclose police report which cast substantial doubt on credibility of witness whom New York state court twice characterized as being "in many respects unreliable," and upon whom the state's entire case rested, deprived defendant of due process and fair trial.

United States v. Turner,
490 F.Supp. 583 (E.D.Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981)

New trial granted where DEA agent, who had entered into a leniency agreement with the defense counsel for a prosecution witness, not only failed to correct the witness' testimony disclaiming any such arrangement but took the stand and buttressed the witness' false testimony through an affirmative material misrepresentation that no agreement existed, and such conduct was an affront to the court's dignity and honor and to the nation.

Jones v. Jago,
428 F.Supp. 405 (N.D. Ohio 1977), **aff'd,** 575 F.2d 1164 (6th Cir. 1978), **cert. denied,** 493 U.S. 883 (1978)

Habeas granted where state, despite a specific request from defense counsel, suppressed statement of co-indictee which, though somewhat ambiguous, appeared on its face to be favorable to the defense and was sufficiently material to compel disclosure.

United States ex rel. Annunziato v. Manson,
425 F.Supp. 1272 (D.Conn. 1977)

Habeas granted where trial court's refusal to permit cross-examination of key prosecution witness as to pending criminal charges to show bias and motive violated right of confrontation, particularly in light of prosecution's nondisclosure of impeachment information concerning extensive immunity and aid offers to the witness.

Kircheis v. Williams,
425 F.Supp. 505 (S.D.Ala. 1976), **aff'd,** 564 F.2d 414 (5th Cir. 1977)

Habeas granted where state, despite a court order, failed to produce motel records tending to exonerate defendant, and failed to inform the defense of an oral agreement with a key prosecution witness which could have affected the witness' credibility.

Moynahan v. Manson,
419 F.Supp. 1139 (D.Conn. 1976), **aff'd,** 559 F.2d 1204 (2nd Cir. 1977), **cert. denied,** 434 U.S. 939 (1977)

Habeas granted where prosecution's failure to disclose that its key witness was a target of police investigation for the same criminal scheme for which defendant stood accused, was threatened with prosecution, but was never charged, deprived defendant of due process because it raised reasonable doubt as to guilt.

Emmett v. Ricketts,
397 F.Supp. 1025 (N.D. Ga. 1975)

No privilege existed between chief prosecution witness and psychologist in connection with "age regression" sessions, and since psychologist was an investigative arm of the prosecution, both he and the DA were required to produce files for in camera inspection. Habeas granted for failure to disclose.

Ray v. Rose,
371 F.Supp. 277 (E.D.Tenn. 1974)

Conviction set aside due to failure of prosecution to reveal that it had made a standing plea

bargain with codefendant, who pleaded guilty only after he gave testimony during trial which implicated defendant, which resulted in defendant's being deprived of due process of law.

Hawkins v. Robinson,
367 F.Supp. 1025 (D.Conn. 1973)

Where government informant was the only witness who was not a law enforcement officer, and his testimony would have been highly relevant to identification and alibi defense, defendant was deprived of a fair trial when the trial court refused at his request to require the government to identify informant and furnish information as to his location.

Simos v. Gray,
356 F.Supp. 265 (E.D.Wisc. 1973)

Where witnesses identified defendant from police photos six weeks after offense and never wavered from their identifications, the state had a duty to disclose police reports which indicated that, of the night of the offense, witnesses declined to view photos because they were sure they could not identify the couple they saw, that five days later a witness made a mistaken identification, and the witnesses gave inaccurate physical descriptions.

Simms v. Cupp,
354 F.Supp. 698 (D.Ore. 1972)

Conviction vacated where state suppressed original description of witness' assailant, which differed substantially with her trial testimony, in order to corroborate inculpatory story of children who had been riding with defendant.

Bowen v. Eyman,
324 F.Supp. 339 (D.Ariz. 1970)

Habeas granted where trial court's refusal to appoint expert to test seminal fluid removed from vaginal tract of rape victim and to test petitioner's blood type, which could have negated guilt, denied petitioner fundamental fairness and was tantamount to a suppression of evidence in violation of *Brady*.

Clements v. Coiner,
299 F.Supp. 752 (S.D.W.Va. 1969)

Police polygraph report and psychiatrist's letter to prosecutor raising possibility of petitioner's defective mental condition were material to issue of limitation of criminal responsibility and failure of prosecutor to produce documents, even though not requested, rendered conviction on guilty plea violative of constitutional due process.

Imbler v. Craven,

298 F.Supp. 795 (C.D.Cal. 1969), aff'd, 424 F.2d 631 (9th Cir. 1970), cert. denied, 400 U.S 865 (1970)

Petitioner was denied due process where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint, and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by petitioner, was not petitioner's.

Hernandez v. Nelson,

298 F.Supp. 682 (N.D.Cal. 1968), aff'd, 411 F.2d 619 (9th Cir. 1969)

Habeas granted where petitioner denied culpability in illegal sale of heroin, informer was material witness on issue of petitioner's guilt, and prosecution knowingly engaged in conduct which permitted informer to be unavailable at time of trial.

IV. STATE COURTS

Moody v. Florida

210 So.3d 748 (Fla. App. 2017)

Florida appellate court reverses Moody's denial of motion to withdraw nolo contendere plea to two counts of child abuse and orders an evidentiary hearing to consider whether evidence disclosed after his plea that the child's stepmother had engaged in abuse against the minor child was *Brady* material the suppression of which rendered Moody's plea involuntary. Moody contended that he would not have entered the plea had he had the information about the sheriff's investigation of a child abuse claim involving the child and her stepmother. Under state law, the adjudication of a claim that a plea was involuntary requires an evidentiary hearing to determine whether the defendant understood his legal rights and voluntarily entered the plea; that did not happen here, so reversal and remand is required.

Nebraska v. Harris

693 N.W.2d 317 (Neb. 2017)

Harris was convicted on charges of first degree murder and use of a deadly weapon to commit a felony. Nebraska Supreme Court holds that although the lower court did not err in denying relief to Harris on his claim that the state failed to disclose exculpatory information it obtained years after Harris's conviction, the lower court did err in concluding that exculpatory information that police officers knew about at the time of trial, but the prosecutor did not, was not suppressed, because the officers' knowledge is imputed to the prosecutor. The lower court did not consider whether the suppressed evidence would have impeached a witness's credibility or whether it was exculpatory, and the Supreme Court remands for further consideration and clarification of this point.

State v. Coverdale

2017 WL 1405815 (Del., Apr. 18, 2017) (unpublished)

Delaware Superior Court grants motion for postconviction relief and vacates plea of guilty to four cases involving nine counts of drug dealing and possession of a firearm by a person prohibited because prosecution failed to disclose information that the chemist who tested the drugs related to one of the cases had a history of failing to follow proper testing procedures, was not candid about his errors and omissions, and did not follow protocols for avoiding sample contamination and mislabeling. When the defense asked for information about the chemist, the prosecution insisted there was nothing to disclose on the chemist other than that he resigned because he of problematic turnaround time on his case work. Whether or not the prosecution had the information on the details of the chemist's improper procedures, the knowledge is imputed to the prosecutor. The prosecutor "knew that the *Brady* materials on [the chemist] were significant to defendant, who was facing a trial where an undisputed identification of drugs and an undisputed linking of those drugs to defendant were essential elements of the State's case against him." 2017 WL 1405815 at *4. The defense could have used the information to impeach the reliability of the chemist's conclusions. The defense relied on the prosecution's misrepresentation that there was no *Brady* information to be disclosed when Coverdale entered a guilty plea. The misrepresentation justifies the withdrawal of the plea to correct a manifest injustice, because Coverdale entered a plea he would not otherwise have entered had he had the information about the chemist—that information would have placed him in an "entirely different plea bargaining position." 2017 WL 1405815 at *9.

State v. Easterling

2017 WL 588442 (Wash. App., Feb. 14, 2017) (unpublished)

Court of Appeals of Washington affirms in part and reverses in part trial court order dismissing charges of rape of a child and communication with a minor for immoral purposes based on allegations that Easterling had sexually assaulted sisters, 9 and 10 years old. The state failed to disclose reports of examinations of the children upon multiple requests by Easterling, stating that the examinations had not been performed. During trial, the prosecution learned that the examinations in fact *had* been performed and provided the reports to Easterling. The reports indicated that one of the children had submitted to a genital exam and the other had not; the child who had been examined did not show obvious signs of sexual assault. The trial court determined the reports were exculpatory and dismissed all the charges. The Court of Appeals holds that the report of the examination of the child who had not submitted to genital exam was not necessarily exculpatory and that the charges stemming from possible abuse of her should not have been dismissed. The court holds that dismissal of the charges related to the first child was appropriate; that the trial court considered and rejected lesser sanctions on grounds that were well-reasoned.

Felder v. Florida

198 So.3d 951 (Fla. App. 2016)

Florida appellate court reverses post-conviction court's summary denial of Felder's *Brady* claim

and remands for further proceedings. Felder was convicted of robbery with a firearm and aggravated battery with a deadly weapon arising from an incident in which three people attacked two victims at gunpoint. One of the victims identified Felder as one of the perpetrators. Felder claimed in post-conviction proceedings that the prosecution had failed to disclose favorable impeachment evidence that the victim who had identified him to police officers had identified a third person as her attacker. The post-conviction court denied the claim, stating that *Brady* was a trial court error not cognizable in a motion for post-conviction relief, and also stating that the trial counsel had knowledge of the identification of the third person. The District Court of Appeal concludes both that *Brady* claims may be raised in post-conviction proceedings and also that the record does not conclusively show that trial counsel was aware of the identification of the third person by the victim.

Bosque v. Florida
202 So.3d 888 (Fla. App. 2016)

Florida appellate court reverses on *Brady* grounds the judgment and sentence on Bosque's charge of tampering with a witness/victim. Bosque was a police officer who, along with other officers, responded to a domestic dispute regarding the custody of an infant. Bosque and the child's father engaged in a physical struggle, and the child's father later went to the police station to file a complaint against him, at which time Bosque handcuffed him, having heard that the child's mother complained that the child's father tried to run over her with his car. Bosque was charged with false imprisonment, tampering with a witness/victim, and battery, on the theory of abuse of authority and retaliation. Following his conviction on the false imprisonment and tampering with a witness/victim charges, the state disclosed dispatch audio recordings that demonstrated that Bosque learned after the incident at the house of the allegation that the child's father tried to run over the child's mother, establishing that when he handcuffed him at the station he had probable cause to arrest him for aggravated assault. The audio recordings also would have served as impeachment evidence regarding the testimony of at least one witness. They were material because, had the jury heard them, the jury could have viewed Bosque's arrest of the child's father as proper and independent of the internal affairs complaint against him.

State v. Robertson
182 So.3d 942 (La. 2016)

Supreme Court of Louisiana grants writ of certiorari, reverses decision of court of appeals, and reinstates judgment of the trial court on the ground that the trial court had discretion to order and conduct an *in camera* inspection of documents to determine whether disclosure was required under *Brady*.

People v. Dimambro
897 N.W.2d 233 (Mich. App. 2016)

Michigan Court of Appeals affirms trial court's order granting motion for a new trial based on prosecution's failure to disclose autopsy photographs in possession of the medical examiner.

Dimambro was convicted of first-degree felony murder and first-degree child abuse stemming from the death of the two-year-old child of his former girlfriend, which occurred after the child went into a coma following a series of incidents that occurred while he was in Dimambro's care. Following Dimambro's conviction, the prosecutor obtained a disk from the medical examiner containing 32 photographs that had not previously been provided to the prosecution, the defense, or the defense expert medical examiner. The trial court entered an order granting defendant's motion for a new trial. The Court of Appeals concluded that the trial court properly concluded that a *Brady* violation had occurred because the photographs were withheld by the prosecutor (the inadvertence does not matter for *Brady* purposes), the photographs were favorable to Dimambro, and the photographs were material. The prosecution had an obligation to learn of the favorable evidence known to the government, and the medical examiner, under state law, has a "duty to act on the government's behalf in cases involving violent or unexpected deaths" and so "(1) the medical examiner may be understood as 'acting on the government's behalf' in a particular case, . . . and (2) responsibility for evidence within the medical examiner's control may be imputed to the government, even if 'unknown to the prosecution.'" 897 N.W.2d at 215 (internal citations omitted). The suppressed photos were favorable to Dimambro because they provided a basis for impeaching the testimony of the medical examiner who conducted the autopsy. The medical examiner had testified that the bruising on the child's brain was the result of blunt-force trauma and non-accidental inflicted trauma. But the suppressed photographs, analyzed by the defense, demonstrated that the bruising solely resulted from medical intervention, and that the medical evidence did not support the conclusion that the injury was intentionally inflicted. The undisclosed photos were material because they were not cumulative to evidence that was presented at trial by the defense pathologist, but instead "provided a basis for the defense to directly challenge [the state's medical examiners'] conclusion that the autopsy revealed that the child's injuries were intentionally inflicted." 897 N.W.2d at 221. This was important in this case "which involve[d] issues of abusive head trauma but include[d] no eyewitnesses, no physical evidence confirming the cause of death, and no explicit intent to kill." *Id.*

Tempest v. Rhode Island
141 A.3d 677 (R.I. 2016)

Supreme Court of Rhode Island affirms trial court's grant of post-conviction relief and vacation of second-degree murder conviction on *Brady* grounds. Tempest was convicted following a nine-year investigation of the homicide of one victim by beating and the near-homicide of another victim who survived but whose memory was impaired. Four witnesses testified that Tempest confessed to the crime. Seventeen days before trial, one of these witnesses told the prosecutor that Tempest's brother, who was a detective at the time, hid the murder weapon—a pipe—in a closet in order to protect his brother, and that on the day of the murder, Tempest's children were excited about getting a puppy. The prosecutor took notes about this statement and wrote that it was new information: "too late-don't volunteer new info-will cause big problems." 141 A.3d at 683. The prosecutor clearly and intentionally failed to disclose this evidence. The witness's statement about the brother was inconsistent with her other statements that Tempest had said that his brother was not aware of his involvement in the murder, and that if he learned about it, he would turn Tempest in. Even if this statement was inculpatory, as the state contended, it nevertheless could have been

used to impeach the witness's credibility, which was already shaky. The statement about the puppy also had impeachment value because it established that Tempest was not living in the same complex at the time of the murder, and so it was unlikely that the witness could have seen Tempest's children and Tempest on the day of the murder as she testified. Although "the materiality of the evidence is not germane when the prosecution's failure to disclose the evidence is deemed to be deliberate" 141 A.3d at 686 (citing state law), the evidence was in fact material, because the witness was the most credible of the "four less-than-stellar witnesses" who testified that Tempest confessed to the murder. *Id.*

State ex rel. Lorenzetti v. Sanders
792 S.E.2d 656 (W.Va. 2016)

West Virginia Supreme Court of Appeals denies writ brought by state challenging trial court order permitting defendant's counsel to review files concerning a child that are confidential under state law but that may contain material exculpatory or impeachment information. Defendant was charged with sexual abuse of his child. He sought to review files pertaining to the child maintained by the Department of Health and Human Services and in the possession of the prosecution. The trial court conducted an *in camera* review of the records following a request by counsel on the grounds that they might contain information that the child recanted her accusation against the defendant and that the child's mother might have taken a misleading position against the defendant in order to be reunited with her daughter. The trial court determined that the records contained exculpatory information material to the defense including recantations, and that defense counsel had a constitutional right to review them. The Supreme Court of Appeals notes that the information in the files is favorable as impeachment evidence and material because it could cast doubt on the child's credibility as a witness, so suppression would violate defendant's right to due process. Although the records are generally confidential, there are statutory exceptions, among which is when the court finds, upon review, that the evidence is relevant and material to the issues in the proceeding and should be made available to the defendant. The trial court must conduct an *in camera* review and balance the defendant's interest in a fair trial with the state's interest in protecting the child's confidentiality, and determine whether an order limiting the examination and use of records is necessary for the child's safety. The trial court did so in this case.

Betancourt v. Warden
2016 WL 490285 (Conn. Super. Ct., Jan. 12, 2016) (unpublished)

Superior Court of Connecticut grants habeas corpus petition on *Brady* claim. Betancourt was convicted of first degree kidnapping, conspiracy to commit kidnapping, first degree burglary, conspiracy to commit burglary, second degree robbery, and conspiracy to commit robbery. One of the perpetrators (a codefendant) testified against Betancourt at trial, giving testimony that directly implicated Betancourt in the kidnapping, burglary, and robbery, and the state's case rested almost exclusively on this codefendant's testimony. The prosecution did not disclose any benefits given to the codefendant, and on cross-examination, the codefendant testified falsely that he had no intention of applying for or hopes of obtaining a sentence modification. Nevertheless, the prosecution intended to and did present the court in codefendant's case with an agreed-upon

disposition reducing the codefendant's prison term by 50% and cited his cooperation against Betancourt as a basis for modifying his sentence. This evidence would have been a powerful impeachment tool for the defense and therefore was material.

People v. Horton

2016 IL App (2d) 141059-U (Ill. App., Oct. 12, 2016) (unpublished)

Appellate Court of Illinois reverses trial court's denial of Horton's request for leave to file a successive post-conviction petition and remands for new trial. Horton was convicted of first degree murder and armed robbery and sentenced to life in prison. Post-conviction, he learned that one of the prosecution's key witnesses had two prior juvenile convictions, was on juvenile probation at the time of his trial testimony, and had been identified although not charged as the gunman in a shooting two weeks prior to when his cooperation in the case against Horton began. None of this information had been disclosed to Horton pretrial. The late discovery of this information established cause for failing to raise the claim earlier. Horton can establish prejudice if he is not permitted to raise the claim now because the suppressed information impeached the testifying witness by raising issues of his credibility due to his juvenile adjudications and probationary status and also his motives to testify as he was under investigation by the prosecution and was motivated to assist in order to obtain leniency. The witness's testimony against Horton at trial was central because he was the only one who testified that he arranged Horton's purchase of the murder weapon before the murder, that he saw Horton with the weapon after the shooting, that Horton said he was going to rob the victims, and that Horton asked for the name and number of a person interested in buying the gun following the murder. Furthermore, "[t]he use of a convicted felon who was suspected of shooting at a person in an ongoing investigation would have provided an opportunity to challenge the thoroughness and integrity of the officers and their failure to even consider [defendant's cousin] as an alternate suspect." 2016 IL App (2d) 141059-U at *43. Although ordinarily the court would remand with directions to the trial court to give leave to the defendant to file his *Brady* claim, here that would be a waste of judicial resources as the state has already admitted that the witness was involved in the prior shooting, so the court simply resolves the claim and finds that the Horton is entitled to a new trial.

***Adams v. Nevada**

2016 WL 315171 (Nev., Jan. 22, 2016) (unpublished)

On appeal of denial of post-conviction petition for writ of habeas corpus in death penalty case, Supreme Court of Nevada remands to the trial court for evidentiary hearing to determine whether the state's withholding of evidence constituted good cause to overcome procedural default rules on a *Brady* claim. Adams was convicted of two counts of first degree murder and burglary for the shooting of his wife and three-year-old daughter and sentenced to death. The Nevada Supreme Court determines that Adams has provided sufficient support for his claim that the state withheld impeachment evidence concerning a key witness in the form of the witness's true identity and criminal history in order to proceed.

Ex parte Temple

2016 WL 6903758 (Tex. Crim. App., Nov. 23, 2016) (unpublished)

Texas Court of Criminal Appeals affirms trial court's grant of habeas corpus relief to petitioner Temple, convicted of the murder of his wife and sentenced to life in prison, due to state's failure to timely disclose police reports. Investigating officers had suspected a high school student who lived next door to the Temple family, and had questioned him, but told defense counsel that he was not a suspect. The prosecutor had police reports that she did not disclose to the defense because she believed she was not required to disclose favorable evidence if, in her opinion, it was irrelevant, inconsistent, or unreliable. Defense counsel asked for police reports, knowing that it was rumored that the high school student and his friends had some involvement in the murder, and counsel "made every attempt . . . to develop an alternate perpetrator defense." Many of the reports counsel requested were not provided at all, and some were provided only during trial, when it was too late for counsel to "strongly develop[] an alternative suspect theory and start[] it from the very beginning of the trial," because the trial court denied a requested continuance.

***Reynolds v. Alabama**

2015 WL 5511503 (Ala. Crim. App., Sept. 18, 2015)

On appeal of dismissal of petition for post-conviction relief, Court of Criminal Appeals of Alabama finds that Reynolds has pled a facially meritorious *Brady* claim and reverses and remands with instructions for trial court to provide Reynolds an opportunity to prove his claim. Reynolds was convicted of five counts of capital murder [note that it appears from the opinion that there were only three victims – a couple and a small child] and sentenced to death. At trial, the state presented testimony from West, Reynolds' girlfriend, that she was present in the car while Reynolds went inside the victims' home. She heard one of the victims screaming and went in the house and saw the body of the male victim and Reynolds stabbing the female victim, and during her attempts to stop Reynolds, she was stabbed as well. She followed Reynolds' instructions and took items out of the house. West also testified that she received no benefit in exchange for her testimony. Reynolds testified in his own defense that he did not participate in the homicides and was not present but instead that West told him she had been stabbed trying to protect the female victim when another perpetrator was stabbing her, and he took West to the victims' home and left her in the car when he went inside and saw the male and female victims, and tried to burn the house down to cover up West's involvement in the homicides. After his conviction, and during appellate proceedings, Reynolds learned that West received a deal from the prosecution in exchange for her testimony. Although West was arrested nearly a year prior to the homicides for drug offenses, charges were not filed until a few days after the homicides. After West testified at trial, the prosecution dismissed three of the pending drug charges against her, and she pleaded guilty to two other charges, for which she was sentenced to three years' imprisonment. Six months later, the prosecution recommended that the rest of her sentence be suspended and she be placed on probation; she was released immediately. The Court of Criminal Appeals finds that the claim was not procedurally barred, contrary to the trial court's conclusion, because the facts were unknown to Reynolds until the government recommended that her sentence be suspended, after he filed his reply brief in support of his appeal. The petition pled facts that, if true, require relief

under *Brady* and *Giglio*, because West's testimony was important to the state's case—the jury's determination regarding Reynolds' guilt depended upon weighing West's testimony against Reynolds'.

***Isom v. Arkansas**

462 S.W.3d 682 (Ark. 2015)

Supreme Court of Arkansas grants petition to reinvest jurisdiction in the circuit court to consider petition for writ of error coram nobis on grounds that state committed *Brady* violation in failing to disclose evidence to capital petitioner regarding alternative suspect. Isom was convicted by a jury of capital murder, attempted capital murder, aggravated robbery, residential burglary, and two counts of rape, and sentenced to death, along with life and terms of years sentences, arising from the robbery and killing of a 79-year old man and the rape and attack on his 72-year old caregiver. The female victim identified Isom's photo from a photo lineup on April 5, 2001. A rape-kit examination of a hair found in the female victim's vaginal opening concluded that the hair did not belong to the male victim or Isom. In his petition, Isom alleged that the state withheld (1) evidence that the female victim did not identify him as the attacker in a photo array shown on April 4, 2001; (2) evidence that she did not identify Isom from a photo array shown on April 5, 2001; (3) investigative notes about interviews with the female victim while she was in the hospital; (4) evidence that another witness knew that Isom was the main suspect before he identified him; (5) evidence that that a second witness had reason to curry favor with the police; and (6) evidence of alternative suspects. Isom also alleged that the state suppressed DNA evidence by turning over illegible copies of documents and incomplete copies of gel strips and that the state failed to correct the female victim's false testimony that she was not on pain medication in the hospital and did not make an identification without her glasses. The Arkansas Supreme Court focuses on the suppressed evidence regarding alternative suspects, and concludes that the state suppressed evidence that, pursuant to information provided by an inmate that a third party had stated that he committed the crime and that a weapon could be found in a particular location, law enforcement went to the location, found a pair of scissors and, in consideration, released the inmate who provided the information. A law enforcement officer had testified falsely during a hearing on pretrial motions that although the inmate provided this information, no weapon was found in the location he named and the inmate was not released from custody. As a result of the false testimony and suppressed evidence, the defense was precluded from presenting the officer as a witness before the jury and developing the theory that the third party had committed the murder. Because Isom's *Brady* claims appear to be meritorious, reinvestment of jurisdiction in the circuit court is the proper remedy.

***State ex rel. Clemons v. Larkins**

475 S.W.3d 60 (Mo. 2015)

Supreme Court of Missouri grants habeas corpus petition seeking vacation of conviction of two counts of first degree murder on grounds that the prosecution withheld evidence that could have led to the suppression of Clemons' confession, a critical part of the case against Clemons. Clemons, along with three other men, was accused of raping sisters aged 19 and 20 and killing

them by throwing them off a bridge. Initially the sisters' male cousin was suspected by police of having committed the offenses, and he testified that he was beaten by the police in the course of his interrogation and before he was cleared. Clemons and one of the other men charged with the rapes and homicides also contended that they had been beaten by investigators during their interrogation and were forced to confess to raping the sisters in order to stop the abuse. At trial, the officers denied beating Clemons, and although medical records and family members indicated that Clemons had bruising to his cheek following the interrogation, other witnesses testified that he did not, and Clemons did not testify. The trial court concluded that there was no evidence presented about how Clemons sustained his injuries, and precluded the defense from arguing that the police coerced Clemons' confession. In post-conviction proceedings, Clemons presented testimony of Weeks, a bail investigator working for the Missouri Board of Probation and Parole who had screened Clemons less than three hours after his arrest. Weeks testified that during the screening he observed a large bump or bruise on Clemons' right cheek and had noted it on his pretrial release form. He discussed the bruise with his supervisor, Lukanoff, who said that he believed the injury occurred during Clemons' interrogation. Weeks testified that several months later, another supervisor, Coleman, told him that the prosecutor wanted to speak with Weeks about his observation of the injury. The prosecutor showed Weeks photos of Clemons that did not depict the bruising, but Weeks told the prosecutor that the photos didn't change his mind about what he had seen and everyone else in the room during the pretrial screening had seen the same thing. The prosecutor seemed annoyed. Weeks was shown his pretrial release form and noted that the reference to the bruise/bump had been edited out. The prosecutor also testified during post-conviction proceedings that Weeks had made references to Clemons' face being swollen and that he "assumed" that a witness like Weeks would have been important to the defense. The Missouri Supreme Court determines that Clemons established cause and prejudice to overcome the procedural bars to the habeas claim because the state deliberately concealed Weeks' observations and suppressed the information in the pretrial release form by altering it. And "[t]he determination of whether prejudice resulted from the underlying error under a cause and prejudice standard is identical to this Court's assessment of prejudice in evaluating Mr. Clemons' *Brady* claims." The undisclosed evidence from Weeks, an objective, impartial witness, corroborating Clemons' statements about being beaten by officers, was favorable—it was the most immediate account of Clemons' physical appearance following the interrogation, it also impeached the credibility of the state's witnesses who testified that Clemons did not have any injuries, and it might have led the trial court to sustain Clemons' motion to suppress his confession, which was the only direct evidence that the rapes were planned, that he was on the platform when the sisters were pushed off the bridge, and that the sisters were conscious and aware of what was happening, all of which likely influenced the jury to vote for death. Even if the trial court did not suppress the confession, it may have permitted defense counsel to argue that the police beat Clemons to coerce his confession. All of the Weeks evidence (including the fact that he was urged to change his report and that he refused but the report was changed anyway) supports a reasonable inference that Clemons was beaten during his interrogation. It was material because the trial court made the decision not to suppress the confession without it—indicating that Clemons was not given a fair trial, not just at the motion to suppress but also at the trial itself, during which Weeks' testimony could have convinced the jury that Clemons had been beaten to confess.

People v. Hubbard

132 A.D.3d 1013, 18 N.Y.S.3d 681 (2d Dep’t. 2015)

The Supreme Court of New York, Appellate Division, affirms grant of motion for new trial. Hubbard was convicted of second degree murder arising from a shooting that occurred when he was 15 years old. The crucial evidence against Hubbard at trial was his admission to the shooting, taken by Detective Ronald Tavares, and testified to by Tavares. There was no physical evidence connecting Hubbard to the crime and eyewitnesses could not identify him. The state failed to disclose that Tavares had secured a false confession in a different case that led to an internal affairs investigation and a federal lawsuit against him. This evidence was favorable to the defense, known by the prosecutor, and material.

Buffey v. Ballard

782 S.E.2d 204 (W.Va. 2015)

West Virginia Supreme Court of Appeals reverses denial of habeas corpus petition and remands for entry of order granting habeas relief and permitting withdrawal of Buffey’s guilty plea due to *Brady* violation. Buffey was arrested and charged with robbery and sexual assault of an 83-year old widow. Approximately a week after the assault, he was arrested for three non-violent breaking and entering offenses at businesses and was questioned for nine hours. He admitted the burglaries and initially denied responsibility for the offenses against the widow. At 3:25 a.m. he admitted breaking into an old lady’s house but denied sexual assault and the limited information he provided was inconsistent with the victim’s repeated, consistent descriptions of the event. After more questioning, Buffey retracted his account of the incidents and said he was not responsible. He was appointed counsel who requested the production of discoverable materials and the state was ordered to provide them within seven days of arraignment. Six weeks prior to Buffey’s entering a guilty plea, entered pursuant to a time-limited plea offer made by the prosecution, an officer with the police forensic laboratory reported that Buffey was excluded as a donor of seminal fluid recovered from the rape kit, but this report was not provided to the defense despite “repeated inquiries.” 782 S.E.2d at 208. Following the filing of a habeas petition, new DNA testing was conducted and concluded that Buffey was not a primary or secondary sperm contributor, and a CODIS search indicated that the primary sperm contributor was a prison inmate who lived a few blocks away from the victim at the time of the assault and was the victim’s paper boy. The court notes that the United States Supreme Court has held that no *Brady* violation occurs when impeachment evidence is withheld prior to the trial (during the plea negotiation stage), *see United States v. Ruiz*, 536 U.S. 622 (2002), but notes that *Ruiz* “specifically distinguished impeachment evidence from exculpatory evidence.” 782 S.E.2d at 213 (citing *Ruiz*, 536 U.S. at 630). The court notes that there is a circuit split as well as other court split about whether exculpatory evidence must be revealed during the plea negotiation stage, and concludes that “the better-reasoned authority supports the conclusion that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage,” 782 S.E.2d at 217, and that a defendant may seek to withdraw a guilty plea based upon the prosecution’s exclusion of material, exculpatory evidence. The court also concludes that the fact that the police were aware that the DNA evidence excluded Buffey is imputed to the prosecution whether or not the prosecutor personally actually had this

information. The DNA results were favorable to Buffey, were withheld from the defense, and were material because both Buffey and his counsel asserted that Buffey would have pleaded not guilty had they been aware of them.

Ex parte Carlos Flores
2015 WL 5453293 (Tex. Crim. App., Sept. 16, 2015) (unpublished)

Court grants application for writ of habeas corpus where parties agreed during post-conviction proceedings that the state failed to disclose evidence prior to Flores's guilty plea that the arresting officer was suspended for 30 days for misconduct in connection with Flores's case.

Danforth v. Chapman,
771 S.E.2d 886 (Ga. 2015)

Petitioner was entitled to a new trial on charges of arson and felony murder because the State violated *Brady* and *Giglio* by failing to disclose three items of evidence which would have impeached the testimony of Joseph White, a jailhouse snitch who testified at trial that petitioner told him he intentionally started the fire that killed the victim. White was the only witness who testified that petitioner had confessed to the crime. It was uncontested that the State failed to disclose the following: (1) a video recording of an interview between White and the prosecutor which clearly showed that White was seeking assistance from the prosecution in exchange for his testimony – in direct contradiction to White's testimony at trial; (2) a statement from William Liner, whom White claimed had also heard petitioner's confession, in which Liner stated that petitioner never confessed and White was actively seeking help with his then-pending charges; and, (3) one page of an otherwise disclosed written statement from White to his pastor which contained instructions from White to “[h]old off on giving my statement to police. I want to see what's going on for a few days,” thereby undermining White's trial testimony that he went to authorities immediately and was not seeking help with his own charges. This evidence was material to the defense and therefore the lower court did not err when it awarded petitioner state habeas relief pursuant to *Brady* and *Giglio*.

Propes v. Commonwealth,
2015 WL 1778198 (Ky. App. 2015)

On direct appeal, defendant was entitled to a new sentencing proceeding on charges of drug trafficking after the prosecution used incorrect testimony regarding his parole eligibility in violation of *Napue*. After jurors found defendant guilty of second-degree trafficking in a controlled substance, they were asked to fix a term of punishment. At the sentencing hearing, defendant's probation officer inaccurately testified that if defendant was sentenced to a ten-year term, he would serve a minimum of 18 months under the fifteen percent rule before he would be eligible for parole. This testimony was inaccurate because, if the jury convicted defendant of a Class D felony (instead of a Class C felony), his parole eligibility date would be calculated using the twenty percent rule, under which he would serve a minimum of 24 months of a ten year sentence before becoming eligible. The Commonwealth characterized this testimony as “at best

incomplete, or inaccurate at worst,” but the state court concluded “we discern no saving grace and deem it necessary to vacate the sentence and remand for a new penalty phase limited to the issue of punishment.” *Propes*, 2015 WL 1778198 at *4.

Lapointe v. Commissioner of Correction,
112 A.3d 1 (Conn. 2015)

Petitioner was deprived of a fair trial on charges of murder and arson because the State violated *Brady* when it failed to disclose a note, authored by Detective Michael Ludlow, containing details concerning the length of time the fire burned inside the victim’s apartment prior to being discovered (the Ludlow note). The victim, eighty-year old Bernice Martin, was raped, bound and murdered in her apartment, which her killer then set ablaze in an apparent effort to destroy evidence of the crime. Petitioner, then the forty-two year old mentally impaired husband of the victim’s granddaughter, Karen Martin, discovered that the victim’s apartment was on fire after a relative called and asked petitioner to make the ten-minute walk to her apartment to check on her because she was not answering her phone. Petitioner suffers from physical and mental impairments as the result of Dandy-Walker syndrome, a congenital brain disorder known to cause poor motor skills and cognitive impairments. Petitioner’s IQ is approximately 92. He was not an initial suspect in the case, had no criminal record or history of violence, and did not seem physically, mentally or temperamentally capable of the crime. However, after the murder remained unsolved for approximately two years, the case was reassigned to Detective Paul Lombardo, who decided to re-interview individuals who previously had been questioned by police. On June 8, 1989, Lombardo interviewed petitioner and took a saliva sample from him (petitioner’s blood type matched a semen stain found at the scene of the crime; petitioner is a secretor with type A blood, as is approximately one third of the male population). On July 4, 1989, Lombardo asked petitioner to come to the police station for questioning. Officers later acknowledged that the intended purpose of the interrogation was to obtain a confession from petitioner. By this time, Lombardo had become convinced of petitioner’s guilt because of his blood type, his peculiar nature and mannerisms, and his repeated questions to police about whether he was a suspect in the victim’s murder. Over the course of the next nine hours, petitioner gave three written statements in which he purported to take responsibility for the crime, although he told police that he had no recollection of the killing and stated he was confessing only because they wanted him to do so. Based on this evidence, petitioner was convicted and sentenced to life imprisonment without the possibility of release. It was undisputed that the Ludlow note was first disclosed to petitioner’s habeas counsel in 1999, in connection with his state habeas proceedings. The Ludlow note demonstrated that, a few days after the homicide, Detective Ludlow met with state fire marshals who opined that the fire in the victim’s apartment had been burning for a minimum of 30 to 40 minutes before the first responding firefighters arrived. Petitioner’s trial counsel testified in the habeas proceedings that if this information had been known at the time of trial, counsel would have called petitioner’s wife, Karen, to testify that petitioner was at home when the fire first started. Petitioner also offered opinions from two additional experts, which were consistent with the notation contained in the Ludlow note. The State offered its own expert testimony concerning the likely burn time of the fire. Under the far longer estimate proffered by the State’s expert, petitioner could not establish, even with Karen’s testimony, that he was home during the entire

period in which the fire could have started. The state habeas court found that the testimony of the State's expert was far more persuasive than the testimony of petitioner's experts and thus, concluded that the withheld information in the Ludlow note was not material because it was not reasonably probable that, if the jury had heard the testimony of petitioner's experts, it would have credited that testimony and reached a different result. The interim appellate court reversed this decision, concluding that the determination of which experts were most persuasive was an issue to be decided by the jury at a new trial. The Supreme Court of Connecticut affirmed, holding that "the testimony of petitioner's experts was more than sufficient to call into question the reliability of the petitioner's conviction. Indeed, even if that expert testimony only tended to support the petitioner's claim that he could not have murdered the victim, in view of the tenuous nature of the state's case against the petitioner – based as it was on his suspect admissions – the state's *Brady* violation would warrant a new trial because, as the United States Supreme Court has recognized, exculpatory evidence of even 'minor importance' may well be 'sufficient to create a reasonable doubt' when, as in the present case, 'the [guilty] verdict is already of questionable validity.'" (quoting *United States v. Agurs*, 427 U.S. 97, 113 (1976)).

***Manning v. State,**
158 So.3d 302 (Miss. 2015)

State committed *Brady* violation by failing to disclose that the apartment from which the State's key witness testified he observed defendant enter the victims' apartment was vacant at the time of the crime. Defendant was convicted of murdering two elderly women in Starkville, Mississippi, and sentenced to death. Although numerous other witnesses placed defendant at the apartment complex on the day of the murder, Kevin Lucious was the only witness to testify that he saw defendant entering the women's apartment shortly before their bodies were discovered. At the time of his testimony, Lucious was a convict serving two life sentences without parole in Missouri. No witnesses testified to seeing defendant leave the apartment. Police conducted a canvass of all residents of the apartment complex during their investigation and recorded the results on index cards. An entry on the cards revealed that the apartment from which Lucious testified he observed defendant enter the victims' apartment was vacant at the time of the crime, and neither Lucious nor his girlfriend was listed as a resident on any of the apartments canvassed. The State conceded this information was not disclosed to the defense prior to trial. The Supreme Court of Mississippi concluded: (1) the evidence was favorable to defendant for impeachment of Lucious's testimony; (2) defense counsel could not have obtained this evidence themselves with reasonable diligence, given that they were not even appointed to represent defendant until three-and-a-half years after the crime; (3) the evidence was suppressed; and, (4) the evidence was material because both defense counsel and the district attorney testified that their actions in preparing and presenting the case would have been different had they possessed the evidence. "Any attorney worth his salt would salivate at impeaching the State's key witness using evidence obtained by the Starkville Police Department." *Manning*, 158 So.3d at 307. Moreover, the district attorney's admission that "he would have investigated the discrepancy between Lucious's testimony and the cards is also crucial to prong four, bolstering that a reasonable probability exists that the outcome of the proceedings would have been different." *Id.*

Biles v. United States,
101 A.3d 1012 (D.C. 2014)

As a matter of first impression, the D.C. Court of Appeals held that *Brady* applies when the government fails to disclose information material to a suppression hearing. Defendant was arrested for peddling counterfeit DVDs at a flea market after he asked an undercover officer if the officer wanted to buy any DVDs. In the middle of defendant's bench trial, a police officer revealed that police located and searched defendant's backpack and a box of DVDs underneath the backpack as a result of a tip from a paid confidential informant, which the officers received after defendant was arrested, and thus the items were not retrieved incident to arrest, from the area of defendant's wingspan, as the police reports initially suggested. After receiving the tip, police opened the backpack and found defendant's identification inside and later determined that the DVDs in the box underneath were counterfeit. Defense counsel objected that there had been no mention of a confidential source in the pretrial discovery materials; she argued that she did not have an opportunity to do motions or investigate this issue, and she asked the court to exclude any evidence found as a result of the tip. The trial court denied the motion to suppress. Defendant was later convicted again on separate charges for a subsequent offense based largely on the same officer's testimony that she recognized defendant's backpack near a case of counterfeit DVDs because of the previous search. First, the court held that "suppression of material information can violate due process under *Brady* if it affects the success of a defendant's pretrial suppression motion." *Biles*, 101 A.3d at 1019; *see also, id.* ("[t]he only courts we know to have squarely addressed the issue on the merits have held that a failure to disclose information material to a ruling on a Fourth Amendment suppression motion can constitute a *Brady* violation."). "[T]he withheld information here, which tended to show that the search could not be justified as a routine search of a suspect's wingspan incident to arrest, was favorable for purposes of the *Brady* doctrine." *Id.* at 1020. Next, this information was suppressed because the delayed, mid-trial disclosure "foreclosed any meaningful opportunity on [defendant's] part 'to use the information with some degree of forethought,' and to frame and litigate what should have been a successful [suppression] motion." *Id.* at 1022-23 (internal quotation omitted). The evidence was material to both the first and second trial because defendant could have filed a timely suppression motion that would have been granted, thus depriving the government of the most important evidence in both cases – the DVDs and the identification cards linking defendant to them.

Mitchell v. United States,
101 A.3d 1004 (D.C. 2014)

Defendants were entitled to relief on a *Napue* claim where the government conceded it relied on false testimony at trial, which was not harmless. Defendants were convicted of murder based on two items of evidence: (1) the testimony of Eric Lindsay that he was a passenger in the victim's car when he witnessed defendants drive by and shoot the victim; and, (2) testimony from Detective Ray Crawford that defendants knew the victim planned to testify against them in a different murder trial because the defendants were present at a preliminary hearing in which Crawford testified that the victim had identified them in connection with that crime. Crawford claimed that he specifically identified the victim by name at the preliminary hearing. However, this testimony

was false. The transcript of the preliminary hearing plainly showed that the victim's name was never mentioned in any way and he was not identified as a witness against defendants. The government conceded a *Napue* violation occurred, but argued any error was harmless. The lower court concluded that defendants failed to show a reasonable likelihood that the false testimony affected the verdict, but the D.C. Court of Appeals reversed, noting "the burden of showing harmlessness is on the government rather than the appellants and harmlessness must be proven by the constitutional standard of beyond a reasonable doubt." *Mitchell*, 101 A.3d at 1008. The government was unable to meet its burden where it had previously characterized the false evidence as "crucial to the government's theory of prosecution," and where "the testimony of the government's sole identification witness, Lindsay, was attacked in significant respects beyond the chaotic and relatively fleeting nature of the sighting, such as the fact that Lindsay did not make a positive identification of the killers for over a month following [the victim's] death and the shifting identification of the car of the killers." *Id.* at 1009. The court concluded: "[n]one of this suggests that the evidence was insufficient to convict appellants, but, in the posture of one of the two major props of the government's case resting on false testimony, the outcome of the case falls significantly short of constitutional impregnability." *Id.*

Clack v. Ridgeland,
139 So.3d 778 (Miss. App. 2014)

In driving under the influence/careless driving case, remand for new trial where city prosecutor unintentionally failed to provide defendant with potentially exculpatory video evidence of the stop by police. (The defendant had argued there had not been probable cause for the stop. The arresting officer falsely claimed there was no video footage of the stop. Because the City failed to file an appellee's brief, the court was unable to affirm the lower court's denial of relief.)

***Wright v. State,**
91 A.3d 972 (Del. 2014)

In robbery-murder case at a liquor store, capital conviction and death sentence reversed due to cumulative effect of multiple items of suppressed evidence, including one item the court previously found not to be material when considered alone. The suppressed evidence was: (1) a deal made by the jailhouse snitch, who claimed Wright confessed to him, in a case six months earlier where the snitch agreed to testify against his co-defendant for reduced charges and sentence; (2) a recent robbery indictment against two cousins (Jamison and Curtis) whom the

defense claimed where the actual perpetrators of this crime which would have impeached Jamison's testimony that the two cousins were not close; (3) the delayed arrest of Jamison, which occurred a month after the indictment against him and his cousin and two days after his testimony in Wright's trial; and (4) a robbery had been attempted of a nearby liquor store shortly before the robbery-murder in this case by similar looking men also involving a handgun and Wright had been excluded as a suspect. Even assuming that the prosecutor in Wright's case was unaware of the indictment of Jamison and Curtis for the unrelated robbery, "the fact that others in the Attorney General's Office were aware of the indictment at the time of trial suffices to make the evidence *Brady* material." That Jamison was technically a defense witness did not absolve the State of its duty to disclose impeaching information given that his was not a typical defense witness. And even if it would have been possible for the defense to learn of Jamison's indictment, "the fact that the State chose not to arrest Jamison until after his testimony at Wright's trial would not have been a publicly available fact at the time. Thus, the State failed to disclose exculpatory and impeachment evidence relating to Jamison that would have been useful to Wright." Similarly, the prosecutor's personal lack of knowledge about the attempted robbery did not preclude a finding of suppression. Nor did the fact that the robbery attempt received publicity demonstrate lack of suppression given that the media reports did not include the fact that Wright had been ruled out as a suspect in the attempted robbery and did not reveal the descriptions of the suspects or the existence of videotape and photographic evidence. In finding materiality when considering the suppressed evidence cumulatively, despite Wright's initial confession, the court noted that the "evidence cuts across multiple, substantive bases supporting the jury's conviction and would have permitted Wright to attack the State's case from every angle." In addition, the suppressed evidence was relevant to penalty in that it supported a residual doubt argument.

***State v. Ziegler,**
159 So.3d 96 (Ala. Crim. App. 2014)

In capital murder case, lower court did not abuse its discretion in determining that the state violated *Brady* by failing to disclose evidence contradicting testimony that petitioner had been at a party the night before the murder where he threatened the victim by referring to him as "a walking dead man." The witness who provided this testimony at trial recanted in the post-conviction proceeding and stated that she had informed law-enforcement both before and after her testimony that she did not know petitioner. Her post-conviction testimony was found to be credible and was supported by her son who also stated that petitioner had not been present at the party and that he told this to the police. The suppressed evidence was material to the issue of intent.

J.E. v. Superior Court,
168 Cal. Rptr. 3d 67 (Cal. App. 2014)

In juvenile dependency proceeding, the court erred in refusing to conduct an *in camera* inspection of a prosecution witness's juvenile dependency file for *Brady* evidence. The petition

was filed under a statute that allows a juvenile court to release information from juvenile files to persons who are otherwise not authorized to access the confidential files. The appellate court held that when a petitioner invokes the statute and requests that the court review a confidential juvenile file, if the petitioner has provided a reasonable basis to support a claim that the file contains *Brady* exculpatory or impeachment material, the juvenile court is required to conduct an in camera review.

People v. Bueno,

___ P.3d ___, 2013 WL 6118364 (Colo. App. Nov. 21, 2013)

In prison killing case, trial court did not abuse its discretion in granting defendant a new trial based on the prosecution's failure to disclose information supporting part of the defense theory – that the victim had been killed by white inmates. The suppressed evidence included a letter found by a nurse at the correctional facility approximately thirty-five minutes after the victim's body was discovered. The letter announced that The Aryan Nation and the Neo Nazi Skin Heads planned to exterminate white inmates who refused to “accept their proud race . . .” While the letter specifically targeted certain individuals, it stated those inmates were only the beginning. The nurse prepared an employee incident report about the letter that also was not provided to defense counsel. Two days after the letter was discovered, one of the targeted inmates died from a pulmonary embolism; blunt force trauma to his chest was observed. The third piece of suppressed evidence was a report by a gang intelligence officer at the prison who opined that the two deaths were related. That the letter and report by the nurse were “available” to defense counsel because they were permitted to review records at the correctional facility did not defeat the *Brady* claim. Because it was undisputed that the letter and the report were in the prosecutor's file, there was an affirmative duty to disclose them.

Liggins v. State,

841 N.W.2d 356 (table), 2013 WL 5963013 (Iowa App. Nov. 6, 2013) (unpublished)

In child-murder case, post-conviction relief is granted due to the prosecution's failure to disclose that one of its crucial witnesses was a paid informant in drug cases. The absence of a direct connection between the payments and the witness's testimony in petitioner's case was immaterial: “What matters is the fact that payments were made. Whether in this case or another, they provided a powerful incentive for the witness to cooperate with the State.” Also immaterial was the supervising detective's denial of knowledge of payments to the witness. The detective had ample opportunity to verify the status of the witness as a paid informant prior to the witness's testimony and he had an obligation to do so. “[T]he State could not shirk its duty to obtain the exculpatory evidence of the witness's status as a paid informant by pointing to the fact that the payments were made in other cases or by denying knowledge of the payments. The State was obligated to unearth and disclose this critical information.” In addressing materiality, the court rejected the State's argument that it could not consider 77 suppressed police reports that the court had found failed the materiality test in a prior post-conviction proceeding. “A materiality analysis must consider all the suppressed evidence, including evidence that was addressed in a

prior proceeding.” When considered together, along with a suppressed FBI report that was presented in this second post-conviction proceeding, confidence in the verdict is undermined. The reports could have, inter alia, called into question certain trial testimony, bolstered the defense’s contention that another person had a motive to kill the victim, and cast suspicion on another party.

Ferguson v. Dormire,
413 S.W.3d 40 (Mo. App. 2013)

Habeas relief granted in robbery-murder case where prosecution suppressed evidence of an interview with the wife of one of the prosecution’s key witnesses at trial. “The undisclosed evidence was favorable because it impeached [the witness’] explanation for his ability to identify Ferguson. The undisclosed evidence was material because of the importance of [the witness’] eyewitness identification to the State’s ability to convict Ferguson, because the evidence would have permitted Ferguson to discover other evidence that could have impacted the admissibility or the credibility of [the witness’] testimony, and because of the cumulative effect of the nondisclosure when considered with other information the State did not disclose.” The other evidence that could have been discovered absent the suppression included the fact that the police had contacted the eyewitness while he was in prison pre-release, which would have enabled Ferguson to argue that the witness felt threatened or intimidated, resulting in his sudden ability to identify Ferguson and the co-defendant. Additional evidence that had been suppressed (although discovered by the defense prior to trial) was (1) a statement by a witness as to the time a bar Ferguson and the co-defendant had been drinking in closed that contradicted the prosecution’s theory of the case; (2) a statement by the second eyewitness indicating her inability to identify either Ferguson or the co-defendant; and (3) the testifying eyewitness’s sudden ability to identify Ferguson and the co-defendant from pictures in a newspaper that the eyewitness claimed to have received from his wife while in prison. Although Ferguson learned of these bits of undisclosed information prior to trial, the delay in receiving the information impacted his ability to use the evidence in his defense. Relief was required even though a co-defendant implicated Ferguson in the robbery-murder. This was because the co-defendant’s confession was severely challenged by Ferguson, as were the investigative and interrogation tactics employed by the State in securing that confession.

State ex rel. Woodworth v. Denney,
396 S.W.3d 330 (Mo. 2013)

In murder, assault, burglary, and armed criminal action case with weak circumstantial evidence and a third party culpability defense, convictions vacated due to suppressed evidence and newly discovered evidence undermining confidence in the verdict. The first suppressed evidence was a series of letters involving the surviving victim, the original trial judge, the local prosecutor and the special prosecutor. Letter 1 was from the surviving victim to the judge complaining about the local prosecutor’s handling of the case and begging the judge to remove him so that the case against defendant could go to the grand jury. Letter 2 was from the local prosecutor to the judge

explaining that the surviving victim had earlier been adamant that a third party, the ex-boyfriend of the victims' daughter, be charged with the crimes. The local prosecutor nevertheless requested that the judge appoint the attorney general's office to represent the State. Letter 3 was from the judge to the special prosecutor thanking the attorney general's office for taking the case, enclosing Letter 1, and explaining that was what prompted the judge to initiate the grand jury inquiry. These letters could have diminished the surviving victim's credibility when he denied having told others that the ex-boyfriend was the shooter and would also have assisted the defense in demonstrating that the State's investigation was not impartial by showing that the investigation improperly focused on defendant rather than on the ex-boyfriend once the surviving victim put pressure on the judge. Also suppressed were complaints by the victims' daughter to the police that the ex-boyfriend was violating a protection order that had issued shortly after the crimes and that he was making threats. This information would have impeached the daughter's deposition testimony denying threats by the ex-boyfriend and her denial that she informed the police when the ex-boyfriend contacted her in violation of the protection order. Finally, newly discovered evidence called into question the credibility of the ex-boyfriend's alibi and supported defendant's claim of innocence.

People v. Gutierrez,
153 Cal. Rptr. 3d 832 (Cal. App.), cert. denied, 134 S.Ct. 684 (2013)

Refusing to overturn existing precedent holding that prosecution's duty to disclose exculpatory evidence under *Brady* applies to preliminary hearings.

People v. Gayden,
111 A.D.3d 1388 (N.Y. 2013), appeal withdrawn by 18 N.E.3d 1142 (N.Y. 2014)

In murder case, defendant was entitled to have his judgment vacated due to the prosecution's failure to inform the defense that an essential prosecution witness was a paid informant.

Adams v. Commissioner of Correction,
71 A.3d 512 (Conn. 2013)

In gang-related murder and assault case, petitioner was entitled to habeas relief as a result of the prosecution's failure to correct false and misleading testimony by one of the surviving victims (Andre) about the consideration he was receiving in two unrelated criminal cases in exchange for his testimony against petitioner and his co-defendants. (The trial prosecutor was unaware of the consideration because another prosecutor was handling Andre's case and they had agreed to create a "firewall" in order for the trial prosecutor to remain in the dark about any deals made. It was the judge in Andre's case that had conducted the plea discussions. At the time, the prosecutor of Andre believed there was no duty to disclose the deal because it was the product of negotiations between the judge and the surviving victim, a position abandoned in this appeal.) In finding that petitioner met the strict materiality standard applicable to *Napue* violations, the court engaged in a lengthy analysis of the evidence against petitioner and its weaknesses, and noted the

difficulty the jury had in reaching a verdict. The court acknowledged that Andre, both as a victim of the attack and as a witness to the fatal shooting of his cousin, had reason to testify against his assailants wholly apart from any promise of leniency. The court further acknowledged that Andre's veracity as a witness was tested by the vigorous cross-examination of defense counsel. The court nevertheless concluded that it was "highly probable that Andre's credibility would have been further undermined, and most likely seriously so, if the jury knew, first, that he had been promised leniency on his pending charges in return for his cooperation and, second, that he was lying when he denied that he had been promised consideration for such cooperation. Because a witness' motivation to avoid prison time is invariably a strong one, the fact that Andre's credibility otherwise had been called into question was not a substitute for cross-examination about the relationship that in fact existed between the leniency that he had been promised and his testimony on behalf of the state."

State ex rel. Koster v. Green,
388 S.W.3d 603 (Mo. App. 2012)

In capital murder case involving a sexual assault where the mentally ill petitioner confessed to the offense, habeas court did not abuse its discretion in concluding that undisclosed evidence could reasonably be taken to put the petitioner's whole case in such a different light as to undermine confidence in the verdict. The undisclosed evidence consisted of: (1) serological test results showing that foreign semen or other biological fluids — which could not have been deposited by petitioner or by the victim's boyfriend or estranged husband — were found on the robe the victim was wearing at the time of the attack; (2) internal police documents showing that the police lab reported the exculpatory findings to the police investigating the case, and that police relied on the undisclosed serological results to exclude suspects until they obtained a confession from petitioner; (3) documents showing that fingerprints found at the crime scene, which the State claimed were mere smudges unusable for comparison, were in fact usable and excluded petitioner as the source, and were tested against numerous alternate suspects even after police obtained petitioner's confession; (4) a drawing of the crime scene made by petitioner, which a detective had asked petitioner to draw to determine if his confession was credible and which the detective concluded was not consistent with the actual layout of the crime scene; and (5) evidence that a key State witness, whose testimony that she yelled out the victim's name was pivotal to corroborating petitioner's confession, had to be hypnotized in order to provide the certain trial testimony she offered. The suppressed serological evidence, which included a handwritten report with an exculpatory finding that was crossed out and omitted from the final report that was disclosed to the defense, could have been used to both bolster the defense argument that petitioner was not the perpetrator and impeach the credibility of the investigation. Similarly, the fact that the police had arranged to have a key prosecution witness hypnotized to clarify her memory, which was not documented or disclosed to the prosecutor or defense counsel, could have been used both to impeach the witness's credibility and the integrity of the police investigation.

Rios v. State,
377 S.W.3d 131 (Tex. App. 2012)

In case where applicant pleaded guilty to charge of driving while intoxicated, he was entitled to habeas relief based on the revelation that the breath results he had been informed of prior to the plea were invalid because the technician in charge of the intoxilyzer used to test application's blood alcohol concentration had falsified the calibration records for that machine. The plea was deemed involuntary because it had been induced by the invalid test result.

Ex Parte Miles,
359 S.W.3d 647 (Tex. Crim. App. 2012)

In murder and attempted murder case, applicant was entitled to habeas relief on both a *Brady* claim and a claim of actual innocence. The undisclosed evidence was two police reports, one of which expressly identified a third party as the perpetrator and the other of which disclosed an altercation between the victims and another party five days prior to the shootings. The second report also contained a claim by the deceased victim's brother that the shooter was someone named Deuce. The reports could have been used both to impeach testimony by a detective that there were no other suspects and to develop an alternate theory of the crime. The report about the altercation could have impeached testimony from the surviving victim that his possession of a sawed-off shotgun was purely for personal protection and his denial of having had problems with others before the crime. In finding the suppressed evidence material, the court found significant the additional evidence that could have been developed had the first report been disclosed suggesting the third party was in fact the perpetrator. The significance of the suppressed reports was "even more obvious" when considered in the context of the trial record, which included questionable gunshot-residue analysis, suggestive eyewitness identifications, disparities between the descriptions of the shooter and applicant, and applicant's alibi.

***Velez v. State,**
2012 WL 2130890 (Tex. Crim. App. June 13, 2012) (unpublished)

Reversal of death sentence where prosecution presented false testimony concerning the conditions of custody defendant would be subject to should he receive a sentence of life imprisonment without possibility of parole rather than death. The testifying witness and the prosecutor knew or should have known about a 2005 regulation that precluded the less restrictive conditions that the witness testified were possible for defendant to receive. In finding that the false testimony was not harmless beyond a reasonable doubt, the court noted: (1) the witness's extensive credentials that "increased his credibility as a person knowledgeable about violence in prisons and future dangerousness"; (2) the witness's testimony about the "horribles" that occur in prison, including murders and his descriptions of prison as a very violent place; (3) the witness's observation that rules can change after conceding that life without parole inmates are not allowed out on work detail without an armed guard; (4) the circumstantial nature of the case against defendant; (5) the fact that the prosecution presented no psychiatric evidence supporting a

finding of future dangerousness, nor sought to rebut the defendant's psychiatric evidence that he would not pose a future danger; (6) that other than a bar fight some 17 years prior to trial, defendant's criminal record was non-violent; and (7) that defendant had been in custody for some time prior to trial and had a clean disciplinary record.

State v. Hollin,

970 N.E.2d 147 (Ind. 2012)

In conspiracy to commit burglary case, *Brady* violation found where prosecution failed to disclose, inter alia, that there was a charge pending against the testifying former co-defendant (Vogel) for battery with a deadly weapon in a neighboring county, that there were petitions pending to revoke Vogel's probation in the neighboring county as well as the county of trial, and that Vogel's theft conviction in the other county would be reduced to a misdemeanor if he completed probation successfully. In finding the suppressed information was favorable, it is noted that Vogel did not implicate Hollin in the burglary until after he was charged with battery with a deadly weapon and two petitions to revoke his probation were filed. The suppressed evidence was deemed material given that the case involved a credibility contest between Vogel and Hollin.

Bunch v. State,

964 N.E.2d 274 (Ind. App.), transfer denied, 971 N.E.2d 1215 (Ind. 2012)

In felony-murder/arson case, post-conviction court clearly erred in denying petitioner's claim that the prosecution violated *Brady* by failing to disclose an ATF report that directly contradicted the report and testimony by an ATF agent at petitioner's trial about the presence of a heavy petroleum distillate (HPD) on two of the ten samples that had been tested. (After obtaining the actual gas chromatographs for the samples at issue, petitioner's post-conviction expert evaluated them and concurred with the findings in the suppressed report.) The post-conviction court was incorrect when it found that the ATF report was not suppressed because it constituted work product that was not discoverable. First, the State never claimed that the report was work product. Second, "the *Brady* rule can require disclosure of evidence not otherwise discoverable if the evidence is shown to be exculpatory." The post-conviction court also erred in finding no suppression because the report at issue was in the possession of the ATF and not the prosecution. "That the ATF kept the complete file on its premises does not mitigate the State's obligation to disclose exculpatory evidence in that file." The post-conviction court further erred in finding that because petitioner had the testifying ATF agent's report, petitioner did not demonstrate reasonable diligence when she made no specific request for the ATF file. Here, there was nothing in the information that petitioner possessed suggesting that the complete ATF file would contradict what had been disclosed. On this record, the complete ATF file was suppressed for purposes of meeting the first prong of the *Brady* test. As to whether the suppressed report was favorable, although it agreed with the testifying agent's finding of HPD on three of the samples, the disagreement on one of the samples was significant because that sample was the only one taken from the victim's bedroom and the prosecution's theory was that because HPD was found

in both the living room and the bedroom, there were multiple, and therefore incendiary, fires. In addition, the second sample on which there was disagreement was taken from what was identified as a pour pattern in the living room. With a finding that it tested negative for HPD, then the significance of the alleged burn pattern was significantly undercut. “The undisclosed evidence is therefore exculpatory, as it directly contradicts the State's theory of the case.” In addition, the report could have been used to impeach the ATF's agent at trial. Finally, because the undisclosed report directly contradicted the trial testimony supporting fires originating in two places, there was a reasonable probability that but for the prosecutorial failure to disclose this evidence, the result of the trial would have been different.

***In re Bacigalupo,**
283 P.3d 613 (Cal. 2012)

Habeas relief granted as to death sentence where prosecution failed to disclose evidence that would have supported a case in mitigation at the penalty phase that petitioner committed the two murders because of a Columbian drug cartel's death threats against petitioner and his family. (Under California law, having acted under duress is a statutory mitigating factor.) At trial, the jury heard petitioner's confession in which he claimed that he had been ordered to kill the victims by the Columbia Mafia under threats to himself and his family. The man petitioner claimed had ordered the killings denied having done so and the prosecutor at both phases of the trial emphasized the absence of evidence supporting petitioner's account of the crime. The prosecution failed to reveal to defense counsel that a confidential informant had tied a high level drug dealer with a connection to a Columbian drug cartel to the killings, that the informant had been present when the drug dealer met with petitioner the night before the murders, and that the informant had been told that the killings were a contract killing rather than for robbery as the prosecution asserted at petitioner's trial. That the trial court in a pre-trial ruling had concluded that the confidential informant was not a material witness as to guilt was not dispositive of the informant's materiality as to the sentencing phase.

***In re Stenson,**
276 P.3d 286 (Wash.), cert. denied, 133 S.Ct. 444 (2012)

In double murder case where defendant claimed one victim killed the other before committing suicide and the key evidence implicating defendant in the killings was gun shot residue (GSR) found in his front pants pocket and blood spatters on the pants, the State violated *Brady* by suppressing an FBI file and a photograph showing how the pants had been handled prior to the GSR testing. The file was favorable because it revealed that an FBI employee other than the one who testified at trial had actually conducted the GSR testing. Knowledge of this would have allowed the defense to challenge the credibility of the testifying FBI agent. In addition, the file showed that only a few particles of GSR was found in the pocket, a fact the defense was unaware of at the time of trial. Also suppressed was a photograph showing that prior to the GSR testing a detective had placed his ungloved hand in the front pant pocket. Suppression was found even assuming that a defense investigator had viewed the photograph prior to trial because there was

no disclosure to defense counsel at the time the FBI agent testified or at any other time “that something had gone into the pocket. . . .” In finding the suppressed evidence to be material, the court explained: “Had the FBI file and photographs been properly disclosed here, Stenson's counsel would have been able to demonstrate to the jury that a key exhibit in the case—Stenson's jeans—had been seriously mishandled and compromised by law enforcement investigators. It is also likely that exposure of the State's mishandling of the jeans with regard to GSR testing would have led to further inquiry by Stenson's counsel into possible corruption of the blood spatter evidence. In that regard, Stenson's defense theory at trial could have taken into account the fact that the jeans may have been folded over when the blood spatter was wet. Instead, the jury was left with only one explanation for the blood spatter, which was that it could not have appeared on Stenson's jeans after [the victim] came to his final resting place.”

Commonwealth v. Murray,
957 N.E.2d 1079 (Mass. 2011)

In murder case, grant of new trial affirmed where prosecution failed to disclose information known to the police regarding the gang activities of “KST,” whose members included the victim and several eyewitnesses to the killing. This information, inter alia, could have been used for impeachment and to show bias.

Freshwater v. State,
354 S.W.3d 746 (Tenn. Crim. App. 2011)

Conviction for first degree murder reversed due to suppression of the portion of a statement from a witness claiming that Freshwater's co-defendant told him that he was the sole shooter of the victim. Provision to the defense of another part of the witness's statement, which appeared to be the complete statement, misled defense counsel who could not then be faulted for failing to discover the missing part of the statement. There was a reasonable probability that the jury, which decided sentence at the time of the 1969 trial, would have imposed a sentence less than ninety-nine years had the statement not been suppressed.

Pena v. State,
353 S.W.3d 797 (Tex. Crim. App. 2011)

In marijuana possession case, the court of appeals erred in concluding that the due process protections afforded under *Brady* did not apply when the State failed to disclose or provide to appellant, after specific request, the audio portion, containing exculpatory statements made by appellant to police, of a videotape used by the State before the jury. The audio was favorable because it included appellant's denial that the plant material was marijuana and the charge required proof that possession of the drug was intentional and knowing. It was also favorable in that it could have impeached the arresting officer's failure to recall whether appellant had asked for testing of the plant material in that the audio confirmed appellant's claim that he did. The audio would also have precluded the prosecutor from arguing that appellant only requested testing

of the material after he knew it had been destroyed. In finding the suppressed evidence material, the court accepts appellant's argument that his defense would have been different had the audio been available in that he would have focused on lack of intent rather than on the destruction of the evidence. Also noted is how the prosecution's case would have had to change.

Jordan v. State,
343 S.W.3d 84 (Tenn. Crim. App. 2011)

In granting post-conviction relief in second degree murder case, the appellate court ruled that the state's open file policy did not discharge its affirmative duty under *Brady* to disclose favorable, material evidence to the defendant and that the defendant was entitled to rely on the state's assertion that it provided him with its entire file. Evidence concerning the discovery of a knife near where the victim's body was found with a slashed throat was favorable even though the knife was not linked to the killing because it demonstrated a failure by the police to further investigate. In addition, defense counsel may have been able to develop exculpatory evidence through his own investigation of the knife. Also favorable was a suppressed police memorandum that impeached a third party suspect's later claim that he was not in the area at the time of the crime. Because the suspect's denial of being in the area was the basis of his being cleared by police after a caller implicated him in the murder, the memorandum could have been used by defense counsel to question the reliability of the state's investigation. After reviewing the record, the appellate court could not be "reasonably confident that every single member of the jury," after hearing evidence impugning the police investigation, would have found the petitioner guilty because the margin of sufficiency was so slim that any favorable evidence would be material."

State v. Ferguson,
335 S.W.3d 692 (Tex. App. 2011)

In aggravated sexual assault case where alleged victim was between eight and eleven years old when the assaults occurred, trial court did not abuse its discretion in granting a new trial based on the State's failure to disclose a forensic sexual assault examination report that at least arguably undermined the alleged victim's claim to have been subjected to vaginal intercourse regularly for more than three years and supported defendant's assertion that no intercourse occurred. Had defense counsel possessed the report, he could have shifted "from the defensive argument used—that there was no physical evidence of sexual assault—to a more offensive argument—that there was physical evidence strongly suggesting that there was no sexual assault, or at least that the regularity reported by complainant was incredible."

Ex Parte Ghahremani,
332 S.W.3d 470 (Tex. Crim. App. 2011)

In sexual assault case, applicant was entitled to resentencing based on the State's presentation of misleading testimony by the parents of one of the victims creating the false impression that the

victim's physical, emotional, and psychological problems resulted solely from her sexual encounter with applicant. Undisclosed to applicant, and known by the prosecution, was evidence showing additional sources for the victim's problems.

Aguilera v. State,
807 N.W.2d 249 (Iowa 2011)

In second degree murder case where petitioner claimed the shooting was accidental, a *Brady* violation occurred through the prosecution's failure to disclose an Iowa Division of Criminal Investigation (DCI) file containing several witness statements, including statements from the two alleged eyewitnesses to the incident. Although a DCI agent had revealed in a pretrial deposition that eyewitness Guido had at one point claimed to have been inside when he heard the shot fired, and only then went outside where the shooting had occurred and never saw a gun, this was not enough to allow petitioner to take advantage of the evidence as the agent did not reveal: (1) the date the statement was made - the day after the shooting; (2) that Guido made a contradictory statement two days later which still differed from later deposition and trial testimony on the key issue of whether Guido saw the actual shooting; and (3) that Guido had also placed the other alleged eyewitness, Lopez, inside the house when the shooting happened. Defense counsel would have been able to far more effectively cross-examine Guido had he been provided the two statements that were inconsistent not only with the deposition and trial testimony, but with each other. Also suppressed was a statement by a witness unknown to petitioner who recounted someone shout "they're fighting" before hearing a gunshot. This account better supported the testimony of Lopez that the gun went off as petitioner and the victim were struggling, as opposed to Guido's trial testimony that the men were two meters apart when petitioner fired the shot. The State did not appeal the lower court's finding that an additional statement was suppressed, a statement expressing the belief that petitioner was extorting money from other Hispanics at work, many of whom were present at the party where the shooting occurred. Defendant's strategy at trial may have changed had he been provided with the statement as it may have uncovered bias against defendant by trial witnesses. Although the statement may not have been material in and of itself, "when viewed in connection with the other statements the State failed to turn over, it supports a finding of materiality." Additional suppressed statements contributed to the materiality finding as they made the defense theory of accidental shooting far more likely.

DeSimone v. State,
803 N.W.2d 97 (Iowa 2011)

In sexual abuse case, the prosecution violated *Brady* by failing to disclose a witness's timecard showing that the witness could not possibly have seen the events to which she testified. (The witness, who befriended the victim prior to trial, described almost hitting a girl with her car on the night the alleged assault occurred. This corroborated the part of the victim's testimony about fleeing the petitioner's home and nearly being struck by a car.) In the post-conviction proceeding, the trial prosecutor suggested that he had hand-delivered the timecard information to defense counsel. Defense counsel in turn denied receiving it but admitted he had not reviewed

the file prior to the hearing. On this record, suppression was found because: (1) it was inconceivable that the prosecutor would have used the witness knowing that her testimony was false and that he had provided proof of the falseness to defense counsel; (2) defense counsel testified that he shared all material with petitioner and petitioner would have brought the discrepancy to the attention of defense counsel; and (3) given defense counsel's experience, it was difficult to believe that he would not have used the timecard information if he had possessed it. The suppression prong of the *Brady* test was not defeated by the fact that defense counsel had been aware that the witness's timecard was going to be sent to the police department. A reasonable attorney would have concluded that the timecard had corroborated the witness's account rather than being exculpatory and so would not have independently sought the information. The suppressed timecard was material because there was no physical evidence and the case turned on the victim's questionable credibility for which there was little corroboration. The defense theory at trial was that the victim was collaborating with persons who disliked petitioner in order to convict him. Bringing the false testimony into the conspiracy theory "completes the picture."

State ex rel. Griffin v. Denney,
347 S.W.3d 73 (Mo. 2011)

In prison killing case, petitioner was entitled to habeas relief because of the State's failure to disclose that within minutes of the stabbing prison guards confiscated a sharpened screwdriver from another inmate as the inmate attempted to leave the area where the stabbing occurred. The evidence was favorable because it supported a viable alternative perpetrator defense. In finding prejudice, additional new evidence is discussed, including an admission by another inmate that he was the actual killer and had been assisted by the inmate who was caught with the screwdriver, the recantation of one of the witnesses who claimed to have witnessed petitioner committing the stabbing and evidence that the prosecution's other eyewitness was actually in the law library when the stabbing occurred. (There was a dissent that contended the *Brady* claim should fail because testimony by the medical examiner refuted the possibility that the screwdriver caused the victim's wounds.)

State ex rel. Koster v. McElwain,
340 S.W.3d 221 (Mo. App. 2011)

In case involving the murder of petitioner's mother, grant of habeas relief affirmed in part because of the State's suppression of evidence that the victim had made numerous reports of abuse by her estranged husband and evidence that the victim was so fearful of her husband that she armed herself with a gun. In finding evidence of the abuse to be favorable, it is observed that such evidence could have been used to attack the thoroughness and even good faith of the police investigation. In finding prejudice, it is noted, inter alia, that the sheriff to whom the victim had reported the abuse had denied at trial that there had been any reports of domestic abuse. In addition, the evidence would have rebutted testimony suggesting that the victim had been nervous and upset in the months before her death because of her fear of petitioner.

Jackson v. State,
714 S.E.2d 584 (Ga. App. 2011)

In robbery/assault case with two co-defendants, defendant Phillips was entitled to a new trial based on the prosecution's failure to provide the defense with a pretrial statement by one of the victims that contradicted the victim's trial testimony. In the statement the victim provided to police, he asserted that he and his mother-in-law had been robbed by two armed men. At trial, the victim testified that not only were three men involved in the crime, but that Phillips was one of the three men. Defense counsel had received a police report which indicated the victim had reported three men being involved, including the driver of the getaway car. Defense counsel did not receive a second police report that tracked the written statement. Because the witness was the only one to identify Phillips as a participant in the robbery and the other evidence was not overwhelming, the suppressed statement was material.

State v. Bai,
2011 Ohio 2206, 2011 WL 1782113 (Ohio App. May 9, 2011)

Conviction for gross sexual imposition is reversed due to the prosecution's failure to disclose a handwritten statement by the alleged victim that was prepared not long after the incident and that presented a rather detailed recollection of the events that occurred, in contrast to her testimony where she claimed lack of a clear memory due to intoxication. The statement was highly probative of the alleged victim's claimed substantial impairment and defendant's knowledge of her alleged impaired ability to resist or consent. It also corroborated defendant's testimony about the initial consensual nature of the encounter.

Flores v. Iowa,
801 N.W.2d 32 (table), 2011 WL 1376777 (Iowa App. Apr. 13, 2011) (unpublished)

Murder and terrorism convictions reversed and new trial granted in post-conviction proceedings based on previously undisclosed FBI interview with a witness suggesting that another person was the actual perpetrator. Although Flores' convictions had been affirmed on direct appeal, it was noted that the evidence of his guilt "was far from overwhelming," and it was a close case involving circumstantial evidence. The report was "[c]learly" favorable to the defense and its suppression affected counsel's trial preparation and undermined confidence in verdict.

State v. Sinha,
84 A.D.3d 35, 922 N.Y.S.2d 275 (N.Y.A.D. 2011), aff'd, 976 N.E.2d 223 (N.Y. 2012)

Invoking its "interest of justice jurisdiction," the court reversed defendant's conviction for bribing a witness "because the prosecution failed to fulfill basic disclosure obligations that are essential to a fair trial." The prosecution possessed, but did not disclose until after its witness (and victim) testified, emails another prosecutor sent to the victim's mother stating she would "do everything in [her] power' to make" the prosecutors handling the case "see that [her son]

deserved a break because of what had happened to him....” Another undisclosed email described the privileges the prosecutors arranged for the victim who was incarcerated on a probation violation, including phone privileges at the youth institution and preventing his transfer to an adult facility. The prosecution’s “tardy” disclosure of the emails was “unexcusable.”

Miller v. United States,
14 A.3d 1094 (D.C. App. 2011)

In a case involving, inter alia, charges of assault with intent to commit murder, the prosecution violated *Brady* by not disclosing until the evening before opening statements that the government’s principal eyewitness had told the grand jury that the shooter used his left hand to shoot the victim. This was material given that the defendant was right-handed and, had defense counsel known about the witness’s testimony earlier, evidence could have been developed showing that an alternative suspect was likely left-handed. (Defense counsel did attempt to present a videotape showing that the alternative suspect signed his Miranda waiver card with his left-hand but the trial court refused to allow it because both sides had rested and instructions to the jury had begun by the time defense counsel noticed this.) Defense counsel’s failure to simply ask the alternative suspect, who was “a patently untrustworthy witness,” whether he was left-handed, or to request a continuance or mistrial, did not defeat the *Brady* claim. “Deferral of disclosure of what might well (and in fact did) turn out to be critically important exculpatory information, until the night before opening statements . . . is not compatible with the Constitution, with our case law, or with applicable professional standards.” *Id.* at 1108. While not dispositive, the ABA Standards for Criminal Justice, The Prosecution Function, informed the court’s analysis.

State v. Green,
2011 WL 709726 (N.J.Super.A.D. Mar. 2, 2011) (unpublished)

Green’s motion for discovery and new trial granted on appeal based on prosecution’s failure to disclose pending criminal charges against its key witness, Muhammad, who implicated Green in the kidnapping and murder of the victim, Williams. When defense counsel requested information about any pending charges against Muhammad, the prosecutor told the judge she would “look[] into it,” and later advised the judge she had “checked” the computer and there were no pending charges. According to the prosecutor, Muhammad’s “rap sheet is in error,” and “[e]verything has been disposed of.” *Id.*, at *1. On cross-examination, Muhammad admitted pleading guilty to drug crimes and receiving a minimum sentence. He testified that he had reported his knowledge of Williams’ homicide to an investigator while incarcerated on drug charges, but denied favorable treatment in exchange for information. In closing, prosecutor emphasized that Muhammad “has nothing to gain,” and noted his testimony that he had “nothing pending.” In fact, that was untrue. When Muhammad testified, he had pending charges against him, including an indictment for armed robbery, possession of a handgun without a permit for use against another, and possession of a firearm for unlawful purpose and possession of a machine gun. The prosecution was obligated to disclose that information but failed to do so.

The trial judge erred in finding defendant should have discovered the withheld information “sooner than 19 years after” trial, and that even if the prosecution had disclosed the pending charges against Muhammad, a different verdict was not probable. That was the wrong legal standard as Green needed only to show that the prosecution suppressed favorable, material evidence.

State v. Russell,

2011 Ohio 592, 2011 WL 494744 (Ohio App.), appeal not allowed, 951 N.E.2d 1046 (Ohio 2011)

In gross sexual imposition case, defendant was entitled to a new trial due to the prosecution’s failure to disclose the specific dates the sexual incidents allegedly occurred. With knowledge of the exact dates, defendant could have provided documented proof of his whereabouts on those days.

***Johnson v. State,**

44 So.3d 51 (Fla. 2010)

Three death sentences vacated in successive post-conviction proceedings where prosecutor violated *Giglio* by knowingly presenting false testimony and misleading argument at suppression hearing in order to hide agency relationship with jailhouse informant who obtained incriminating statements from Johnson. If the true facts of the informant’s status as a government agent had been known, his testimony would have been inadmissible in both the guilt and penalty phases. The prosecution’s use of the informant’s testimony concerning crime details was immaterial to the guilty verdict, however, given that the defense conceded Johnson had committed the crimes and relied on an insanity defense. The testimony was material to sentence because: (1) the prosecutor twice emphasized the informant’s testimony that Johnson “play[ed] like he was crazy”; (2) there is a lesser burden of proof needed to establish mitigation; (3) the facts of the murders were not “necessarily inconsistent” with proposed mental health mitigation; and (4) the proposed mitigation was “extensive, consistent and unrebutted.”

Bly v. Commonwealth,

702 S.E.2d 120 (Va. 2010)

In drug distribution case, *Brady* violation occurred where the prosecution failed to disclose evidence that the paid confidential informant who allegedly made controlled “buys” from defendant had been giving false accounts to the drug task force of other alleged drug purchases. The lower court incorrectly assumed that the trial court, having been the trier of fact, would have convicted defendant based on other evidence even if the confidential informant’s testimony had been entirely excluded. This failed to take into account how the suppressed evidence could have been used to discredit the entire police investigation, thereby tainting the remaining evidence in the case.

Baker v. State,
238 P.3d 10 (Okla. Crim. App. 2010)

In case involving assault and battery with a dangerous weapon, the prosecution violated *Brady* by failing to disclose the victim's pending drug charges, plea agreement, and prior felony conviction. Because the victim's credibility was critical, defendant had made a specific request for information that could be used to attack his credibility. In response, the "State attempted to keep relevant information from [defendant] through the use of semantics or a play on words. . . . This Court has repeatedly held that a criminal trial is not a game of hide and seek." *Id.* at 12.

State ex rel. Engel v. Dormire,
304 S.W.3d 120 (Mo. 2010)

In armed kidnapping case, the prosecution violated *Brady* by failing to disclose that the chief prosecution witness who purportedly hired petitioner to commit the crime was paid for his testimony against petitioner and a co-defendant, that investigators coached the witness, and that investigators sought leniency for the witness based on his cooperation in the cases. That documents memorializing the deal did not exist at the time of trial did not defeat defendant's allegation of suppression – "it is enough that the evidence shows that the 'deal' itself already existed, even if it had not yet been documented." *Id.* at 127. And that the investigators at issue were from outside Missouri was irrelevant since they were part of Missouri's prosecutorial team in the cases against defendant and the co-defendant. That the witness was impeached on other points at trial did not defeat the *Brady* claim. "The unknown impeachment information, especially when coupled with the impeachment information presented at the time of trial, could have led the jury to a different assessment of [the witness'] credibility." *Id.* at 128. Having shown a valid *Brady* claim, defendant also established the cause and prejudice necessary to overcome the procedural bar to granting him habeas relief.

State v. Piety,
2009 WL 3011107 (Tenn. Crim. App. 2009) (unpublished)

Aggravated rape conviction vacated due to state's failure to disclose photographs taken of the alleged victim's "private parts" during her physical examination. The alleged victim was engaged to the defendant and lived with him. During a fight, the defendant conceded that he beat her and choked her. That night and the next morning, the defendant testified they had consensual vaginal and anal sex. The alleged victim, however, testified that she was raped. Police were called after the alleged victim's mother and sister arrived and saw the victim's injuries. While there was plenty of evidence and the aggravated assault conviction was affirmed, the rape conviction was supported only by the alleged victim and a nurse, who testified about injuries to the alleged victim's buttocks and vaginal area. The state failed to disclose the pictures of the alleged victim's buttocks and vaginal area, however, which did not reflect the injuries described by the nurse in her testimony.

Deren v. State,
15 So. 3d 723 (Fla. App. 2009)

Battery and disorderly conduct charges vacated due to the State's failure to disclose workers' compensation records detailing payments of \$24,000 to the alleged victim. The charges arose out of a disturbance between the defendant and his friend and the victim, a bar bouncer. The evidence was material to show the victim's financial motive to paint the defendant and his friend as the aggressors in the initial fight.

Harris v. State,
966 A.2d 925 (Md. 2009)

Murder, conspiracy, and solicitation to commit murder convictions vacated in post-conviction proceedings. The state's theory was that the defendant had solicited and conspired with a co-defendant to kill the defendant's fiancée. The co-defendant went along with the plan and made numerous statements to others as events unfolded. Ultimately, the fiancée was killed and the defendant was shot in the leg. The co-defendant, who had pled guilty to murder in exchange for a 50-year sentence, testified that he had changed his mind at the last minute and that the defendant took the gun and killed the victim and then ordered the co-defendant to shoot him in the leg which he did. The co-defendant also testified that his initial confessions to police and his younger brother were false. The defendant denied guilt. A jailhouse snitch testified that the co-defendant admitted involvement in the murder plot but claimed he was too scared to go through with it. The snitch also testified that the defendant had twice offered to pay him if he would tell the defendant's lawyer that the co-defendant admitted shooting the victim. The jailhouse snitch had also been facing a number of charges but pled guilty prior to the defendant's trial pursuant to a deal in which he received a 30-year sentence. Both the co-defendant and the snitch acknowledged during testimony that they could seek a sentence reduction but denied any promises from the state in that regard. Reversal was required because the state had, in fact, promised not to oppose their motions for reduction if the state was satisfied with their testimony. The co-defendant's sentence was reduced to 30 years and the snitch's sentence was reduced to 25 years. This evidence was material as both of these witnesses had prior criminal records and credibility issues while the defendant had no prior record and no apparent motive to have his fiancée killed since he was not even the beneficiary on her life insurance policy.

State v. Soriano-Clemente,
2009 WL 2432052 (Minn. App. 2009) (unpublished).

Aggravated robbery case vacated due to state's failure to disclose the victim's prior convictions. The victim testified that she and her mother were robbed at gunpoint by two men in her sister's store. When the robbers left, the victim ran out and saw a Jeep drive away. Sometime later, the Jeep with the license plate number provided by the victim was stopped and defendant, who had been a passenger before running when the vehicle stopped, was arrested. The victim identified the Mexican defendant as an assailant at trial (even though she initially described the assailant as

Asian) but her mother could not identify the assailants. The defendant testified that he had been in the Jeep with three other men only for the purpose of buying drugs. He waited in the Jeep while two others went inside the store. Following conviction but prior to sentencing, defense counsel discovered that the victim had a significant conviction history including drug possession, perjury, use of different names and addresses during prior arrests, and multiple crimes of dishonesty, including financial transaction fraud. While there was no evidence the prosecutor on defendant's case knew about this prior record, some of the victim's prior convictions were prosecuted by the same state office.

Sarber v. State,
2009 WL 2366097 (Minn. App. 2009) (unpublished)

Drug possession conviction vacated in post-conviction. The defendant was a passenger in the car driven by the state's primary witness. When police stopped the car, drugs were found either in the console between the seats or under the driver's seat. The defendant was the only one charged. While the evidence of non-disclosure was not clear, it was clear that the witness had been arrested only weeks before on a drug charge in which he attempted to shift blame to his companion. In addition, the witness had met with a detective on numerous occasions to discuss working as an informant in order to gain assistance with his pending charges. While defense counsel was aware of the prior arrest and incident report, the state did not challenge the findings that the discussions with the detective were never disclosed. Likewise, it was not disclosed that the detective did approach the prosecutor and speak on the witness' behalf. While there was no formal agreement, the witness still had incentive to testify against the defendant. Because the record was unclear, the court found alternatively that if the evidence was disclosed by the state, counsel was ineffective in failing to impeach the witness with this information.

Ex parte Johnson,
2009 WL 1396807 (Tex. Crim. App. 2009) (unpublished)

Relief granted in post-conviction proceedings due to *Brady* violation in aggravated sexual assault of a child case. The per curiam opinion does not discuss the facts but the concurrence does. The day before the scheduled trial, the prosecutor interviewed the alleged victim who denied any sexual abuse. Also, shortly before trial, the prosecutor's investigator had been informed by school officials that the alleged victim was a "great liar." On the day of trial, the alleged victim did not appear to testify. None of this was disclosed prior to the defendant entering a guilty plea and later being adjudicated and sentenced to life. The complainant's recantation was directly exculpatory and the non-disclosure required a grant of relief.

State v. Smith,
2008 WL 5272480 (Tenn. Crim. App. 2008) (unpublished)

Rape of child convictions reversed due to state's failure to disclose the alleged victim's juvenile adjudications for car theft and joyriding and her prior allegations of physical abuse by her

grandfather that were not substantiated by social service workers.

Ex parte Toney,
2008 WL 5245324 (Tex. Crim. App. 2008) (unpublished)

Relief granted in post-conviction proceeding due to “Agreed Findings of Fact & Conclusions of Law” of *Brady* violation. The per curiam opinion does not discuss the facts.

***Taylor v. State,**
262 S.W.3d 231 (Mo. 2008)

In prison killing case, denial of post-conviction relief as to death sentence reversed in part due to prosecution’s failure to disclose: (1) letters sent by the state’s jailhouse witness to the lead investigator for the prosecutor that the investigator then destroyed; (2) a memorandum the investigator composed memorializing one of his conversations with the jailhouse witness in which the latter referenced the likelihood of his testimony being needed against petitioner and contained false allegations of corruption on the part of two police officers; and (3) the state’s intention to ask prosecutors to extend favorable treatment to the jailhouse witness on his pending charges if he gave helpful testimony against petitioner.

People v. Hunter,
892 N.E.2d 365 (N.Y.App. 2008)

In case where defendant was charged with multiple sexual offenses against the alleged victim and was convicted of sodomy despite his defense that what occurred was consensual, petitioner’s due process rights were violated by the suppression of evidence that the complainant had later (but before defendant’s trial) accused another of rape under similar circumstances, i.e., in both cases, the alleged assaults took place in the accused man’s home. The other alleged assailant also contended that the encounter was consensual but sometime after defendant’s trial pleaded guilty to attempted rape. That plea, however, did not cure the due process violation that occurred from the prosecution’s failure to reveal the accusation – “If the information known to the People when this case was tried was ‘favorable to [the] accused’ and ‘material’ within the meaning of *Brady*, defendant had a due process right to obtain it, and that right could not be nullified by post-trial events.” And although the trial court did have the discretion to preclude the defendant from impeaching the complainant with the second accusation, it also had the discretion to allow the impeachment. In finding that the suppressed information was material, it was noted that the prosecutor at defendant’s trial highlighted the implausibility of defendant’s account and that evidence of a similar accusation may have left the jury more skeptical of the complainant. Also, that the jury did learn of the complainant’s earlier threat to falsely accuse her own father of rape did not render the withheld evidence cumulative.

***In re Miranda,**
182 P.3d 513 (Cal. 2008)

In capital case, habeas relief granted as to death sentence where prosecution suppressed inmate letter tending to rebut its “star penalty phase witness” and contradicting prosecution’s suggestion in argument that evidence that another person killed the second victim “didn’t exist.” State’s argument that letter not material under *Brady* because it was inadmissible hearsay was erroneous as inadmissible evidence may be material under *Brady*. The trial judge, not prosecutor, is arbiter of admissibility, and prosecutor’s disclosure obligations do not turn on prosecutor’s view of whether or how defense might use particular evidentiary items. Prosecutor’s disclosure obligation depends on collective effect of all suppressed evidence favorable to defense, not effect of evidence considered item by item.

People v. Beaman,
890 N.E.2d 500 (Ill. 2008)

In first degree murder case where evidence against petitioner was not particularly strong, prosecution violated *Brady* by failing to disclose information about an alternative suspect, “John Doe.” Doe was known to defense counsel as having been involved in a relationship with the victim but counsel had no evidence pointing to him as the killer. The undisclosed evidence about Doe consisted of the following: (1) Doe failed to complete a polygraph examination; (2) Doe was charged with domestic battery and possession of marijuana with intent to deliver prior to petitioner's trial; (3) Doe had physically abused his girlfriend on numerous prior occasions; and (4) Doe’s use of steroids had caused him to act erratically. That some of the undisclosed evidence may have been inadmissible at trial did not mean it was not “favorable” given that it could have assisted in gaining admission of critical alternative suspect evidence. First, the undisclosed polygraph evidence would have bolstered a claim by petitioner that Doe was a viable suspect because the circumstances of his avoidance of the exam could be viewed as evasive, and also because the polygraph examiner indicated that Doe was specifically identified as a suspect. The evidence that Doe was charged with domestic battery and had physically abused his girlfriend on many prior occasions could also have been used by petitioner at a pretrial hearing to establish Doe as a viable suspect given that Doe was in the process of renewing his romantic relationship with the victim prior to her death. And the undisclosed evidence of Doe's steroid abuse may have explained his violent outbursts toward his girlfriend and supported an inference of a tendency to act violently toward others. Finally, the undisclosed evidence that Doe had been charged with possession of marijuana with intent to deliver could have been used by petitioner as part of Doe's motive to commit the murder in light of evidence that the victim owed Doe money for drugs.

People v. Williams,
854 N.Y.S.2d 586 (N.Y.A.D. 2008)

In robbery case, defendant “substantially prejudiced” by untimely disclosure of *Brady* materials.

Although victim could not identify robber, defendant was convicted based on testimony of possible accomplice and another witness who defendant and accomplice visited later that day. During cross-examination of police officer, defense counsel discovered defendant and accomplice made statements that had not been disclosed, and prosecution file contained other “potentially exculpatory material.” Motion to dismiss charges based on *Brady* violations denied but trial judge instructed jury it could infer that had additional cross-examination been conducted on one witness, witness would have been “further impeached.” This instruction failed to ameliorate prejudice defendant suffered because jury not informed how witness’s testimony would have been impeached or how it was different than before.

State v. Williams,

660 S.E.2d 189 (N.C.App. 2008), aff’d, 669 S.E.2d 628 (N.C. 2008)

Affirming dismissal of charges in assault on government employee case where government officials destroyed booking photographs taken of defendant in different county before and after the alleged assault and also destroyed a poster that had been made by prosecutors using those same photographs. (After defendant was booked in Stanly County on unrelated charges, he filed a lawsuit against a Stanley County Assistant District Attorney, as well as other Stanly County officials. Defendant was then transferred to Union County, where the alleged assault on an officer occurred. Defendant contended that he had in fact been the victim of assault by Union County officers. Defendant was transferred back to Stanly County where a second booking photo was taken. The photos, according to the captions created by the prosecutors for the poster, showed defendant “before and after” defendant filed his Stanly County lawsuit. The “before” picture showed defendant at the initial booking in Stanly County. The “after” photo showed injuries sustained by defendant during the assault incident in Union County. At the time this all occurred, Union and Stanly Counties were in the same prosecutorial district.) The poster was material because it would have been admissible as impeachment evidence. It was also relevant to any defense that could have been offered, including self-defense. Noting that a judge refused to admit testimony about the contents of the destroyed poster in the unrelated Stanly County trial, the court found defendant was irreparably prejudiced by destruction of the poster and photographs as to the Union County charge.

People v. Uribe,

76 Cal.Rptr.3d 829 (Cal.App. 2008)

In case where defendant was charged with various sexual crimes against his granddaughter, the prosecution violated *Brady* by failing to disclose a videotape of a medical examination of the alleged victim. In the motion for new trial, the defense expert explained how the videotape provided further support for his trial testimony that there was no evidence of penetration, and

contradicted the opinions offered by the prosecution experts. Knowledge of the videotape, which was taken during an examination at a local medical center, was imputed to the prosecution given that the medical center conducted such examination at the initiation of a police officer who was investigating possible criminal conduct. This meant that the medical center was acting on the government's behalf and was part of the prosecution team for *Brady* purposes. The prosecution also had greater access to records generated from the examination given that the examiner, in accordance with law, forwarded the final report to law enforcement.

***State v. Brown,**
873 N.E.2d 858 (Ohio 2007)

Where evidence established defendant was involved in deaths of two victims and the defense theory was that defendant lacked the level of intent needed to establish “prior calculation and design,” the prosecution breached its duty to provide all material evidence when it withheld police reports containing statements implicating other persons in the murders, including statements that someone other than Brown claimed responsibility for the murders. Even though statements were “hearsay and might not be admissible,” they were material because they suggested someone other than Brown “pull[ed] the trigger” which could have impacted the sentencing decision. In addition, trial counsel's decision not to contest Brown's involvement in the murders was based upon the evidence that had been disclosed. Had counsel known that someone else had claimed to have fired the gun that killed the two victims, a different defense strategy may have been employed. Undisclosed police reports “put the reliability of the verdict in question,” and required new trial.

State v. Farris,
656 S.E.2d 121 (W.Va. 2007)

Prosecution's failure to disclose to defendant, who was charged with sexually abusing children in his care, evidence obtained by forensic psychologist during interview with defendant's cousin, that alleged victims' mother had attempted to convince her to falsely accuse defendant of sexual abuse, and that one of the alleged victims had inserted a toothbrush into her own vagina, constituted a *Brady* violation. The undisclosed evidence provided impeachment evidence, supported defendant's claim that alleged victims' mother convinced her children to lie, and provided alternate explanation for physical evidence of vaginal penetration. The knowledge obtained by the psychologist during the forensic examination, conducted at the request of the West Virginia prosecution team investigating sexual abuse allegations against defendant, would be imputed to West Virginia prosecuting authorities.

Ex Parte Elliff,
2007 WL 1346358 (Tex. Crim. App. 2007) (unpublished)

Summarily affirming grant of habeas relief in murder case where prosecution failed to disclose the existence of a witness who possessed information indicating that someone else committed the

offense.

State v. Youngblood,
650 S.E.2d 119 (W.Va. 2007)

Following remand from the Supreme Court for full consideration of defendant's *Brady* claim, defendant's convictions for numerous sexual and weapons offenses are reversed and a new trial ordered based on the suppression of a note that corroborated the defendant's claim that the sexual encounters were consensual and might have impeached the testimony of the alleged victim's friends who denied knowing about sexual activity between the defendant and the alleged victim. Suppression is found given testimony that a police officer read the note and then urged the person who discovered it to destroy it. Although the prosecutor was unaware of the note, a police officer's knowledge of it is imputed to the prosecutor.

Buchli v. State,
242 S.W.3d 449 (Mo. App. 2007)

In murder case, post-conviction relief is granted based on the State's failure to disclose the entire building surveillance tape which would have cast doubt on the prosecution's timeline theory. The complete tape would have provided petitioner "with plausible and persuasive evidence to support his theory of innocence by supporting his theory that he did not have enough time to commit the crime. If believed, this evidence would have established that [petitioner] had only three and a half minutes to club [the victim] nine times with a blunt object, clean any blood from himself, and get down 13 floors to leave the building. Although the jury was free to believe that [petitioner] could have done all of these acts in less than four minutes, [petitioner] conceivably could have used [the complete tape] to persuade the jury that the 'time window' was too brief."

Walker v. Johnson,
646 S.E.2d 44 (Ga. 2007)

In case involving various charges, including kidnaping and robbery, the prosecution violated *Brady* by suppressing taped statements by a witness who explained in detail why she believed the victim had actually set up the crime to recover insurance monies, by the victim, and by the defendant. Although the State did provide a one paragraph reference to the witness's 48-page statement, this did not comply with *Brady* given that these notes "omitted much of the potentially exculpatory material contained in the complete transcript" and incorrectly reported that the witness had offered no justification for her belief that no crimes occurred. "Rather than informing the defense of the substantive nature of [the witness's] statement, there is a significant likelihood that the State's incomplete and inaccurate response to Johnson's discovery and *Brady* motions induced defense counsel to believe either that the taped statements were not in existence or that they contained no information beneficial to the defense." Inconsistencies in the victim's statement would have assisted the defense during cross-examination. Finally, the defendant's statement would have been useful at trial because in it the defendant clearly told the interrogating

officer where he was at the time of the crime and who could corroborate this, which would have contradicted the officer's trial testimony that the defendant never provided him with the names of any alibi witnesses. Suppression of the defendant's statement permitted the prosecutor to argue that the alibi defense was recently fabricated.

Ex Parte Masonheimer,
220 S.W.3d 494 (Tex. Crim. App. 2007)

Double jeopardy under the state and federal constitutions barred a third trial of defendant charged with murder where his prior mistrial motions were necessitated primarily by prosecution's intentional failure to disclose exculpatory *Brady* evidence with the specific intent to avoid the possibility of an acquittal. The defendant contended that he killed the victim, who was his daughter's boyfriend, in self-defense. According to the defense, the victim had grown increasingly aggressive toward the daughter due to his use of anabolic steroids. Suppressed by the prosecution, among other things, was evidence that the victim had a hidden supply of steroids.

Stewart v. Commonwealth,
2007 WL 89476 (Va. App. Jan. 16, 2007) (unpublished)

Brady violation found where prosecution belatedly revealed information about a third party who could have been responsible for the check forgery that the defendant was charged with. Although the information came out during the trial, defense counsel had cross-examined several witnesses and the defendant had already testified in his own defense, "thus potentially compromising whatever alternative trial strategy the evidence might have suggested."

In re Sodersten,
53 Cal.Rptr.3d 572 (Cal.App. 2007)

In murder case where no physical evidence directly implicated petitioner, habeas relief was granted based on the prosecution's failure to disclose "tape-recorded statements of the two key trial witnesses that contained inconsistent statements, as well as admissions of lying and coercive interrogation of one of the witnesses." The evidence was material even though other witnesses placed petitioner at or around the victim's residence before and after her body was discovered, contrary to his alibi, given that the key prosecution witnesses were the only ones who identified petitioner as the victim's attacker/killer. And the fact that one of the suppressed tapes, which was made surreptitiously when petitioner and one of the key witnesses were in custody, included statements by petitioner that conflicted with his trial alibi did not defeat materiality because petitioner offered an explanation for the conflict at the habeas hearing and he could have altered his defense at trial had the tape been disclosed. That petitioner passed away before the court of appeal ruled did not render the proceeding moot given that petitioner spent 20 years in prison for a crime he may not have committed, and the integrity of the judicial system was undermined by the prosecution's actions.

Workman v. Commonwealth,
636 S.E.2d 368 (Va. 2006)

In homicide case where defendant's claim that victim was shot in self-defense depended on the jury believing defendant's assertion that victim's friend had a gun, which the friend denied, *Brady* violation occurred where prosecution failed to reveal that a witness in another case had brought up this case during a police interview and reported having been told that the victim's friend had tried to pass the victim a gun during the altercation and then fled the scene with the weapon. (The police never informed the prosecutor about this statement.) Because the police failed to follow up on this witness's statement, it was material because it would have been a powerful tool to support the defense's contention that the police investigation was inadequate. In addition, once the defense team learned of the statement, the witness was interviewed and he revealed personal knowledge about two recent "shoot outs" involving the victim's friend. The witness also led the defense to someone else who recounted a separate recent shooting by the victim's friend. Thus, even if the first statement was not admissible, it was material because its disclosure would have led to exculpatory admissible evidence. There was no lack of diligence in failing to discover the first statement even though defense counsel happened to interview one of the officers who conducted the witness interview and that officer testified at trial. Under *Strickler*, defendant could not be faulted for relying on the Commonwealth's "open file" response to defendant's discovery motion. Finally, given how recent the new shooting incidents were, the evidence could not be deemed cumulative of evidence at trial about the victim's friend pointing a weapon at a Deputy Sheriff four years earlier.

People v. Harris,
825 N.Y.S.2d 876 (N.Y. A.D. 2006)

Summary reversal of attempted murder and robbery convictions where prosecution failed to disclose exculpatory material obtained by an investigator for the Monroe County District Attorney and the subject material was *Brady* material because it affected the credibility of a key prosecution witness. "Reversal of defendant's judgment of conviction is required, moreover, because defendant made a specific request for such material and 'there is a "reasonable possibility" that, had that material been disclosed, the result would have been different'"

***Riddle v. Ozmint,**
631 S.E.2d 70 (S.C. 2006)

In case where the capital conviction rested almost entirely on the testimony of petitioner's mentally retarded younger brother, the prosecution violated *Brady* by failing to disclose a statement made by the brother close to a year after his original statement which contained major inconsistencies and the fact that three days before trial, the officers took the brother to the scene for a re-enactment. Evidence about the trip would have underscored the defense position that the brother was unreliable and needed to be coached. The lower court's finding that the defense could have found the statement by interviewing the officer who took it is rejected as "unrealistic"

and not what *Brady* requires. The lower court also erred in finding that the defense could have discovered the information through the prosecution's "open-file" policy, given that the prosecution routinely removed work product and other information on a "case-by-case" basis. In addition, because the trip occurred only three days before trial, this further hindered any attempt, even if required, to discover it. Finally, the brother testified that he had made no statements or had any contact with officers after his first statement, and the prosecutor let this testimony go uncorrected. The lower court was wrong to accept the State's assertion that the brother simply must not have understood the question or not recalled the events.

State v. Williams,
896 A.2d 973 (Md. 2006)

In murder case where key prosecution witness was a jailhouse snitch, a *Brady* violation occurred by the suppression of evidence that the snitch was a paid informant and that he was seeking leniency in another case based on his testimony in petitioner's case, contrary to his claim on the stand that he was testifying against petitioner solely because it was the right thing to do. Although the particular Assistant State's Attorney prosecuting petitioner was unaware of this information, *Brady* mandated "that, under the circumstances of this case, the State's duty and obligation to disclose exculpatory and mitigating material and information extend beyond the individual prosecutor and encompass information known to any prosecutor in the office." Defense counsel could not be blamed for failing to discover the impeachment evidence given that the snitch's status as a paid informant could only have been revealed by the prosecution or the police. That defense counsel had conducted a "superb" cross-examination of the snitch failed to render the suppressed impeachment evidence immaterial.

Sykes v. United States,
897 A.2d 769 (D.C. 2006)

Defendant convicted of robbery-murder and other charges was entitled to a new trial based on the prosecution's failure to timely provide grand jury testimony of two witnesses, who were unavailable at the time of trial, which directly contradicted the confidential informant's testimony with respect to defendant's alleged express and adoptive admissions. That the defendant was permitted to introduce portions of the grand jury testimony did not cure the error because the prosecutor was able to suggest that the witnesses had not been truthful before the grand jury and the jury was not able to observe the witnesses's demeanor and make a credibility determination.

State v. Anderson
2006 WL 825270 (Ohio App. Mar. 31, 2006) (unpublished)

DUI charges properly dismissed where defendant requested that videotapes taken of him and his interaction with police be preserved and the State destroyed them. Due to the specificity of defendant's request, State is found to bear the burden of demonstrating that the evidence would have been wholly inculpatory, which it could not. In addition, the destroyed videotapes would

have resolved several matters in dispute and provided the only possible impeachment of the officers.

***Simpson v. Moore,**
627 S.E.2d 701 (S.C. 2006)

In case involving charges of robbery-murder at a convenience store, the prosecution's failure to disclose that a bag of money was found behind the counter violated *Brady*. One victim/witness testified that after some shots were fired, petitioner took money from the cash register. Petitioner claimed that he "chickened out" of the robbery, only shot the owner after the owner accosted petitioner, and did not take any money from the store. The bag of money at the crime scene was determined to be critical evidence regarding the robbery charge/aggravator. A new trial was ordered on the robbery charge, with a resentencing to follow based on the outcome of that retrial.

State v. Larkins,
2006 WL 60778 (Ohio App. Jan. 12, 2006) (unpublished)

Indictment on robbery charges is dismissed where defendant's initial conviction was overturned based on the State's failure to disclose a wealth of *Brady* material and the defendant now would be unable to use the information that had been suppressed because eight defense witnesses were now deceased and 10 had no known address.

State v. Scheidel,
844 N.E.2d 1248 (Ohio 2006)

In prosecution for kidnaping, rape and attempted rape, the prosecution violated *Brady* by suppressing notes from an interview with the child victim before trial, in which the child stated that defendant did not penetrate her vagina. Materiality is found even though the notes did not constitute a "statement" by the victim and despite a clear description by the child of the rape to a nurse, evidence of vaginal scarring, and testimony by a friend of the defendant who claimed on one occasion to have walked into the child's room and discovered the defendant with his pants down standing over the bed of the naked, crying child.

Commonwealth v. Lykus,
2005 WL 3804726 (Mass. Super. Dec. 30, 2005)

In kidnaping and murder case where evidence against defendant included dye from ransom money that was found in his car and on his belongings, same kind of bags that ransom money was in were found in his truck, bullets in victim were consistent with those fired from his gun, and several witnesses identified his voice on tapes demanding ransom money, a *Brady* violation is found from the Commonwealth's failure to disclose FBI lab reports indicating that defendant's voice could not be conclusively established to be the voice on the tapes. Although the prosecutor had requested production of this evidence, supervisors at the FBI specifically directed agents not

to produce it. The suppression of the lab reports is nonetheless imputed to the Commonwealth because the FBI had been “intimately involved” in the investigation of the case. Even if the suppression could not be imputed to the Commonwealth, the lab reports would then be considered newly discovered and still provide grounds for a new trial given that the voice identification was a “major component” of the case against defendant.

***Schofield v. Palmer,**
621 S.E.2d 726 (Ga. 2005)

Despite the existence of “considerable” evidence implicating petitioner in the murders of his estranged wife and step-daughter, habeas relief was required based on the prosecution’s suppression of evidence that the Georgia Bureau of Investigation had paid a witness \$500 for providing information implicating petitioner. Petitioner’s nephew testified that he went to the victims’s home with petitioner, cut the phone lines at petitioner’s request, and petitioner then kicked in the door and shot the victims. The defense theory was that the nephew alone was responsible for the crime. The witness at issue testified to seeing petitioner’s car parked in the location described by the nephew. Evidence of the payment was material because it provided a basis for impeaching the witness. Suppression of the evidence provided cause to overcome the procedural default of the claim.

People v. Proventud,
802 N.Y.S.2d 605 (N.Y. Sup. 2005)

In attempted murder case, prosecution violated *Brady* by failing to disclose that the victim identified defendant’s brother in a photo array and wrote down “looks like him.” Notably, the conduct of the jury during trial indicated that identification was a major issue. Relief was required despite the fact that the identification was tentative and that defendant’s brother was incarcerated at the time of the crime.

People v. Blackman,
836 N.E.2d 101 (Ill. App. 2005)

State violated *Brady* when it failed to disclose the payment of \$20,000 in relocation expenses to a witness where the witness in question was one of only two to put defendant at the scene and the only one who was not chemically impaired at the time. Nondisclosure of information prevented defendant from the impeaching witness and making a knowing choice of jury trial over bench trial. Court’s offer of continuance following disclosure of information insufficient to cure error.

Robinson v. Commonwealth,
181 S.W.3d 30 (Ky. 2005)

Napue violation occurred at the sentencing proceedings following defendant’s conviction for various drug offenses when the parole officer erroneously testified that good time credits would

be factored into the parole eligibility date and the prosecutor not only failed to correct this incorrect information in his argument to the jury, but relied heavily on the parole officer's testimony in arguing that the jury should impose the maximum penalty.

People v. Garcia,

2005 WL 2387474 (Cal. App. Sept. 29, 2005) (unpublished)

In attempted murder case, the prosecution's failure to disclose a letter requesting leniency for a witness for his participation in the case and requesting his placement in a witness protection program, when considered in combination with misconduct by the prosecutor during argument, justifies a new trial. At trial, the witness had claimed that he was testifying because he received a deal that released him from juvenile hall. The lead investigator testified that the State had requested leniency for the witness in a separate case. With regard to another witness, the investigator testified that she was absolutely sure of her photo identification while the witness said she had equivocated. It is found that the suppressed information would have assisted in the impeachment of one witness and also have damaged the credibility of the investigator with regard to the disputed circumstances of the other witness' photo identification.

Bowlds v. State,

834 N.E.2d 669 (Ind. App. 2005)

In case of criminal recklessness resulting in serious bodily injury, the prosecution's suppression of three police reports violated *Brady*. The reports included information about the arrest of another suspect matching the description of the assailant, incriminating statements by another person present at the scene, hearsay statements regarding culpability of a third possible suspect, and prior-conviction impeachment material concerning two witnesses who identified petitioner in a lineup.

***McCarty v. State,**

114 P.3d 1089 (Okla. Crim. App. 2005), cert. denied, 126 S.Ct. 660 (2005)

Post-conviction relief granted in rape-murder case because of the conduct of forensic analyst Joyce Gilchrist, who withheld evidence, most likely destroyed exculpatory evidence, provided flawed analysis and documentation, testified in a manner that exceeded the limits of forensic science, and altered lab reports to avoid detection.

***Tillman v. State,**

128 P.3d 1123 (Utah 2005)

Petitioner was entitled to relief from his death sentence where, following conclusion of federal habeas proceeding and while execution date was active, petitioner discovered partial transcripts

of pre-trial interviews conducted with state's star witness. Because the State had affirmatively represented that no recordings of interviews had been made, petitioner was not under an obligation during the first round of post-conviction proceedings to have found them and petitioner demonstrated good cause under state common law to overcome the procedural default of his *Brady* claim. The key witness, who was present at the crime scene, was granted complete immunity and presented the only evidence against petitioner. The transcript contained indications that the witness was not as certain about the sequence of events as she was at trial; evidence that an officer was attempting to coach her testimony; inappropriate laughter when recounting details of the gruesome murder; and evidence that petitioner was suicidal prior to the incident. The evidence was material as to the sentence because discrepancies, coaching, and laughter tended to decrease the witness's credibility and therefore could have increased the jury's perception of her moral culpability. If the witness was more culpable than she indicated, the State's attempt to portray her as an innocent victim under the sway of petitioner would have been undermined. An increase in her moral culpability could also have underscored to the jury the disparate treatment of granting the witness full immunity while sentencing petitioner to death. Evidence of petitioner's suicidal ideation was found to be mitigating.

***Floyd v. State,**
902 So.2d 775 (Fla. 2005)

In robbery-murder case with an African-American defendant, prosecution violated *Brady* by suppressing statements of a neighbor who saw two white men park their truck in the victim's driveway and enter the victim's house, heard "scrambling" noises while the men were inside, and saw the men leave hurriedly, all within the time period the medical examiner had estimated as the time of death. This was *Brady* evidence particularly when combined with other evidence in police reports that was inconsistent with the State's presentation at trial, including inconsistencies in reports of pry marks on interior window frames, and arguments regarding the presence of Negroid hair on the victim's sheet despite the fact that the bed was made at the time of the crime. Also suppressed were letters written by a jailhouse snitch seeking a bonus for his help. The court found that the *Brady* evidence warranted relief, despite the fact that it did not amount to "irrefutable evidence" or "smoking gun" for innocence. (The evidence against the defendant included his ownership of a coat which contained a sock with the victim's blood on it and his having cashed a check belonging to the victim.)

Prewitt v. State,
819 N.E.2d 393 (Ind. App. 2004)

In murder case involving the death of the defendant's husband, who the defendant claimed she found dead in the bathroom with a gunshot wound in the head after she awoke from a blackout, the prosecution violated *Brady* by suppressing evidence that could have supported a third party guilt defense. Without the evidence, the only available defense had been suicide. A State detective had indicated that there was no exculpatory evidence, but withheld the following information: (1) the known presence of defendant's son at the crime scene during a key time

period coupled with statements that he went by a witness's house and said that he would be going to California if something happened that night and then left a blood trail from there back to the bar where he was later seen; (2) a witness's statement that the son and a friend moved the victim's body, which was consistent with crime scene evidence; and (3) witness statement that the son had hired him to beat up the victim. The defendant was not guilty of lack of due diligence in obtaining this information because the State had misrepresented the status and results of its investigation. Although the body moving evidence was not independently material, it was found to fall under *Brady* as a part of a cumulative analysis.

***Mordenti v. State,**
894 So.2d 161 (Fla. 2004)

In murder-for-hire case where the prosecution's case turned almost completely on the testimony of petitioner's former wife, the prosecution violated *Brady* by failing to turn over the ex-wife's date book which contradicted part of her testimony and affected the credibility of other parts of her testimony. In addition, an entry on the date of the murder implicated the ex-wife's then boyfriend in the killing. The prosecution also violated *Brady* by failing to turn over the results of an interview with the lawyer who had represented the victim's husband who had been charged with hiring petitioner to commit the murder. (The victim's husband had committed suicide prior to trial and the trial court, unbeknownst to defense counsel, issued an ex parte order finding that the attorney-client privilege no longer applied and ordering the attorney to submit to an interview with the State.) The attorney revealed in the interview that petitioner's ex-wife and the victim's husband had had an affair and the victim's husband believed that the ex-wife had orchestrated the murder. The victim's husband had also claimed that a phone call to petitioner on the day of the murder was related to business and had been set up by the ex-wife. This was consistent with petitioner's explanation about the call. Even if the attorney's testimony was inadmissible hearsay, it was nevertheless material because it would have led defense counsel to discover evidence for impeaching the ex-wife. Further, the testimony may have been admissible for impeachment purposes. "Cumulatively, the total picture in this case-the State's *Brady* violations in failing to disclose [the ex-wife's] date book and the undisclosed information obtained from [the attorney's] interview with the State, in addition to other *Brady* violations where the State failed to disclose information obtained from interviews with key witnesses coupled with misrepresentations by the prosecutor-compels us to grant Mordenti relief in the instant case."

Herndon v. Commonwealth,
2004 WL 2634420 (Ky. App. Nov. 19, 2004) (unpublished)

In sexual abuse case, investigating detective is found to have lied in order to mislead the jury.

Commonwealth v. Vettraino,
2004 WL 2320319 (Ky. App. Oct. 15, 2004) (unpublished)

Grant of post-conviction relief upheld where detective remained silent when prosecution argued that petitioner's defense – that he only shot the two victims after the surviving victim raised his arm revealing a silver gun – was unbelievable because no such gun was found at the crime scene. In fact, the detective had discovered a silver gun in the male victim's night stand. By smelling and examining it, the detective concluded it hadn't been fired. He also found it to be irrelevant because he saw no blood trail leading from the kitchen, where the shooting occurred, to the night stand. The evidence was material because defense counsel would have tested for blood between the kitchen and night stand.

State v. Johnson,
599 S.E.2d 599 (N.C. App. 2004)

Trial court erred in violation of defendant's rights under *Brady v. Maryland* in this sexual offenses case when it failed to order that defendant be provided with Department of Social Service records concerning the minor victim which indicated: (1) the victim's brother had a history of physical violence; (2) the victim and her brother suffered yeast infections at the same time; (3) the victim and her brother were sometimes left in the house alone together; (4) the victim admitted lying to a social worker on one occasion about injuries; and (5) the victim's mother believed that she could have caused at least one of the victim's injuries.

State v. Martinez,
86 P.3d 1210 (Wash. App. 2004)

Prosecution violated *Brady* by withholding an exculpatory police report until shortly before it rested its case. "The State prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial is . . . so repugnant to principles of fundamental fairness that it constitutes a violation of due process." Defendant had been charged with being an accomplice to numerous crimes. The actual perpetrators claimed that defendant had been the mastermind and had provided them with the two guns used in the offense – one black, one silver. A co-worker of defendant was shown a line-up of guns and picked out the guns recovered by the perpetrators as the guns shown to her by defendant in December 1999 which he had offered to sell to her. What the prosecution failed to reveal until well into the trial was a police report establishing that the silver gun had been owned by a third party who had not reported it stolen until October 2000. Thus, the silver gun earlier possessed by defendant, which he had reported stolen in the summer of 2000, could not have been the gun recovered by one of the perpetrators. On this record, where the jury hung 10-2 in favor of acquittal, the appeals court concludes that the trial court did not abuse its discretion in dismissing the refiled charges as a sanction for the prosecution's misconduct.

State v. Hill,
597 S.E.2d 822 (S.C. App. 2004)

Trial court erred as a matter of law in holding that *Brady* and the state discovery statute did not apply in probation revocation proceedings. The Probation Department was required to disclose exculpatory documents in the possession of investigating agencies, even though it was a separate entity from those agencies. The suppressed evidence was found to be material even though it had been considered during a motion for reconsideration that was denied. The court reasoned: "Having already found Hill violated his probation and having imposed a sentence, we believe it would have been difficult for the court to be completely objective during the subsequent proceeding." Further, Hill was denied the opportunity to thoroughly cross-examine the witnesses when armed with full information.

State v. Bright,
875 So.2d 37 (La. 2004)

Second degree murder conviction reversed where prosecution suppressed evidence of its key witness's criminal history, including the fact that he was on parole at the time of his identification of petitioner, and could have been subject to parole revocation due to his drinking at the time of the offense. In concluding that the suppressed evidence was material the court noted that no physical evidence or other witnesses implicated petitioner, and the defense alibi witnesses had been impeached by their prior criminal convictions.

State v. White,
680 N.W.2d 362 (Wisc. App. 2004)

In armed robbery case, petitioner was entitled to post-conviction relief based on the prosecution's failure to disclose the probationary status of the alleged victim/key prosecution witness. While the alleged victim, who was a store clerk, claimed that petitioner robbed him at gunpoint, petitioner testified that the alleged victim had willingly given him money from the cash register to compensate petitioner for a shortfall in a prior marijuana purchase. Although the jury did learn that the witness had a prior conviction, there was a reasonable probability of a more favorable verdict had the jury been given evidence showing a possible motive for the witness to shape his testimony, i.e., to avoid having his probation revoked.

People v. Richardson,
2004 WL 1879506 (Cal.App. 2004) (unpublished)

In case where defendant was charged with, among other things, resisting arrest and battery on peace officers, the prosecution violated *Brady* by failing to disclose a complaint against one of the arresting officers alleging that the officer used excessive force in arresting the complainant.

This was material because it supported defendant's contention that the same officer used force on him, without provocation, and then falsely claimed that the force was justified by defendant's conduct. That the complainant recanted his story when ultimately interviewed by the defense did not defeat the *Brady* claim.

People v. Stein,
2004 WL 1770418 (N.Y.A.D. 2004)

Defendant who had been convicted of numerous sexual offenses, as well as endangering the welfare of a child, was entitled to a new trial based on the prosecution's failure to disclose that two of the complainants had filed notices of civil claims against defendant's employer, a school district, attempting to hold it responsible for defendant's alleged criminal conduct. Evidence of the civil claims was highly relevant to the issue of the complainants' credibility. The failure to disclose this evidence was aggravated by the prosecutor's argument during summation that there was no evidence that the complainants were bringing civil lawsuits.

Commonwealth v. Adams,
2004 WL 1588108 (Mass. Super. 2004)

Petitioner who had been convicted of murder and robbery was entitled to a new trial based on the prosecution's suppression of evidence including the prior criminal records of Commonwealth witnesses, and police notes and reports showing prior inconsistent statements of a key Commonwealth witness.

Toro v. State,
2004 WL 1541917 (R.I.Super. 2004) (unpublished)

Under Rhode Island's "variable standard for applying *Brady*," a new trial is granted automatically where there was a deliberate failure to disclose by the state regardless of the degree of harm. Here, defendant was entitled to a new trial based on an investigating officer's failure to disclose to the defense that an uninterested witness claimed that a key prosecution witness had admitted to him that he had not actually seen defendant commit the murder. That the prosecutor was ignorant about this new witness was irrelevant, as was the alleged "good faith" of the officer who claimed to have withheld the information because he concluded it was not credible.

Babich v. State,
2004 WL 1327986 (Minn. App. 2004) (unpublished)

In drug sale and possession case, prosecution violated *Brady* by failing to disclose the full statement of the key witness which contradicted trial testimony by the witness and a police officer claiming that the witness had not mentioned petitioner's drug activities during an initial interview. The full statement was also exculpatory in that it contained a basis for suggesting that someone other than petitioner could have had exclusive control over the methamphetamine

petitioner was charged with possessing and selling.

Williams v. State,
831 A.2d 501 (Md. App. 2003)

Brady violation is found in homicide case where the prosecution failed to disclose that jailhouse snitch was a paid police informant for a drug unit, that he received benefits in criminal cases because of his assistance to the drug unit, and that he had requested leniency from the judge in a pending criminal case based in part on his testimony against petitioner. Although neither the trial prosecutor nor the homicide investigators were aware of this information, under the circumstances of this case – which included the fact that a judge had notified the prosecutor’s office of the informant’s requests for leniency – the appeals court finds that "it is not unreasonable to charge the prosecution with knowledge of impeachment information about [the informant] that, in violation of *Brady v. Maryland*, it failed to divulge to appellant's counsel." The court explained: "When, as here, there is an obvious basis to suspect the motives and credibility of a proposed witness for the State, it may be incumbent upon the State's Attorney, in an office with many Assistant State's Attorneys, to establish a procedure to facilitate compliance with the obligation under *Brady* to disclose to defense material that includes information ‘casting a shadow on a government witness's credibility[.]’ Moreover, the police officers who are part of the prosecution team should be required to make some investigation into the background of the jailhouse snitch." (Footnote and citation omitted.) In finding that the undisclosed information was material, the court pointed out that the snitch provided direct evidence against petitioner and that the only other direct evidence was from a witness whose testimony was confused and contradictory.

People v. Stokes,
2003 WL 22707339 (Cal. App. 2003) (unpublished)

Defendant was denied a fair trial in case involving charges of sexual offenses where the prosecution failed to disclose a lengthy police report until nearly a year after the alleged victim’s conditional examination and the report contradicted some of the testimony given by the alleged victim during the examination. Because the victim died prior to trial, the conditional examination was offered into evidence and defendant was unable to cross-examine the witness about the police report.

State v. Larkins,
2003 WL 22510579 (Ohio App. 2003) (unpublished)

In robbery-murder case where no physical evidence linked defendant to the crime, the trial court properly found a *Brady* violation by the prosecution’s failure to disclose, inter alia, that: (1) a witness’s description of the assailant who was allegedly defendant, i.e., "Road Dog," did not match defendant; (2) this same witness claimed "Road Dog" and the codefendants were at his home at a time when a trial witness stated she was with defendant; (3) another witness provided a

statement which contradicted some trial testimony, implicated a third party as being "Road Dog," and provided a possible alibi for defendant; (4) all the eyewitness descriptions obtained from people present at the crime scene differed from defendant's appearance; and (5) the testifying co-defendant lied when asked if the prosecution had promised her anything in exchange for her testimony and about her past criminal convictions.

Ex Parte Molano,

2003 WL 22349039 (Tex.Crim.App. 2003)

In case involving conviction for bodily injury to a child, record supported trial court's grant of relief on *Brady* claim. Although there was no intentional suppression by the trial prosecutors, police agencies and other prosecutors in the same office were aware of written statements by witnesses that would have impeached two of the trial witnesses and supported the defense.

People v. Lee,

2003 WL 22100843 (Cal.App. 2003) (unpublished)

The prosecution violated *Brady* by failing to disclose a dispatch tape containing a description of the suspect that did not match defendant. Although defendant was aware of the description because it was mentioned in a police report, and the names of officers from various jurisdictions were included in that report, defense counsel had been unable to find the source of the description and so was without admissible evidence on this issue. Once he received the dispatch tape, after defendant had been convicted, defense counsel was able to identify the officer and obtain favorable testimony. The court rejects the State's argument that it met its *Brady* obligations by giving defendant notice of the description and names of possible sources. "Respondent's position here would support a prosecutor's disclosure of exculpatory statements, and a list of names of possible witnesses, accompanied by a deliberate refusal to divulge which, if any, of the listed witnesses made the exculpatory statements. This turns the important constitutional mandate of *Brady* into a childish game of hide-and-seek. Reasonably diligent defense counsel should be able to operate under the assumption that the prosecutor has complied with *Brady* at least to the extent of disclosing evidence of exculpatory statements made by police officers that were part of the investigative team in the case being prosecuted."

***Head v. Stripling,**

590 S.E.2d 122 (Ga. 2003)

In Georgia capital case, the prosecution violated *Brady* by failing to disclose petitioner's confidential parole records for his prior convictions, where the records revealed that State officials and petitioner's mother had characterized him as mentally retarded, that a State official characterized an above-average IQ test result as "questionable," and that petitioner had sub-70 IQ score on another IQ test taken when he was 16 years old. Such evidence was material given the prosecution's assertion at trial that petitioner had recently concocted his mental retardation claim, and the prosecution relied on the above-average IQ test score as direct evidence of his actual

intelligence. That the State had an alleged good motive in keeping the records from petitioner – the statutorily-imposed confidentiality of parole files – was irrelevant to the *Brady* claim. A state statute regarding parole file confidentiality cannot trump a capital defendant's constitutional rights.

State v. Bennett,
81 P.3d 1 (Nev. 2003)

The prosecution committed a *Brady* violation where it failed to disclose a statement by a jailhouse informant that the co-defendant had admitted that he planned the murder of the victims during the robbery and had convinced petitioner to do the killing. Although the statement was obtained after the jury returned a death verdict against petitioner, it was before formal sentencing and its revelation to petitioner when it was obtained would have entitled petitioner to a new penalty hearing. The statement was favorable at the sentencing stage in that: (1) it was relevant to refute the aggravating circumstance that the murder was random and without apparent motive; and (2) it provided mitigating evidence by characterizing petitioner as a follower who was convinced by the co-defendant to participate. In finding a reasonable probability of a more favorable result had the information been disclosed, the court notes that the statement corroborated petitioner's contention that he had fallen under the influence of the co-defendant who had planned the crime, and that the prosecution also failed to disclose the prior criminal history contained in the co-defendant's juvenile records from Colorado, and the fact that a prosecution witness had been a paid informant in Utah.

State v. Greco,
862 So.2d 1152 (La. App. 2003)

In non-capital robbery-murder case where the defendant had claimed self-defense, the trial court did not abuse its discretion in finding that the defendant was entitled to relief based upon the recantations of two prosecution witnesses and their claims that law enforcement officers and the prosecutor's investigator suborned perjury. The witnesses testified in post-conviction proceedings that the prosecution's key witness was the one who stated he planned to "roll" the victim, and that they had falsely attributed the remark to defendant at trial because of threats by authorities. The credibility of trial testimony by the officers regarding the circumstances of taking defendant's confession, in which a detective admitted paraphrasing certain statements and omitting others, was sufficiently undermined and called into doubt the validity of other statements and the confession, thus entitling defendant to a new trial.

Brownlow v. Schofield,
587 S.E.2d 647 (Ga. 2003)

Prosecutor violated *Brady* in child molestation case by failing to reveal that during an interview 10 days before trial the alleged victim shook his head negatively when asked by the prosecutor whether the defendant had committed oral sodomy on him. The trial court erred in denying relief on the ground that the prosecution had disclosed to the defense similar and more weighty

exculpatory evidence, i.e., a videotape of an earlier interview with the alleged victim in which he denied that any improper touching occurred. Given that the only evidence of defendant's guilt was the alleged victim's trial testimony claiming oral sodomy had occurred, there was a reasonable probability of a more favorable verdict on that count had the prosecutor disclosed the second denial.

People v. Kazakevicius,

2003 WL 21190612 (Mich.App. May 20, 2003)(unpublished)

In case involving charges of criminal sexual conduct, a *Brady* violation occurred when the prosecution effectively suppressed the alleged victim's counseling records that "could be read to indicate that the victim had suppressed her memories of the alleged sexual abuse for several years; that it was through counseling that these memories resurfaced; that the victim still did not have a complete memory of what allegedly happened; and that the victim's memories may have been triggered by a form of hypnosis during counseling." (The records were in the possession of the prosecution and the trial court denied defendant's request for in camera review of the records.) The counseling records were material given that the victim's testimony was the principal evidence against defendant, and the counseling records "would have allowed defendant to explore possible alternative explanations for the origin of the allegations of sexual abuse, including whether they were the product of outside influences affecting both the reliability of the allegations and the credibility of the victim."

State v. VanWinkle,

2003 WL 1798945 (Neb.App. April 8, 2003)(unpublished)

In case involving charges of burglary and criminal mischief, the prosecution violated *Brady v. Maryland* when it suppressed a letter written by its key prosecution witness – who was the alleged accomplice– which stated that defendant was innocent of the crimes. The fact that the information was not sought by Van Winkle through a discovery request was irrelevant. And the letter was not cumulative to other evidence which also impeached the alleged accomplice. "The fact [the alleged accomplice] was impeached to a degree by evidence that he had lied when he accused VanWinkle of another similar crime in Palmer, that he was an unwilling witness testifying under the threat of prosecution for additional crimes, and that he had told [another person] that VanWinkle was not there is not the same as a written statement to the prosecutor that [the alleged accomplice] was lying when he accused VanWinkle of the crime."

Keeter v. State,

105 S.W.3d 137 (Tex. App. 2003)

In case involving charges that defendant sexual abused his stepdaughter, his claim of *Brady* error was properly preserved through his amended motion for new trial which was accompanied by an affidavit from the victim's stepmother stating that the victim had changed her story so many times that she was not believed by the stepmother, and that the prosecutor told the stepmother

that she would not be called as a witness in light of her disbelief of the victim. Based on the evidence presented at the hearing on the motion for new trial, it is found that the prosecution suppressed favorable evidence that neither the victim's father nor her stepmother believed the victim, that they thought she was a constant liar, and that the victim had made contradictory statements to them about defendant. This evidence was material given that the case against defendant rested on the testimony of the victim, and the suppressed evidence could have raised doubts about the victim's credibility. The court squarely rejects the argument that the evidence did not have to be disclosed because it could have been discovered by defense counsel acting with due diligence. "The cases do not hold that the prosecution is relieved of its duty under *Brady* to disclose exculpatory evidence when defense counsel (a) knows or should know a witness exists, and (b) might discover the exculpatory evidence if defense counsel asks the right questions of the witness. Implementation of such a rule could effectively undermine *Brady* because it would almost always relieve the prosecutor of disclosing *Brady* information."

State v. Lindsey,
844 So.2d 961 (La.App. 2003)

In homicide case where the defense at trial centered on petitioner's intoxication, the prosecution violated *Brady* by failing to reveal that two witnesses who testified to petitioner's sobriety at trial had previously stated that he was intoxicated at the time of the shooting. Although petitioner's trial counsel could not be found, and so there was no definitive proof that the prior statements had not been disclosed to him, the appellate court rejected the trial court's conclusion that petitioner had failed to meet his burden of establishing suppression. The trial prosecutor, who had not been on the case throughout the proceedings, testified that she would have turned over the statements had she been aware of them. Given that defense counsel presented an intoxication defense but did not impeach the witnesses with the prior statements, the prosecutor presumed that defense counsel did not receive the statements. Further, the prosecution's file indicated that the State's answer to discovery was that the defense was not entitled to the witnesses' statements. Finally, the suppressed statements were material under *Brady*, contrary to the finding of the trial court.

Hutchison v. State,
118 S.W.3d 720 (Tenn. Crim. App. 2003)

In burglary and assault case, the trial court did not err in considering a claim of *Brady* error that was raised after the statute of limitations had run in light of its finding that petitioner Harper had raised the claim within one year of learning about the existence of an exculpatory FBI report indicating that petitioner Hutchinson's tools had not been used in the burglary. The trial court also properly permitted the petitioners to amend their petitions, despite a limited remand from the appellate court, given the discovery of additional exculpatory evidence. Evidence supported the trial court's finding that the state, acting in good faith, unintentionally failed to disclose exculpatory material, i.e., the FBI report and a statement by a witness which would have lent some support to the defense theory that the assault was committed by the victim's cousin and

was unrelated to any burglary. The grant of post-conviction relief on the claim of *Brady* violations is affirmed.

Harrington v. State,
659 N.W.2d 509 (Iowa 2003)

Approximately twenty-five years after his murder conviction, petitioner was granted post-conviction relief based on the suppression of police reports that provided "abundant material for defense counsel to argue that [a third party] had the opportunity and motive to commit the crime." Although trial counsel had some information about a suspicious third party, he was denied "the 'essential facts' of the police reports so as to allow the defense to wholly take advantage of this evidence." In order to show materiality petitioner was not required to establish that the police reports would have "led to evidence that someone else committed [the] crime." If the evidence would create a reasonable doubt about the petitioner's guilt, "it is material even if it would not convince the jury beyond a reasonable doubt that [the third party] was the killer."

People v. Martinez,
103 Cal.App.4th 1071 (Cal.App. 2002)

Habeas relief granted where prosecution failed to investigate and confirm allegations that critical prosecution witness had prior felony convictions that had been expunged and also failed to reveal that charges were pending against the witness at the time of trial.

Ramirez v. State,
96 S.W.3d 386 (Tex.App. 2002)

In "official oppression" prosecution, State's knowing use of false and misleading testimony by key witness against defendant entitled him to a new trial. The State violated the *Mooney-Pyle-Napue* line of cases by permitting the witness to testify that her contact with an attorney was not about seeking money, even though the prosecution was aware that a civil suit had been or soon would be filed by that attorney against the city. That the witness did not know that the lawsuit had actually been filed at the time she testified was irrelevant since the State knew that the testimony was false or misleading.

***Ex parte Richardson,**
70 S.W.3d 865 (Tex. Crim.App. 2002)

Capital conviction and death sentence reversed based on prosecution's suppression of a diary kept by one of the police officers who was guarding the State's sole eyewitness to the crime. The diary revealed the officer's belief that the witness was not a truthful person, and also identified five other members of the protective team who harbored the same opinion. In finding the suppressed evidence material, the appeals court notes that the eyewitness's credibility was the key issue, and when her credibility was successfully challenged at the separate trials of the two co-defendants, both were acquitted. Although petitioner did challenge the witness's credibility at

the time of his own trial, "nothing that [petitioner's] attorney presented . . . could compare with a parade of six law enforcement officers testifying that, in their opinion, [the purported eyewitness] was not a credible witness and not worthy of belief under oath."

Nickerson v. State,
69 S.W.3d 661 (Tex.App. - Waco 2002)

Murder conviction is reversed due to prosecution's untimely disclosure of a videotape showing defendant's bizarre behavior in jail prior to trial. (The tape was revealed for the first time during the punishment phase of the proceedings.) It was clearly favorable to an insanity defense, which defendant had considered raising, and it was undisputed that the tape was in the possession of agents acting on behalf of the State. In light of the uncertainty regarding defendant's sanity, his personal "knowledge" of the taped event had no bearing on what his attorney should have known. The tape was deemed "material" given that two mental health experts expressed strong reservations about their initial sanity diagnoses after their review of the videotape, and despite the fact that two experts presented by the prosecution did not believe that the tape established defendant's insanity at the time of the crime.

***Conyers v. State,**
790 A.2d 15 (Md. 2002)

Post-conviction relief granted regarding capital conviction and death sentence where the State suppressed evidence that the jailhouse snitch requested a benefit when he first approached the police and that he refused to sign his written statement absent such a commitment. That the jury was aware that the informant later received a plea agreement in return for his testimony against defendant did not vitiate the State's error in withholding the other evidence. The suppressed evidence is found to be material for a number of reasons, including: (1) the snitch was a key witness as to defendant's principalship in the murder and principalship directly governed eligibility for the death penalty; and (2) the prosecution emphasized the snitch's credibility in argument.

Hensley v. State,
48 P.3d 1099 (Wy. 2002)

Where the state suppressed evidence which could have been used to impeach a confidential informant, the Court held that such evidence was material and warranted a reversal of the defendant's conviction. The evidence at issue was an audio recording of the informant allegedly using methamphetamine, which was inconsistent with her testimony that she was addressing her addiction and only used methamphetamine once during the two years that she worked for the government.

***Martin v. State,**
839 So.2d 665 (Ala. Crim. App. 2001)

Post-conviction relief granted to Alabama death row inmate in light of prosecution's suppression of several pieces of material evidence. The undisclosed evidence included: (1) the fact that the sole eyewitness to defendant's presence near the crime scene had undergone hypnosis; (2) a statement made by the sole eyewitness while under hypnosis; (3) a description of the perpetrator (which did not match defendant) and an identification of someone other than defendant at a pretrial lineup by a witness who testified at trial she was unable to identify the perpetrator because she had been focused on the gun; (4) the presence of unidentified fingerprints on evidence related to the murder; and (5) a suggestive photo array regarding defendant's car.

Hoffman v. State,
800 So.2d 174 (Fla. 2001)

Where the state failed to disclose results of scientific hair analysis which excluded petitioner, codefendant and male victim as the sources of hairs found in the female victim's hands, petitioner was prejudiced. In addition, under circumstances where another person also confessed to the crime, the state's failure to disclose information regarding the existence of other suspects prejudiced petitioner.

State v. Barber,
554 S.E.2d 413 (N.C. 2001)

Due process violation found where prosecution failed to disclose telephone records that were not merely corroborative, but rather lent crucial factual support to a defense witness whose credibility was questioned by the prosecution. Evidence proffered by the petitioner to establish materiality included affidavits from two jurors confirming that, had the phone records been introduced at trial, it "would have" and "could have" affected the verdict.

Atkinson v. State,
778 A.2d 1058 (Del. 2001)

Defendant's conviction of attempted unlawful sexual intercourse second degree and related charges was reversed due to the state's failure to disclose notes of witness interviews done by an investigating prosecutor until that prosecutor testified as the state's final witness. The notes revealed that the complainant, who was the state's main witness, had not initially described the sexual component of the alleged assault to three of the state's witnesses; if the notes had been made available to defense counsel before trial, cross-examination of those witnesses may have changed outcome of defendant's trial.

State v. Kemp,
828 So.2d 540 (La. 2002)

Second degree murder conviction reversed where the prosecution failed to timely reveal a taped statement of an eyewitness which mentioned a comment by the victim that lent support to petitioner's self-defense contention. Although the statement came out towards the end of the trial, reversal was still required. "[T]he details provided by [the witness] in her taped statement which had [the victim] offering an option to 'shoot it out' possess such potential to give the evidence at trial an entirely different cast that undermines confidence in this jury's rejection of [Kemp's] self-defense claim. To this extent, the state's failure to provide timely disclosure impacted the fundamental fairness of the proceedings leading to [Kemp's] conviction."

***Hoffman v. State,**
800 So.2d 174 (Fla. 2001)

The court reversed the denial of post-conviction relief in this Florida capital case, and remanded for the grant of a new trial. The state violated *Brady* by failing to disclose the results of analysis performed on strands of hair found in one victim's hands; those results excluded defendant, his co-defendant, and both victims as possible sources of the hairs, prejudiced the defense and entitled defendant to new trial, where only other evidence linking defendant to murders was a single fingerprint found on pack of cigarettes in victims' motel room, and defendant's confessions, and where another suspect had also confessed; defendant challenged both of his confessions at trial, and saliva samples taken from cigarette butts found at murder scene did not match defendant's blood type.

***State v. Huggins,**
788 So.2d 238 (Fla. 2001)

The state violated *Brady* in this Florida capital case by failing to disclose the statement of a witness indicating that he saw the defendant's wife driving a vehicle similar to the victim's vehicle. The substance of this statement contradicted the testimony of the defendant's wife, who was a key prosecution witness. The court found that the state suppressed the information even though it had provided the defense with a "lead sheet" naming the witness, because that sheet inaccurately reflected that the witness had seen a male driving the victim's vehicle, thereby making the witness' account seem unfavorable to the defense.

Spray v. State,
2001 WL 522004 (Tex.App. May 17, 2001)

The court reversed the defendant's conviction for aggravated sexual assault of a child under fourteen, finding that the state violated *Brady* by failing to disclose a Child Protective Services report reflecting that the alleged victim's sister, who corroborated the abuse allegations at trial, had denied any sexual abuse when questioned by investigators. On appeal, the court concluded

that "[c]learly the CPS report was favorable and material in that [alleged victim's sister], the only other witness who can corroborate the sexual assault allegations, made statements contained therein that directly contradict her testimony at trial."

State v. Gonzalez,
624 N.W.2d 836 (S.D. 2001)

The South Dakota Supreme Court reversed defendant's conviction of attempted statutory rape, finding that the state failed to disclose - in direct violation of the trial court's order - the alleged victim's counseling records. Those records were favorable and material because they contained a version of the alleged sexual encounters that differed from that offered by the complainant - who was the state's only witness on this issue - with respect to the number of encounters, and the events which took place during those encounters.

Garrett v. State,
2001 WL 280145 (Tenn.Crim.App. March 22, 2001)

The prosecution violated *Brady* in this arson/felony murder case by failing to disclose an investigative report containing a statement by the first fireman to reach the victim, who was found in a utility room in a burning house. At trial, the state contended that the utility room door had been locked from the outside, raising the implication that the defendant locked the victim in the room prior to setting the house on fire. The report, however, indicated that the first person to reach the utility room found the door unlocked. The court found this information favorable and material even though the state presented additional evidence in post-conviction proceedings suggesting that the person who made the report had misquoted the fireman, who had actually stated that the door was locked at the time he arrived.

Wilson v. State,
768 A.2d 675 (Md.App. 2001)

The court upheld the grant of post-conviction relief in this case involving robbery and related charges on the ground that the state violated *Brady* by failing to disclose written plea agreements between the state and two key codefendant witnesses. Although defense counsel was able to elicit some information about the witnesses' deals during their testimony, that testimony was not completely accurate, and the inaccuracy was compounded by the state's characterization of those deals, and of the witnesses' lack of motivation to lie, during closing arguments.

***Rogers v. State,**
782 So.2d 373 (Fla. 2001)

The court granted post-conviction relief in this Florida capital case, finding that the state violated *Brady* by failing to disclose: (1) a second confession by defendant's alleged co-perpetrator, who also testified for the prosecution, which could have been used to show that although defendant

participated in other robberies with co-perpetrator, he had not participated in the one for which he was being tried; and (2) an audiotape of a witness preparation session on which the prosecution can be heard attempting to influence the testimony of its chief witness.

State v. McKinnon,
2001 WL 69214 (Ohio.App. Jan. 29, 2001)

Defendant's rape conviction was reversed due to the prosecution's nondisclosure of an investigative report quoting a security guard from the apartment complex where the alleged victim claimed to have been raped as having been told by the alleged victim that her attacker made her take off all her clothes and do it on the floor. At trial, on the other hand, the alleged victim testified that her attacker "tore off" her clothes. The court found the undisclosed report favorable and material because it could have been used to undermine the alleged victim's credibility, and rebut the prosecution's argument that she had been consistent in her account of the attack every time she spoke about it - both crucial points given that the alleged victim's testimony was the only evidence tying defendant to the attack.

***Johnson v. State,**
38 S.W.3d 52 (Tenn. 2001)

In this Tennessee capital case, the court granted sentencing phase post-conviction relief on the ground that the state violated *Brady* by withholding a police report containing favorable information material to the issue of the applicability of an aggravating sentencing factor. The withheld police report showed that petitioner could not have fired the bullet that grazed a customer during a grocery store robbery. The state relied on the theory that petitioner fired that bullet to support the aggravating circumstance that he knowingly created great risk of death to two or more persons, other than the murder victim, during the act of murder. The court found the information in the police report material because, had it been disclosed, there was a reasonable probability that the aggravating circumstance would not have been applied to petitioner; absent evidence that petitioner fired the bullet in question, the state failed to prove that he placed any other people at great risk of death.

Lay v. State,
14 P.3d 1256 (Nev. 2000)

The court granted post-conviction relief from petitioner's murder conviction after concluding that the state violated *Brady* by withholding evidence that a paramedic, who testified that the victim identified petitioner as the shooter, had stated in several pretrial interviews that the victim did not tell her anything while she was treating him. This information was favorable and material because, apart from evidence of petitioner's fingerprints on the stolen car from which shots were fired, the paramedic was the only neutral witness to provide evidence that petitioner either fired shots or drove the car.

Commonwealth v. Hill,
739 N.E.2d 670 (Mass. 2000)

The court affirmed the grant of a new trial in this Massachusetts murder case, concluding that the state violated *Brady* by deliberately failing to disclose a leniency agreement with a key prosecution witness, despite requests for such information. The state's nondisclosure deprived defendant of his right to cross-examine the witness effectively, and the harm resulting from this nondisclosure was exacerbated by the conduct of the prosecutor, who allowed the witness to mislead the jury about his own sentencing expectations and his motive for testifying for the state, and suggested in closing argument that the jury should assess credibility by considering whether the witness had "something to lose," and that defendant was the only witness with anything to lose.

***Commonwealth v. Strong,**
761 A.2d 1167 (Penn. 2000)

The Pennsylvania Supreme Court reversed the denial of post-conviction relief in this capital case, finding that the state violated *Brady* by failing to reveal the existence of an understanding between the state and petitioner's co-perpetrator, pursuant to which the co-perpetrator was offered a sentence of two years on charges of murder and kidnapping in exchange for his testimony, and eventually received a sentence of 40 months after pleading guilty. The court found it irrelevant that the trial prosecutor had been unaware that his superior had been negotiating the co-perpetrator's deal with his counsel, and found the evidence of that deal "material" because there were obvious discrepancies between petitioner's and the co-perpetrator's testimony, and because the co-perpetrator was the key witness who put the gun in petitioner's hand at the time of the murder.

Byrd v. Owen,
536 S.E.2d 736 (Ga. 2000)

The Georgia Supreme Court affirmed the grant of habeas relief in this drug-related murder case on the ground that the state deprived petitioner of due process by withholding evidence that it had reached an immunity agreement with its key witness, and by failing to correct the witness' misleading testimony about the existence of such an agreement. The court further found that the state's nondisclosure deprived petitioner of his right to effective assistance of counsel at trial and on direct appeal. Counsel testified in habeas proceedings that he would not have advised petitioner to waive trial by jury if he had known of the state's deal with the witness; with regard to direct appeal, the state's suppression of evidence of its agreement with the witness deprived counsel of the ability to raise all meritorious issues. The state's misconduct in this case was made more egregious by the fact that petitioner's direct appeal focused on the suppression of information about deals with two other witnesses, which the appellate court held should have been turned over pursuant to *Brady* before concluding that petitioner had not demonstrated materiality.

State v. Harris,
2000 WL 1376459 (Ohio App. Sept. 26, 2000)

The Ohio court of appeals reversed defendant's attempted murder and felonious assault convictions due to the prosecution's suppression of the victim's grand jury testimony, in which the victim denied having a gun prior to the fight which led to his stabbing. At trial, the victim acknowledged having had a gun prior to the fight. Although the version provided by the victim at trial was more favorable to defendant than the version he gave to the grand jury, the court of appeals concluded that the suppression of the grand jury testimony prejudiced defendant by depriving him of information which would have been useful for impeaching the victim's trial testimony. In reaching this conclusion, the court noted that "the prosecution placed emphasis on the veracity of [victim]'s account of losing possession of the handgun [before being stabbed] . . . [and] challenged the jurors to contrast [victim]'s testimony against the testimony of 'defendant and his friends who have already lied to both the police and on the stand.'"

People v. Ellis,
735 N.E.2d 736 (Ill.App. 2000)

The appellate court reversed the denial of post-conviction relief in this murder case, finding that the prosecutor violated *Brady* by failing to inform defense counsel and the jury about benefits, of which prosecutor knew or should have known, which were orally promised to prosecution witnesses in exchange for their testimony. In so holding, the court imputed a detective's knowledge of these promises to the prosecutor.

State v. Hunt,
615 N.W.2d 294 (Minn. 2000)

The prosecution violated *Brady* by failing to disclose that a psychological examination of its key witness against defendant revealed that the witness was incompetent to stand trial.

Buck v. State,
70 S.W.3d 440 (Mo.App.E.D. 2000)

The state's failure to inform defendant about five of a prosecution witness' six convictions prejudiced defendant at his trial for tampering with a witness; although the prosecutor told defendant about one of the convictions, the witness was central to the prosecution's case in that he provided the only evidence that defendant tampered with a witness, and the other convictions would have been useful for impeachment.

State v. Henderson,
2000 WL 731472 (Ohio App. 1 Dist. June 9, 2000)

The state violated *Brady* in prosecution arising out of a drive by shooting by failing to disclose the taped statement of another individual who claimed to have been driving the car in which defendant was riding. This statement was significant because it contradicted the prosecution's two witnesses, both of whom testified that defendant was both the driver and the shooter.

State v. Larimore,
17 S.W.3d 87 (Ark. 2000)

The state's suppression of evidence of a state medical examiner's change of opinion concerning time of death following his conversation with police about his initial time of death determination providing defendant with an "iron-clad alibi" violated *Brady*.

State v. Nelson,
749 A.2d 380 (N.J.App.Div. 2000)

The state's failure to reveal that one of its witnesses in this drug case had a prior sexual assault conviction violated *Brady*; the witness was important to the state's case, the trial involved a credibility contest, the defendant was impeached with his own prior conviction, and the jury deliberated for over two days, reaching a verdict only after hearing a read-back of witness' testimony.

Harridge v. State,
534 S.E.2d 113 (Ga.App. 2000)

In this vehicular homicide case, the state violated *Brady* by failing to reveal the existence of lab results generated by the Georgia Bureau of Investigation indicating that cocaine and marijuana had been detected in the decedent's urine. In reaching this conclusion, the court noted that, "[f]or purposes of *Brady*, we decide whether someone is on the prosecution team on a case-by-case basis by reviewing the interaction, cooperation and dependence of the agents working on the case. . . . Here, the GBI laboratory was fully involved in the investigation of this case in that it was responsible for testing not only [the decedent's] blood and urine, but also [defendant's] blood. Moreover, both the medical examiner and the prosecutor were completely dependent on the crime lab for determining the amount of drugs and alcohol present in [the decedent's and defendant's] bodies. Because the GBI laboratory was part of the prosecution team and based on [the GBI doctor's] affidavit, we find that the state had possession of the test results showing drugs in Smith's urine."

***Mazzan v. Warden,**
993 P.2d 25 (Nev. 2000)

The court granted relief in this 1979 capital murder case, finding the prosecution violated *Brady* by failing to disclose numerous documents indicating that an alternate suspect with a motive had been in the area with an associate on the night of the murder. Had this information been disclosed, it would have supported petitioner's claim that he heard two people running from the murder scene. The withheld information revealed suspicion among law enforcement that the decedent had been killed as a result of his involvement in a major drug dealing organization, and the alternate suspect was believed by law enforcement to have been a key figure in that organization.

State v. Sturgeon,
605 N.W.2d 589 (Wis.App. 1999)

Defendant established his right to withdraw a guilty plea to burglary due to the state's failure to disclose an interview transcript and an officer's personal recollection indicating that he twice denied any knowing involvement in the crime; the evidence was within the exclusive control of the prosecution, and defendant established that the *Brady* violation caused him to plead guilty.

Robles v. State,
1999 WL 812295 (Tex.App. Oct. 7, 1999)

The court reversed defendant's convictions for sexual assault and indecency with a child on the ground that the prosecution acted in bad faith in misleading the trial court as to the existence of a tape recording of the alleged victim, who recanted at trial, being interviewed, and possibly coerced and threatened, by the prosecutor and a child protective services worker. Assuming that the tape no longer exists, the court remanded for a development of evidence of the tape's contents to be followed by a determination whether, in light of the tape's destruction, defendant can be afforded a fair trial.

***Mooney v. State,**
990 P.2d 875 (Okla. Crim. App. 1999)

Although not expressly relying on *Brady*, the appeals court vacates the death sentence due to the prosecutor's failure to timely disclose letters from the State's star witness on the continuing threat aggravator, where investigation into the contents of the letters would have provided substantial evidence to effectively confront and impeach the witness concerning his motive for testifying. He claimed in one letter, and while testifying, that his reason for coming forward was because his grandfather had been murdered under circumstances similar to the capital offense. In fact, his grandfather had not been killed and his true motive for testifying was to obtain relocation within the prison system.

State v. Castor,
599 N.W.2d 201 (Neb. 1999)

The state's failure, despite a *Brady* request by the defense, to disclose statements of two witnesses, one of which directly contradicted the state's theory that the victim was shot in his home, and one of which supported defendant's theory that the victim disappeared after getting into a brown pickup truck parked in front of the victim's house, violated *Brady*, and warranted grant of defendant's motion for new trial.

Johnson v. State,
1999 WL 608861 (Tenn.Crim.App. Aug. 12, 1999), aff'd, 38 S.W.3d 52 (Tenn. 2001)

The state violated in connection with the sentencing phase of petitioner's capital trial by withholding a crime scene report indicating that a bullet which grazed a bystander could not have been fired from the location the state contended petitioner was in at the time of the offense. This evidence was material because the state argued to the jury that petitioner had fired that shot in support of the aggravating circumstance of creating a great risk of death to others, which the jury ultimately found.

***Young v. State,**
739 So.2d 553 (Fla. 1999)

The Florida Supreme Court vacated petitioner's death sentence and remanded for resentencing due to the prosecution's failure to disclose attorney notes indicating that one of its key witnesses who testified to the sequence and type of gunshots he claimed to have heard during petitioner's altercation with the decedent had initially indicated that he was not even sure whether he had heard gunshots or firecrackers. In addition, the prosecution withheld statements from other people which, if disclosed, would have provided corroboration for petitioner's theory that the decedent had fired first and petitioner returned fire in self-defense. In the course of granting relief, the court rejected the state's contention that the exculpatory notes were attorney work product and therefore exempt from disclosure. The court explained that "the [disclosure] obligation exists even if such a document is work product or exempt from the public records law."

People v. Torres,
712 N.E.2d 835 (Ill. App. 1999)

The court reversed petitioner's convictions for murder and two counts of attempted murder where the prosecution failed to disclose that two of its witnesses were promised release from probation in exchange for their testimony, and failed to correct one witness' false testimony that he had not been promised leniency in exchange for his testimony. This evidence was material because, aside from these witnesses, only two others identified petitioner as a shooter, and all of the prosecution's witnesses were members of a gang that was at odds with petitioner's gang.

Little v. State,
736 So.2d 486 (Miss. App. 1999)

The court reversed defendant's embezzlement conviction on the ground that the prosecution violated *Brady* by failing to disclose the existence and contents of a "cash receipts journal" which documented that "the bulk" of the \$96,000 he was accused of embezzling had in fact been deposited into the company account.

State v. DelReal,
593 N.W.2d 461 (Wis. App. 1999)

Defendant's conviction for second degree recklessly endangering safety while armed was reversed due to the prosecution's failure to reveal that his hands had been swabbed for gunshot residue, but that the swabs were not analyzed prior to trial. This evidence was material both because the results of the post-trial tests requested by defendant were negative, and because the fact that the swabs had been taken directly contradicted the testimony of the self-proclaimed lead investigator, who testified unequivocally that no swabs had been taken. In the context of this case, which involved questionable eyewitness identifications of defendant and inconsistent testimony as to the location of the perpetrator relative to others at the scene, there was a reasonable probability of a different result had the residue evidence been revealed.

In re Pratt,
82 Cal.Rptr.2d 260 (Cal. App. 1999)

The court affirmed the trial court's grant of state habeas relief on the ground that the state violated *Brady* by failing to disclose a substantial amount of evidence indicating that the only prosecution witness to claim that petitioner had confessed to the murder for which he was convicted had been a long-time informant for state and federal law enforcement agents, and had received favorable treatment in return for his cooperation with authorities. In the course of its decision, the appellate court provided a useful discussion of how *Brady* claims should be analyzed on state habeas in California.

Gibson v. State,
514 S.E.2d 320 (S.C. 1999)

The court affirmed the grant of state post-conviction from petitioner's guilty plea to voluntary manslaughter on the ground that the prosecution violated *Brady* by failing to disclose that a state witness could not have seen the crime in the manner she claimed because the view from the position she described was obstructed. When confronted with this fact by state authorities with whom she visited the crime scene, the witness changed her story. If disclosed, this evidence would have been favorable to petitioner as additional proof of the witness' propensity to lie. The evidence was material because, had it been disclosed, there was a reasonable probability that petitioner would have chosen to go to trial instead of pleading guilty.

Rowe v. State,
704 N.E.2d 1104, 1109 (Ind. App. 1999)

The court granted post-conviction relief from petitioner's convictions for murder and attempted murder. At trial, petitioner's "intoxication and insanity defenses were completely hamstrung by" the testimony of his roommate/lover that petitioner had not ingested any drugs prior to shooting several members of his own family. The state violated *Brady*, however, by failing to reveal that this witness had been convicted of burglary and theft and was on probation at the time of his testimony. This information would have been useful to petitioner in order to establish that the witness had strong motivation to deny taking part with petitioner in the consumption of illegal drugs -- namely, admitting taking drugs would have strengthened the state's case at the witness' probation revocation proceeding scheduled to take place a few months after petitioner's trial.

State v. Allen,
1999 WL 5173 (Tenn. Crim. App. Jan 8, 1999)

Defendants' attempted rape convictions were reversed on the ground that the state breached its *Brady* obligation by failing to comply with a court order to review the alleged rape victim's psychiatric treatment records for exculpatory information. Citing concerns for the alleged victim's privacy, the prosecutor never undertook the order examination, and therefore failed to uncover and disclose evidence indicating that the alleged victim had a documented history of, among other things, psychotic behavior. Because the outcome of defendants' trial "primarily turned on the credibility of the victim," the appellate court concluded that they were entitled to relief. Commenting on the prosecutorial inaction which led to the *Brady* violation in this case, the court stated that "[a] 'hear no evil, see no evil' attitude is inconsistent with prosecutorial responsibilities."

***In re Brown,**
952 P.2d 715 (Cal. 1998)

Writ of habeas corpus granted in capital case where crime lab neglected to provide the defense a copy of the worksheet attached to defendant's toxicology report, even though the prosecution was unaware of the error. The prosecution was obligated to review the lab files for exculpatory evidence and provide any such evidence to the defense. The worksheet reflected that PCP was present in the defendant's system at the time of the incident, which would have supported his claim of diminished capacity.

State v. Copeland,
949 P.2d 458 (1998)

Conviction of second-degree rape reversed where prosecution failed to disclose that the victim/witness had a prior felony conviction. Such information could have been used by the defense to impeach this key witness, and there is a substantial likelihood that the failure to disclose the prior record affected the jury's verdict.

***State v. Parker,**
721 So.2d 1147 (Fla. 1998)

The court granted sentencing phase relief in this Florida capital case as a result of the state's suppression of evidence from a jailhouse informant indicating that a co-defendant, not petitioner, actually shot and killed the victim. In concluding that this evidence was material, the court noted that petitioner had been sentenced to death by a vote of eight to four, and that the only evidence suggesting petitioner had been the shooter was the testimony of another co-defendant's girlfriend, who claimed petitioner admitted the shooting while the girlfriend was visiting his co-defendant in jail. That co-defendant received a life sentence.

State v. Calloway,
718 So.2d 559 (La. App. 1998)

Defendant's convictions for two counts of first-degree murder were reversed due to nondisclosure by the prosecution and the trial court (which reviewed the information in camera) of statements made by two of the prosecution's primary eyewitnesses. These statements, which were taken shortly after the murders occurred, contradicted the eyewitnesses' trial testimony in several important respects, including the height, weight, age and attire of the assailant. The court explained that the failure to make these statements available to the defense "not only . . . deprived [defense counsel] of the opportunity to cross examine the witnesses about these inconsistencies, but . . . also deprived [defendant] of the opportunity to show the weakness in the [witnesses'] identifications. Further, it might have bolstered the defense theory that the witnesses colluded to cover up what really happened on the night in question."

***State v. Nelson,**
715 A.2d 281, 285-288 (N.J. 1998)

Defendant's death sentence was vacated on the ground that the prosecution violated *Brady* by failing to reveal that an officer wounded during defendant's shootout with police had served notice of, and later filed, a lawsuit against local authorities alleging that they had failed to provide training and instruction necessary to ensure the safety of police officers in situations such as the one that occurred in this case. The court reasoned as follows concerning the materiality of the officer's allegations to the sentencing phase of defendant's trial: "Had the jury been aware that this crucial witness, the brother of one of the dead police officers, agreed with defendant that inadequate police training had sparked defendant's violent reaction, it is at least reasonably probable that an additional juror or jurors would have found the existence of one or more of defendant's mitigating factors."

State ex rel. Yeager v. Trent,
510 S.E.2d 790 (W.Va. 1998)

Petitioner was entitled to a new trial on murder charge where substantial evidence developed post-trial indicated that a critical prosecution witness had an undisclosed plea agreement.

Little v. State,
971 S.W.2d 729 (Tex. App. 1998)

Defendant's DWI conviction was reversed due to the prosecution's failure to reveal to defense counsel that its expert on blood alcohol content had lost the graphical information necessary to assess the accuracy of the state's blood alcohol analysis. Although this information was not directly exculpatory, it was impeaching in the sense that "the graphical results are necessary to analyze the reliability . . . of the results of the blood test." In concluding that relief was warranted under Brady, the court reasoned: "[H]ad the State disclosed the loss of the evidence as soon as it became aware of the fact, defense counsel would have had the option of employing a different trial strategy--one that may have resulted in exclusion of the testimony altogether. * * * The testimony was the only quantitative evidence of appellant's intoxication. * * * Thus, we conclude the State's failure to inform the defense of the lost evidence is a failure to disclose material information which undermines confidence in the outcome of the trial."

People v. Diaz,
696 N.E.2d 819 (Ill. App. 1998)

Defendant, a county jail correctional officer, was convicted of three charges arising out of his alleged involvement in drug dealing within the jail. The court reversed the convictions on the ground that the prosecution violated *Brady* and *Napue* by failing to disclose that an important inmate witness had been given a deal resulting in an illegal concurrent sentence, and by failing to correct that witness' false testimony that he had not received favorable treatment in exchange for his testimony. Rejecting the state's contention that the witness had not been given a deal, the court noted a clear indication in the State's Attorney's undisclosed file that the witness' "illegal sentence was 'OK'd' by a supervisor in the State's Attorney's office because [the witness] had worked as an informant for the State's Attorney's public integrity unit," and explained that "this court does not have to ignore common sense." "An agreement between the State and its witness," the court continued, "does not have to be so specific that it satisfies the traditional requirements for an enforceable contract." Here, the "circumstances, taken as a whole, indicate that a deal was made between [the witness] and the State . . ." Turning to the prosecution's failure to correct the witness' false denial that a deal existed, the court stated: "We consider the State's conduct to have been outrageous and we will not tolerate it. . . . That [conduct] raises questions about the State's integrity and goes to the heart of the judicial system--confidence in the factfinding process."

State v. Harris,
713 N.E.2d 528 (Ohio App. 1998)

The court of appeals affirmed the trial court's dismissal of felony possession of marijuana charges against defendants following disclosure by a prosecution investigator during trial that he had long possessed an airport log indicating that defendants had not been given baggage claim tickets when they boarded the flight on which the prosecution contended the defendants were smuggling marijuana. This evidence was consistent with defendants', which was that a third party who purchased defendants' tickets and encouraged them to fly to Ohio to look for work had actually placed the marijuana in their luggage without their knowledge. The court of appeals found that the trial court did not abuse its discretion in dismissing the charges rather than imposing a lesser sanction in light of the fact that the information had been purposely withheld, and continuing the case would result in undue prejudice to the defendants.

People v. Johnson,
666 N.Y.S.2d 160 (N.Y.A.D. 1997)

In prosecution for sale of a controlled substance, prosecution erred in not disclosing lab analysis that contained alterations testified to by a police officer. New trial ordered.

People v. Kasim,
66 Cal. Rptr.2d 494 (Cal. App. 1997)

Reversal required where prosecution withheld impeachment evidence that key witnesses had received deals for lenient treatment in their own criminal cases in exchange for their testimony against defendant. Such evidence was material as the result of the trial depended in large part on the credibility of the witnesses.

State v. Blanco,
953 S.W.2d 799 (Tex. App. 1997)

Trial court did not abuse discretion in granting a motion for a new trial due to state's failure to disclose in the prosecution of an aggravated assault case that the defendant's brother had confessed to the crime.

People v. LaSalle,
243 A.D.2d 490 (N.Y.A.D. 1997)

First degree sodomy conviction reversed due to prosecution's failure to disclose that complainant indicated at a prior hearing that she was unfamiliar with her attacker's full name.

Ware v. State,
702 A.2d 699 (Md. 1997)

Reversal required where prosecution failed to disclose that its key witnesses had a motion to reconsider sentence pending which was being held in abeyance until the conclusion of defendant's trial. The Maryland Court of Appeals held that this was an implied deal which should have been revealed.

State v. Kula,
562 N.W.2d 717 (Neb. 1997)

Murder conviction reversed and new trial ordered where prosecution failed to disclose material evidence regarding investigation of other suspects before the first day of trial and trial court abused its discretion and committed plain error by refusing to grant a continuance following disclosure of the evidence to allow counsel to investigate other suspects and prepare a defense.

***State v. Phillips,**
940 S.W.2d 512 (Mo. 1997)

New penalty phase ordered where state withheld audiotape containing hearsay statement indicating that defendant's son claimed sole responsibility for dismembering murder victim. The statement was material because the prosecution specifically argued that defendant deserved the death penalty because she had cut up the victim's body herself, and the sole aggravating circumstance found by the jury was depravity of mind, which was based upon the dismemberment of the victim's body.

People v. Ariosa,
660 N.Y.S.2d 255 (N.Y.Co.Ct. 1997)

Indictment for three counts of forcible rape dismissed where prosecution waited until jury deliberations had begun to turn over an envelope it had possessed for several months containing numerous items directly contradicting the victim's assertions at trial, some of which were written in the victim's own hand. While the court expressed its belief that the prosecution's nondisclosure was not motivated by malice, it nevertheless decided to send a message to the state that its review of discoverable materials must be "a pro-active, vigorous attempt to respond to the requests made by defense counsel or to seek protective orders in circumstances they feel are inappropriate for discovery."

Ohio v. Aldridge,
1997 WL 111741 (Ohio App. 2 Dist. March 14, 1997) (unpublished)

Order granting relief from multiple convictions for forcible rape of a child and gross sexual imposition of a child affirmed where prosecution failed to disclose full length report detailing:

numerous instances of highly suggestive questioning techniques employed with child accusers; medical evidence indicating absence of sexual abuse; inability of alleged child victim to identify picture of defendant; and numerous threats made by police investigator against child witnesses in the face of their denials that sexual abuse occurred. Rather than full report, defense counsel were furnished with a redacted version which made no mention of the exculpatory and impeaching information contained in the full length version.

Flores v. State,
940 S.W.2d 189 (Tex. App. 1996)

Murder conviction reversed where prosecution failed to disclose written and verbal statements made by disinterested witness corroborating defendant's contention that victim, who was defendant's roommate, shot herself during an argument with defendant. Because there were no eyewitnesses to the shooting other than defendant her credibility was crucial, and undisclosed statements fully supported defendant's version of events such that, had they been disclosed, the result of the trial would likely have been different.

Ex parte Mowbray,
943 S.W.2d 461 (Tex.Crim.App. 1996)

Murder conviction reversed where prosecution waited until two weeks before trial to disclose blood spatter expert's report tending to support defendant's contention that victim shot himself in bed next to her despite having received the report seven months earlier; prosecution purposely delayed disclosure and caused defense counsel to erroneously believe that the expert who had written the exculpatory report would be a witness for the state and be available for cross-examination.

***Cook v. State,**
940 S.W.2d 623 (Tex.Crim.App. 1996)

Defendant's conviction and death sentence for a 1977 murder reversed where testimony of a key prosecution witness from defendant's first trial was introduced against defendant at his third trial after the witness had died. The introduction of the testimony at the third trial undermined the reliability of defendant's conviction because the prosecution's earlier failure to disclose the witness' prior inconsistent statements to police and to the grand jury had precluded the defense from effectively investigating the witness' testimony and impeaching him with his prior statements.

State v. Oliver,
682 So.2d 301 (La.App. 1996)

New trial ordered where conviction hinged on credibility of two alleged victims who were key prosecution witnesses and prosecution failed to disclose statements made by each near time of

offense differed significantly from their trial testimony.

State v. Ponce,
1996 WL 589267 (Ohio App. Oct. 10, 1996)

Rape conviction reversed where prosecution failed to turn over a police report and records from the county children's services authority. The police report contained a description of the alleged rape which was significantly inconsistent with the alleged victim's trial testimony, and the children's services records revealed information supportive of the defendant's theory at trial that the alleged victim's story had been fabricated. The court found that, "[c]ollectively, the prosecution's refusal to disclose the [materials] serve to undermine confidence in the outcome of defendant's trial."

***Craig v. State,**
685 So.2d 1224 (Fla. 1996)

Death sentence reversed and new sentencing hearing ordered where prosecutor elicited false and misleading testimony from codefendant indicating that he was serving two life sentences for his role in the crime and argued severity of codefendant's punishment to the jury when prosecutor knew that codefendant was already in a work release program and would soon be paroled; this information was material because it affected codefendant's credibility and prevented jury from considering actual disparity between sentences of each defendant.

Carroll v. State,
474 S.E.2d 737 (Ga. App. 1996)

Defendant who pleaded guilty to homicide by vehicle and serious injury by vehicle allowed to withdraw plea due to state's failure to disclose that sole state expert had indicated, shortly before defendant entered plea, that calculation of speed at which defendant was driving when she lost control of vehicle was incorrect and that it was not possible to calculate her speed based on data provided by investigating officer, and opined that road conditions contributed to accident.

State v. Womack,
679 A.2d 606 (N.J.), cert. denied, 519 U.S. 1011 (1996)

For purposes of defendant's prosecution for practicing medicine without a license, evidence that defendant told investigator his professional status as doctor of naturopathy and not medical doctor was not probative on state's theory regarding practice of medicine without a license, but was probative on state's alternative theory of holding oneself out as a medical doctor; failure to disclose such exculpatory evidence to grand jury required dismissal of portion of indictment asserting alternative theory.

Frierson v. State,
677 So.2d 381 (Fla. App. 1996)

Prosecution's failure to disclose police report and deposition of officer regarding incident strikingly similar to shooting incident for which defendant was convicted and which indicated that date of event was day after that indicated by witnesses required new trial; fact that witnesses who testified were alcohol and substance affected and could have mistaken date of incident, along with officer's description and other undisclosed discrepancies in eyewitness testimony, undermined confidence in jury's verdict.

State v. Knight,
678 A.2d 642 (N.J. 1996)

Murder conviction reversed on cumulative impact of suppressed exculpatory evidence which included: state's alleged eyewitness got no prison time on unrelated offense carrying potential 364-day confinement period, despite prosecution's claim that she had no incentive to lie; woman eyewitness who claimed to have spoken to witness just prior to crime had made statement that she was not near crime site at critical time; and FBI agent had testified that he lacked certain information regarding case at time he interrogated defendant when teletype records showed he had received information.

Farmer v. State,
923 S.W.2d 876 (Ark. App. 1996)

New trial ordered where prosecution failed to disclose impeachment evidence that officer upon whose testimony state's case was built was not a police officer at time of trial because he had resigned shortly before after wrecking his police car and filing a false police report to cover up his violation of police rules; prosecutor admitted that decision had been made not to ask witness at trial where he was employed.

People v. May,
644 N.Y.S.2d 525 (N.Y.A.D. 1996)

Convictions for second degree murder, second degree attempted murder and first degree assault reversed where prosecution failed to disclose arrangement with witness who was promised favorable sentence on unrelated charges in exchange for testimony against defendant, and failed to correct witness' false statement to effect that he had not been promised any consideration in return for testimony; nondisclosure was not harmless in light of significance of witness' testimony that he witnessed actions alleged in indictment.

People v. Lantigua,
643 N.Y.S.2d 963 (N.Y.A.D. 1996)

Sole eyewitness' recantation of identification testimony was not incredible or collateral to defendant's guilt or innocence in second-degree murder prosecution; credibility of eyewitness' testimony at trial, not of her recantation, was relevant issue, and there were questions as to conflicting testimony by eyewitness and her brother, and where eyewitness was at time of murder, and People's failure to disclose existence of another witness deprived defense of opportunity to investigate what that witness might have observed and of ability to conduct knowledgeable cross-examination of eyewitness as to her whereabouts, her view of events, distractions caused by presence of another person, and her general credibility.

***Jiminez v. State,**
918 P.2d 687 (Nev. 1996)

Post-conviction relief granted in capital case where prosecution failed to disclose evidence of other possible suspects which was relevant to informant's impeachment and to challenge methods and reliability of police investigation, and failed to disclose evidence that informant had assisted police in other cases in exchange for dismissal of charges while police witness and informant both testified informant had no relationship with police in other cases; information could have altered outcome where evidence against defendant was circumstantial, informants' testimony that he overheard defendant's telephone conversation with his father in which he admitted to killing was impeachable, and police did only slight investigation of other possible suspects.

Smith v. State,
471 S.E.2d 227 (Ga. App. 1996)

Conviction for selling crack cocaine reversed where special agent and probation officer had agreement that as part of informant's undercover work, officer would not serve outstanding warrant on informant and informant had crucial role in drug transaction, but state failed to fully disclose relationship with informant upon defendant's request and special agent testified that informant "didn't have any charges pending or anything."

Dinning v. State,
470 S.E.2d 431 (Ga. 1996)

New trial ordered on *Giglio* violation where prosecution failed to disclose evidence of immunity agreements with material prosecution witnesses where evidence against murder defendant was circumstantial and witnesses' testimony was critical to state's case; withheld evidence included videotape of one witness' interview with police which contained protracted discussion of immunity in exchange for testimony.

Shields v. State,
680 So.2d 969 (Ala.Crim.App. 1996)

Murder conviction reversed where state withheld evidence of victim's prior conviction for assault and other information tending to show victim was aggressive and prone to violent acts. This information was material to defendant's claim of self-defense.

Cotton v. Commonwealth,
1996 WL 12683 (Va.App. Jan. 16, 1996)

Statutory burglary and arson convictions reversed where state failed to timely disclose its relationship with a key witness who was incarcerated with defendant prior to trial. In exchange for testimony, prosecutor had agreed to make efforts on the witness' behalf with the parole board, and witness had been furnished with a copy of defendant's statement to police, which he was seen reading prior to defendant's trial.

Brummett v. Commonwealth,
1996 WL 10209 (Va.App. Jan. 11, 1996)

Convictions on five counts of sexual crimes reversed where trial court erroneously failed to order disclosure, after in camera review, of statements of victim and forensic evidence indicating semen found was not that of defendant.

***Hamilton v. State,**
677 So.2d 1254 (Ala.Crim.App. 1995)

Conviction and death sentence reversed where key witness perjured himself with regard to statements he claimed were made by defendant regarding lack of remorse and pride resulting from the murder, and falsely denied the existence of a deal for his testimony. Police had led witness to believe he would be freed from jail in exchange for his testimony, and their actions were taken as part of the prosecution team, despite fact that prosecutor had no knowledge of the deal.

***Padgett v. State,**
668 So.2d 78 (Ala.Crim.App.), cert. denied, 668 So.2d 88 (Ala. 1995)

Capital murder conviction is reversed due to the prosecution's delayed disclosure of test results calling into question whether the blood sample allegedly provided by defendant, which was tied to the victim, had in fact come from defendant. Defendant's opportunity to cross examine the serologist the afternoon he found out about the second test result was inadequate to cure the violation.

People v. Jackson,
637 N.Y.S.2d 158 (N.Y.A.D. 1995)

State violated *Brady* in second-degree murder prosecution by failing for three years to disclose statements by learning-disabled witness who, by time of disclosure, had no substantive memory of many details of events at issue; statements' exculpatory value was evident on their face, as witness stated numerous times that defendant was outside apartment when shots were fired, and witness gave leads as to other possible perpetrators of crime.

***Kills On Top v. State,**
901 P.2d 1368 (Mont. 1995)

Confidence in the death sentence was undermined by the prosecution's failure to disclose evidence related to a key guilt-phase witness that could have been used by the defense to challenge her credibility or argue bias. The undisclosed evidence concerned the witness's criminal history and her allegation that she had been raped by a jailer.

Jackson v. Commonwealth,
1995 WL 710112 (Va.App. 1995)

Conviction for abduction with intent to defile reversed where trial court erroneously failed to order state to disclose victim's statements to police. These statements contained information inconsistent with victim's testimony on several points. Because victim's credibility was the crucial issue in the case, nondisclosure of the statements deprived defendant of the opportunity to explore and expose victim's inconsistencies.

People v. Wright,
658 N.E.2d 1009 (N.Y. 1995)

Alleged assault victim's status as police informant was material and favorable to defendant, and prosecution's failure, despite *Brady* requests, to reveal that alleged victim was informant denied defendant due process. If information had been revealed, defendant could have presented it as motive for police to corroborate alleged victim's testimony and to disbelieve defendant's claim that she stabbed alleged victim because she believed he was going to rape her. Information also would have refuted state's explanation that victim did not want to go to hospital after stabbing because police would have thought he "did something" due to of his criminal record.

People v. Curry,
627 N.Y.S.2d 214 (N.Y.A.D. 1995)

Motion to withdraw guilty plea granted where state failed to disclose information about investigation into police corruption in violation of due process. Case would hinge on credibility contest of defendant and cop, who allegedly stole defendant's money during arrest, and DA had

serious information about the cop's criminal activities.

State v. Laurie,
653 A.2d 549 (N.H. 1995)

New Hampshire constitutional right to present all favorable evidence affords greater protection to criminal defendant than federal *Brady* standard; it requires state to prove beyond a reasonable doubt that favorable evidence knowingly withheld would not have affected verdict.

State v. Gardner,
885 P.2d 1144 (Idaho App. 1994)

Defendant entitled to withdraw guilty plea where prosecutor violated *Brady* by failing to disclose eyewitness statement tending to show that collision and resulting death were caused by tire blowout, not by defendant's fatigue or drug use.

People v. Rutter,
616 N.Y.S.2d 598 (N.Y.App.Div. 1994), opinion adhered to on reargument, 623 N.Y.S.2d 97 (N.Y.App.Div. 1995)

Appellate counsel held ineffective for failing to raise and argue: (1) People's disclosure, on morning after key witness was excused, of transcript of polygraph in which this witness denied knowledge of the homicide as *Rosario* and *Brady* violation; and (2) failure of trial court to allow the witness to be recalled and cross-examined with the transcript.

Bowman v. Commonwealth,
445 S.E.2d 110 (Va. 1994)

Prosecution's failure to earlier disclose police officer's report violated *Brady*; had defendant been aware of discrepancies in police officer's report and officer's failure to mention defendant's facial scars, he could have strengthened his defense of mistaken identity. Trial court abused its discretion in refusing to review in camera police officer's report as requested by defendant.

Jefferson v. State,
45 So.2d 313 (Ala.Crim.App. 1994)

Writ of error coram nobis granted where prosecution failed to disclose prior inconsistent statements of two witnesses who testified to seeing defendant fleeing the scene. Earlier statements identified the fleeing suspect as someone else.

***State v. Gilbert,**
640 A.2d 61 (Conn. 1994)

Capital murder conviction reversed where state failed to disclose, after specific defense request, reports from victims' family and friends in which they said that two other individuals had been in the store earlier the same day---carrying guns and threatening to kill someone.

State v. Perry,
879 S.W.2d 609 (Mo.App. 1994)

State's failure to disclose defendant's girlfriend's pretrial statement violated *Brady* where statement was directly contrary to girlfriend's trial testimony, supported claim that he was "framed" and confessed solely in response to police beating, he specifically requested statement, and defense did not know statement existed until after trial.

State v. Munson,
886 P.2d 999 (Okla.Crim.App. 1994)

New trial granted where state failed to disclose hypnosis of key prosecution witness, withheld over 165 exculpatory photographs and willfully suppressed hundreds of pages of exculpatory reports.

***Commonwealth v. Green,**
640 A.2d 1242 (Pa. 1994)

Conviction and death sentence reversed where state failed to disclose two out of court statements by co-conspirator in which she claimed she shot and killed a cop.

State v. White,
640 A.2d 572 (Conn. 1994)

State's failure to disclose exculpatory *Brady* material prior to probable cause hearing mandated reversal of convictions and new probable cause hearing even though material was disclosed to defense during jury selection; although defendants made use of evidence, witnesses whose statements were initially not revealed were unavailable at time of trial.

Commonwealth v. Galloway,
640 A.2d 454 (Pa. Super. 1994)

Commonwealth's *Brady* violation in failing to disclose that its key witness' recollection was hypnotically refreshed prior to trial entitled defendant to new trial on one murder where witness was only one to testify that she saw him possess and shoot a gun, and one of two witnesses to testify that she heard defendant confess.

State v. Landano,
637 A.2d 1270 (N.J. Super. App. Div. 1994)

Brady violated where cop's handwritten notes indicating that witness rejected defendant's photo were suppressed, and only an official report saying witness failed to make an ID was disclosed.

State v. Florez,
636 A.2d 1040 (N.J. 1994)

Conviction reversed where state failed to disclose fact that informant had been involved in reverse sting drug transaction, even though defendants knew he was involved in crime, but did not know he was an informer. This was material because the informer played a central role in setting up the drug deal.

People v. White,
606 N.Y.S.2d 172 (N.Y.App.Div. 1994)

Convictions vacated under *Brady* and *Rosario* where undisclosed statement indicated that prosecution witness said he could not identify person who shot victim, while at trial he testified to knowing defendant vaguely and seeing him chase victim and fire weapon at him, and link of defendant to second murder was in significant part through ballistics evidence that same gun was used in both murders.

West v. State,
444 S.E.2d 398 (Ga.App. 1994)

Conviction reversed where State's failure to disclose tape recording of alleged drug deal involving defendant prior to trial violated due process; tape was exculpatory in that it might have shown that informant gave perjured testimony.

Jefferson v. State,
645 So.2d 313 (Ala.Crim.App. 1994)

Brady violated where undisclosed exculpatory evidence was material to murder prosecution because it would have tended to show that someone other than defendant committed crime and would have been relevant to impeach credibility of two witnesses who testified for prosecution.

Ex parte Williams,
642 So.2d 391 (Ala. 1993)

Brady violated where state failed to produce lineup photographs from which victim had identified a person other than defendant, hat which had led police to that person, and statement in which victim had failed to mention supposedly identifying raincoat found in defendant's home.

Burrows v. State,
438 S.E.2d 300 (Va.App. 1993)

Commonwealth's failure, in response to murder defendant's *Brady* request for exculpatory material, to provide defendant with information respecting Commonwealth witness' criminal past and apparent long-standing relationship with Commonwealth's attorneys, warranted new trial.

People v. Gaines,
604 N.Y.S.2d 272 (N.Y.App.Div. 1993)

Brady violation, which required reversal of convictions, occurred where prosecutor did not disclose cooperation agreement reached between trial assistant's superior and attorney for principal prosecution witness under which witness would not be required to go to prison on pending felony charges if he testified against defendant.

People v. Steadman,
623 N.E.2d 509 (N.Y. 1993)

Convictions reversed under *Brady* where trial assistants, as representatives of DA's office, were chargeable with knowledge of promises made by assistant DA to prosecution witness' attorney for purposes of duty to disclose *Brady* material, and assistants were obligated to clarify record after witness falsely testified that no promises were made.

State v. Avelar,
859 P.2d 353 (Idaho App. 1993)

Prosecution's failure to disclose that party to whom cocaine was delivered could not identify defendant as one who delivered cocaine violated due process and required that conviction be set aside; disclosure would likely have altered defendant's trial strategy significantly.

People v. Garcia,
17 Cal.App.4th 1169 (Cal.App. 1993)

Habeas granted where state failed to disclose evidence that tended to impeach reliability of state's accident reconstruction expert, by showing that expert had used faulty methodology and made errors in other cases.

Swartz v. State,
506 N.W.2d 792 (Iowa App. 1993)

PCR granted where state failed, in violation of *Brady*, to disclose evidence of alleged co-perpetrator's threatening and overbearing nature, and where rebuttal witness, who was the only witness available to directly contradict defendant's compulsion testimony, falsely denied

existence of a deal for his testimony.

***Garcia v. State,**
622 So.2d 1325 (Fla. 1993)

Conviction and death sentence reversed where prosecution failed to disclose statement to police given by a key prosecution witness which corroborated defendant's assertion that someone else committed the murder. Violation was compounded because prosecution denied the existence of the person defendant identified, despite the fact that police had arrested him and knew he was going by the name defendant gave them.

State v. Lindsey,
621 So.2d 618 (La.App. 1993)

Conviction reversed where state failed to disclose a promise to give accomplice favorable consideration if she testified credibly, and exacerbated the *Brady* violation by failing to correct the witness' assertion at trial that she was not expecting consideration.

State v. Spurlock,
874 S.W.2d 602 (Tenn.Crim.App. 1993)

Murder conviction reversed where prosecution failed to disclose: (1) statements, which had been taken by the sheriff's department, which stated or implied that someone else did the murder; and (2) audio and video recordings of key prosecution witness giving statement incriminating defendant after being promised he would be released from jail.

Jones v. State of Texas,
850 S.W.2d 223 (Tex.App.-Fort Worth 1993)

Conviction and sentence reversed where prosecution failed to timely disclose exculpatory, material information in a victim impact statement which tended to negate the only evidence of defendant's intent to shoot the victim.

Funk v. Commonwealth,
842 S.W.2d 476 (Ky. 1993)

Life sentence (state did seek death penalty) reversed where state failed to turn over various pieces of exculpatory hair and fiber evidence.

Averhart v. State,
614 N.E.2d 924 (Ind. 1993)

Negative results from gunshot residue tests that were withheld by the prosecution during trial

were material at sentencing phase, even though they were not at the guilt phase. Although the test results did not establish that petitioner had not failed the fatal shot, "[t]he absence of gunshot residue . . . form[ed] part of a chain of circumstantial evidence pointing away from [petitioner] as the triggerman. Confidence in the manner in which the jury evaluated the aggravating circumstances with respect to [petitioner] cannot be maintained in this atmosphere."

People v. Davis,
614 N.E.2d 719 (N.Y. 1993)

Brady violated by failure to disclose, despite specific request, hospital records of third party whom complainant identified as one of his attackers, indicating that third party was admitted to hospital shortly before the attack.

McMillian v. State,
616 So.2d 933 (Ala.Crim.App. 1993)

Brady violated where prosecution failed to disclose: (1) earlier statements by its key witness claiming to know nothing about the crime and then argued to jury that witness had told same story from the beginning; (2) statement of fellow inmate who overheard key witness discussing plan to frame defendant.

State v. Bryant,
415 S.E.2d 806 (S.C. 1992)

Once defendant has established basis for his claim that undisclosed evidence contains exculpatory material or impeachment evidence, State must produce undisclosed evidence for trial judge's inspection; trial judge should then rule on materiality of evidence to determine whether State must produce it for defendant's use.

***Gorham v. State,**
597 So.2d 782 (Fla. 1992)

Conviction and death sentence vacated where state failed to disclose that key witness had been a paid CI in defendant's case and in others. The fact that the witness had received substantial payments in other cases made the evidence material for challenging his credibility.

People v. Holmes,
606 N.E.2d 439 (Ill.App.1 Dist. 1992), appeal denied, 612 N.E.2d 518 (Ill. 1993)

Conviction reversed where prosecution told jury that chief witness was just an innocent bystander when in fact he participated in the crime, and violated *Napue* by lying about the benefits witness was to receive for his testimony.

People v. Clausell,
182 A.D.2d 132 (N.Y.App.Div. 1992)

Due process violated where prosecution failed to disclose a buy report in a drug prosecution until after conviction since defense specifically requested the report twice, officer's testimony was essential, and report contained useful impeachment material.

People v. Jackson,
154 Misc.2d 718 (N.Y.Sup.Ct. 1992), aff'd, 603 N.Y.S.2d 410 (N.Y.Sup. 1992),
appeal denied, 633 N.E.2d 487 (N.Y. 1994)

Convictions for second degree arson and six counts of felony murder reversed where detective and fire department, despite their independent duty to disclose under *Brady*, failed to reveal that it was the expert opinion of the detective that the fire was an accidental electrical fire.

Savage v. State,
600 So.2d 405 (Ala.Crim.App.), cert. denied, 600 So.2d 409 (Ala. 1992)

Manslaughter conviction reversed where prosecutor failed, in violation of *Brady*, to disclose statements of two witnesses who said defendant acted in self-defense; statements were arguably exculpatory and could have been used to impeach the testimony of the witnesses at trial.

Commonwealth v. Moose,
602 A.2d 1265 (Pa. 1992)

Murder conviction reversed where state failed to disclose deal with jailhouse snitch despite a general request by the defense. Defendant's failure to seek criminal records of state witnesses was directly traceable to state's failure to identify the prisoner.

People v. Janota,
181 A.D.2d 932 (N.Y.App.Div. 1992)

Rape conviction reversed due to prosecution's delay in turning over notes of complainant's initial version of the incident which would have brought her credibility into serious question. Counsel found out about the notes after he had cross-examined her for a day and a half, and did not recall her for fear such a move would be seen as harassment.

State v. Knapper,
579 So.2d 956 (La. 1991)

Reversed where prosecution failed to disclose a police report in which eyewitness gave description of murderer's clothes which was opposite that of chief state witness. The report also mentioned another group of men who were committing crimes that night, one of whom was

found in possession of the murder weapon.

People v. Godina,

584 N.E.2d 523 (Ill.App. 1991), appeal denied, 591 N.E.2d 26 (Ill. 1992)

Second-degree murder conviction reversed where pending burglary prosecution of state's witness was material and thus subject to disclosure under *Brady* where the witness' testimony assisted state in convicting defendant.

Commonwealth v. Santiago,

591 A.2d 1095 (Pa.Super. 1991), appeal denied, 600 A.2d 953 (Pa. 1991)

Because the point of the disclosure requirement is to ensure a fair trial, the trial judge had an obligation to disclose to the defense prior inconsistent statements made in camera by prosecution witness.

State v. Davis,

823 S.W.2d 217 (Tenn.Crim.App. 1991)

Drunk driving conviction reversed where state failed to disclose police department memoranda revealing knowledge of incorrect readings, malfunctions, and tampering with intoxilizer machine; although evidence also included police observations of defendant, the intoxilizer was central to the state's case.

Perdomo v. State,

565 So.2d 1375 (Fla.App. 1990)

Trial court should have held *Richardson* hearing on potential *Brady* violation and its potential to prejudice defendant where potentially exculpatory evidence might still be in state custody, even though state did not disclose evidence because it believed it had been stolen.

***Bevill v. State,**

556 So.2d 699 (Miss. 1990)

Conviction and death sentence reversed where defense was not allowed to adduce at trial whether prosecution helped its key witness to have one of his prior convictions expunged in exchange for his testimony.

Ex parte Adams,

768 S.W.2d 281 (Tex.Crim.App. 1989)

Conviction reversed where prosecution suppressed prior inconsistent statements of its key witnesses. These statements seriously eroded the credibility of both witnesses.

Ex parte Brown,
548 So.2d 993 (Ala. 1989)

Conviction reversed where state failed to disclose, until introduction at trial, physical evidence which contradicted victim's statement despite the granting of defense's motion requiring disclosure of tangible evidence expected to be introduced at trial.

Ham v. State,
760 S.W.2d 55 (Tex. App. 1988)

Conviction reversed where state failed to turn over evidence, following *Brady* request, of chief medical examiner's testimony which tended to confirm defense expert's position and draw into question the state's evidence of defendant's guilt.

***State v. Johnston,**
529 N.E.2d 898 (Ohio 1988)

Conviction and death sentence reversed where prosecution failed to disclose evidence which undermined its theory of where the murder occurred and who did it.

Ex parte Womack,
541 So.2d 47 (Ala. 1988)

Conviction reversed where prosecution failed to disclose: (1) transcript of a meeting with a witness who recanted his grand jury testimony and attempted to implicate himself in the crime, only to be dissuaded by his counsel and the district attorney; (2) plea arrangements with two witnesses; (3) police reports and memos which included prior inconsistent statements and jailhouse confessions.

State v. Smith,
504 So.2d 1070 (La. App. 1987)

Defendant should have been permitted in camera inspection of alleged prior statement of victim for material inconsistencies or *Brady* information, in light of defendant's specific requests for such statements, which were based on differences between opening statement and victim's testimony.

State v. Osborne,
345 S.E.2d 256 (S.C.App. 1986), aff'd as modified, 353 S.E.2d 276 (S.C. 1987)

Nondisclosure, despite timely *Brady* motions prior to trial, of two recorded statements by State's primary witness, who was a heavy alcohol and drug user, had long criminal record, and had changed his story to an eyewitness account in exchange for near immunity, denied defendants

due process, where verdict was questionable, and defense counsels' cross-exam might well have shifted weight of evidence to establish reasonable doubt had State complied with motion.

State v. Wyche,
518 A.2d 907 (R.I. 1986)

Prosecutor's failure to disclose existence of blood test, which indicated that sexual assault victim's blood-alcohol concentration was .208, was deliberate, violated due process and *Brady*, and required new trial, where prosecutor knew of test results on evening before testimony of physician, who knew about test, and where prosecutor made no disclosure of test until guilty verdict.

Bloodworth v. State,
512 A.2d 1056 (Md. 1986)

Under *Bagley*, exculpatory material does not have to be in the prosecutor's possession. Here, fact that prosecutors were not in physical possession of detective's report of another possible suspect with respect to three offenses was immaterial to whether failure to disclose report to defendant was *Brady* violation.

Cipollina v. State,
501 So.2d 2 (Fla.App. 1986), review denied, 509 So.2d 1119 (Fla. 1987)

State committed *Brady* violation by failing to inform defense counsel of name and address of witness who obtained alibi information for defendant from codefendant in prison, even though State had informed defense that same witness had inculpated codefendant.

People v. Buckley,
501 N.Y.S.2d 554 (N.Y.Sup. 1986)

Updated rap sheet on prosecution witness, showing disposition of a charge not appearing on sheet given to defense was material which prosecution was obligated to disclose to defense.

Knight v. State,
478 So.2d 332 (Ala.Crim.App. 1985)

Evidence that both defendant and rape victim were A and H secretors (substances in saliva), and that person who smoked cigarettes found ground out on victim's card table was an H secretor, was clearly favorable to defendant's claim of innocence, and State's failure to disclose such evidence was a due process violation.

***Binsz v. State,**
675 P.2d 448 (Okl.Crim.App. 1984)

Convictions and death sentence overturned where prosecution tried to avoid telling the jury of key witness's leniency deal by keeping the witness ignorant of the bargain struck with her counsel.

Commonwealth v. Wallace,
455 A.2d 1187 (Pa. 1983)

Prosecution failed to correct false statements by its key witness and suppressed parts of his criminal record. Defense made numerous requests for full disclosure of the witness's criminal record and the prosecution repeatedly failed to deliver.

Granger v. State,
653 S.W.2d 868 (Tex.App. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), cert. denied, 472 U.S. 1012 (1985)

Life sentence reversed where prosecutor, judge, and witness's counsel all failed to disclose existence of a deal that changed witness's sentence from death to life. Also, because prosecution failed to correct the witness's testimony regarding the deal, her testimony from the first trial was not admissible at the second, after she refused to testify, because defendant's right to cross-examine her had been violated.

State v. Perkins,
423 So.2d 1103 (La. 1982)

Reversed under *Brady* where State failed to disclose statement of eyewitness, which substantially corroborated defendant's version of shooting, despite defendant's request of a copy of any statements of any person interviewed by agent of State in connection with subject matter of case. Statement might have affected outcome as to either guilt or punishment.

People v. Angelini,
649 P.2d 341 (Colo.App. 1982)

Where defendant requested tapes of prosecution's interviews with key prosecution witness, prosecution's failure to disclose that witness had been hypnotized on morning witness testified required new trial.

State v. Goodson,
277 S.E.2d 602 (S.C. 1981)

In prosecution for housebreaking, grand larceny and safecracking, state's failure to disclose existence of roll of film showing a person other defendant on premises where crime occurred deprived defendant of a fair trial, in that film could possibly cast serious doubt on credibility of state's only witness implicating the defendant.

State v. Fullwood,
262 S.E.2d 10 (S.C. 1979)

Where defendant pled self-defense when victim attacked him with a knife and cut him, where investigating officer, who was asked for disclosure, falsely told counsel that he had no information beneficial to defendant, and where prosecutor argued several times that victim had no knife although prosecutor had knife in his possession during the trial, concealment of the knife deprived defendant of fundamental fairness in his trial.

Deatrick v. State,
392 N.E.2d 498 (Ind.App. 1979)

New trial ordered where, in response to defendant's request, prosecutor and codefendant denied existence of a "deal" for codefendant's testimony, and on direct exam prosecutor elicited denial from codefendant that any promises for his testimony were made. Prior to trial prosecutor made promises and wrote a letter to parole board. This could have affected verdict, especially considering eyewitnesses' were inability to identify faces of perpetrators and prosecutor's repeated emphasis of codefendant's sincerity.

Dozier v. Commonwealth,
253 S.E.2d 655 (Va. 1979)

Conviction reversed where prosecutrix had made written statement which did not refer to alleged rape and did not refer to defendant by name. Statement was constitutionally material to charges, in that it affected credibility of the witness, even though the written account of the abduction was substantially consistent with the prosecutrix's testimony at trial. Failure of Commonwealth to disclose pursuant to defendant's request required new trial.

V. MILITARY CASES

United States v. Winningham,
2006 WL 2266827 (A.F. Crim. App. July 26, 2006) (unpublished)

Brady violation found in rape case where prosecution failed to disclose identity of and statement by a witness who was told by defendant, sometime after the alleged offense, that the sexual

encounter had been consensual and that the victim had been awake, contrary to her allegations.

United States v. Stewart,
62 M.J. 668 (A.F. Crim. App. 2006)

Prosecution violated *Brady* in rape case by belatedly disclosing the alleged victim's medical records which indicated a wide variety of medical conditions and drugs which could have provided an alternative explanation for the symptoms she displayed after drinking a beverage provided by defendant. The prosecution theory was that defendant intentionally drugged the victim and then raped her after she was unconscious. Although there was a suggestion of a type of "date rape" drug found in the victim's urine sample, it was too small to be considered a "positive" result. The defense did not receive the medical records until after the prosecution's case in chief had concluded. The remedy offered – a new opening argument, re-cross of the victim, and stipulated testimony by the prosecution toxicologist – was inadequate to cure the harm in light of the defense's explanation about the ways its strategy would have been different had it possessed the records earlier.

United States v. Mahoney,
58 M.J. 346 (C.A.A.F. 2003)

In court-martial proceedings for use of cocaine, the government violated *Brady* by failing to provide the defendant with a letter that had been written by a command staff judge advocate criticizing the prosecution's expert witness for his testimony in prior court-martials and questioning whether his employment should be continued. In particular, the letter complained about the expert's lack of enthusiasm for the military's drug testing program and his criticism of studies that other forensic toxicologists rely upon. In finding that disclosure of this letter was required, the appeals court rejected the government's defense that the trial prosecutor did not know of the letter. The court concluded that "it would have become known to him by the exercise of reasonable diligence," and that appropriate inquiry would have led to discovery of the letter. Because the letter arguably created a significant motive for the expert to testify positively about lab procedures and underlying scientific studies, cross-examination about the letter could have enhanced the defense case which centered on attacking the procedural regularity and reliability of urinalysis.

United States v. Sebring,
44 M.J. 805 (N.M.Crim.App. 1996)

Under *Kyles*, prosecutor's obligation to search for favorable evidence known to others acting on the government's behalf extends to information concerning levels of quality control at government's controlled substances testing laboratory. Failure of prosecuting officer to discover and disclose report indicating that laboratory had experienced significant quality control problems required reversal of defendant's conviction.

Brady v. Maryland Outline

Prepared by the Special Litigation Division,
Revised March 2013

THE PUBLIC DEFENDER SERVICE

for the District of Columbia



CHAMPIONS OF LIBERTY

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Introduction

This outline discusses in some detail what the prosecution's obligations are under *Brady v. Maryland*, 373 U.S. 83 (1963), and how a trial attorney litigating in Superior Court for the District of Columbia may advocate to hold the government to those obligations.

The outline is meant to serve both as a quick reference guide when trial lawyers are confronted with *Brady* issues in court and as the starting point for any correspondence or pleading addressing the government's *Brady* obligations. However, since *Brady* issues can be so fact-specific (and there is seemingly no shortage of *Brady* opinions, old and new), **doing case-specific research is always important.**

The outline relies on a variety of authorities:

- Binding authority from the Supreme Court and the D.C. Court of Appeals;
 - Persuasive authority from federal courts around the country;
 - The government's own policy documents, specifically:
 - The "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the United States Attorney's Manual (hereinafter "USAM") available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001), and
 - The 2010 memo "Guidance for Prosecutors Regarding Criminal Discovery" issued by then Deputy Attorney General David Ogden in the wake of the Ted Steven's scandal (hereinafter "DAG Guidance Memo"), now codified at Section 165 of the United States Attorney's Criminal Resource Manual and available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.
- (NOTE: PDS is unaware of any similar policy documents from the District of Columbia Office of the Attorney General).
- Local rules/standing orders from other federal courts around the country, in particular Massachusetts (borne of its long-standing troubles with *Brady* violations).

The first category of authority will obviously be the most persuasive to a Superior Court judge, and should always be the starting point of any argument.

Persuasive authority is valuable too, if only to remind D.C. judges that prosecutors from other jurisdictions – in particular Assistant United States Attorneys – are held to more stringent standards elsewhere and, as a consequence, behave differently vis-à-vis *Brady*.

Lastly, although the AUSAs will not hesitate to inform judges that their internal *Brady* policies create no enforceable rights for defendants, these policies are important because they contain a "constructive and objective description of a prosecutor's responsibilities pursuant to *Brady*" that memorializes "the government's own stated sense of fairness vis-a-vis criminal

defendants.” *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011). Defense counsel should be prepared to (1) remind government counsel about their obligations under these policies, (2) call on the government to explain why it cannot or will not comply with its own policies – policies which were drafted to reassure the courts and the public that the government takes its *Brady* obligations seriously, and (3) urge trial courts that any display of ignorance of or disregard for these policies by government counsel simply reinforces the need for courts to act to regulate the government’s *Brady* disclosures.

I. □ THE BASIC RULE

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Today, *Brady* and its progeny impose on the prosecution a “duty to learn of”¹ and disclose to the defense all “favorable,”² “material”³ information⁴ “known to the others acting on the government’s behalf in the case, including the police,”⁵ a group commonly referred to as “the prosecution team.”⁶ The prosecution must disclose this information “at such a time” and in such a manner “as to allow the defense to use the favorable material effectively”⁷ – which, as a practical matter, means well before trial if not at the outset of the case, because “the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.”⁸

Each of these requirements – what is favorable information, where the prosecution must look for it, how materiality must be assessed, when it must be disclosed, and in what format – has been analyzed by courts and is discussed in further detail below. But in litigating *Brady* claims, the defense should never lose sight of the fact that *Brady* is the furthest thing from a technicality. It is a “rule of fairness.”⁹ The motivating force behind the Court’s decision in *Brady* was the belief that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”¹⁰ The Court affirmed that a prosecutor should not be the “architect of a proceeding that does not comport with standards of justice.”¹¹

¹ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), *see also* III *infra*.

² *Brady*, 373 U.S. at 87; *see also* II *infra*.

³ *Brady*, 373 U.S. at 87; *see also* IV *infra*.

⁴ *See* II.D & III.B.3 *infra* (explaining that the prosecution has an obligation to disclose favorable information whether or not it has been documented and whether or not it is itself admissible if it may lead to admissible evidence).

⁵ *Kyles*, 514 U.S. at 437; *see also* III.B.2 *infra*.

⁶ *See, e.g.*, DAG Guidance Memo, Step 1.A.

⁷ *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) (internal quotation and citation omitted).

⁸ *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009).

⁹ *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (internal quotations and citations omitted).

¹⁰ *Brady*, 373 U.S. at 87.

¹¹ *Id.* at 88.

“By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.”¹² This is because “the prosecutor’s role transcends that of an adversary: the prosecutor ‘is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’”¹³ When litigating *Brady* claims, the defense should examine whether the prosecution is acting consistently with its obligation “to assist the defense in making its case” or whether it is acting strategically – *e.g.*, to limit the scope of disclosure or to delay the timing – which is antithetical to its duty to “transcend” its role as “an adversary.”¹⁴

II. WHAT CONSTITUTES FAVORABLE INFORMATION?

A. Favorable information is any information that the defense can use to assist its defense either offensively or defensively:

1. Favorable information is any information that might help the defense attack the government’s case or mount an affirmative defense. In determining what must be disclosed under *Brady* “the [prosecution’s] guiding principle must be that *the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel*, who has a different perspective and interest from that of the police or prosecutor.” *Miller*, 14 A.3d 1094, 1110 (D.C. 2011) (quoting *Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010) (emphasis added).
2. Certain categories of information are listed below, *see* II.E. *infra*, but ultimately what is favorable to the defense in a case will be fact-specific.
3. Thus, defense counsel should be prepared to explain (*ex parte* when appropriate) why certain types of information might be favorable in light of the government’s apparent theory and the defendant’s defense.

B. Favorable information encompasses “Exculpatory” and “Impeaching” Information:

¹² *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

¹³ *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *Miller*, 14 A.3d at 1107 (“the constitutional command of *Brady* unambiguously prescribes the prosecutor’s priorities: The prosecutor’s obligation is to seek justice before victory”) (internal quotation and citation omitted).

¹⁴ *Bagley*, 473 U.S. at 675 n.6; *see also Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011) (expressing dismay that “prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense”).

1. The Court in *Brady* simply spoke of the duty to disclose information “favorable” to the defense. 373 U.S. at 87.
2. Subsequent decisions have referred to the duty to disclose exculpatory and impeaching information. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Perez v. United States*, 968 A.2d 39, 65 (D.C. 2009) (citing *Strickler*).
 - a. **“Exculpatory” information is information “of a[ny] kind that would suggest to any prosecutor that the defense would want to know about it.”** *Miller*, 14 A.3d at 1110 (internal quotation and citation omitted) (endorsing this “eminently sensible standard”). It typically refers to information that, in itself, tends to reduce the likelihood of guilt or bears favorably on culpability or some other component of punishment. Under *Brady*, the defense is entitled, for example, to any mitigating information. Indeed, *Brady* itself addressed the failure to disclose to the defense the co-defendant’s confession that he actually strangled the victim (although he said it was Brady’s idea). Brief of Respondent, 1963 WL 105617 *4.
 - b. **“Impeachment” information typically refers to information that tends negatively to impact the credibility or reliability of a Government witness.** Impeaching information may be case-related (e.g., inconsistent statements about the same incident – which also may be exculpatory) or witness specific (e.g., evidence of past dishonesty).
3. Exculpatory and Impeaching information are *not* strictly distinct categories. *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979) (accepting “the premise that ‘impeaching evidence’ is exculpatory.”)
 - a. Indeed there is often little conceptual distinction between the two: evidence that casts a doubt on the reliability of evidence against a defendant is exculpatory in that it undermines the prosecution’s case. In other words, impeaching information may be a substantive reason to doubt whether the Government has sufficiently proven defendant’s guilt. See *Bagley*, 473 U.S. at 676 (“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.”) (internal quotation and citation omitted); *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) (same). **Because showing weaknesses in allegedly inculpatory evidence makes a person’s guilt less likely, any attempt to treat “impeachment” information as something other than “exculpatory” information is untenable as a matter of logic and fairness.**
 - b. Ultimately the distinction is immaterial: **A prosecutor’s duty to disclose impeaching information is the same as his/her duty to disclose exculpatory information.**
 - c. Nevertheless, the DC USAO has a history of trying to distinguish between the two, particularly vis-à-vis timing of disclosure, and the defense must be prepared to

combat the impression that impeaching information is somehow constitutionally less important (e.g., “*Brady* with a little b”).

- 1) Supreme Court case law is clear that the full force of a prosecution’s disclosure obligations under *Brady* applies to both types of information. *Strickler*, 527 U.S. at 281-82. Indeed, the Supreme Court has generally “disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes.”¹⁵ *Kyles*, 514 U.S. at 433. (In *Bagley*, the Court rejected an argument that the failure to disclose impeaching information was *more* egregious because it impinged both on a defendant’s right to due process and his right to confrontation, and held that the same standard of review applied to the failure to disclose exculpatory and impeaching information. 473 U.S. at 676-78.)
- 2) For its part, the Court of Appeals has not only reaffirmed that “[t]here is, of course, no difference between exculpatory and impeachment evidence when it comes to the prosecutor’s duty to disclose evidence favorable to the accused,” *Moore v. United States*, 846 A.2d 302, 305 n. 4 (D.C. 2004) (internal quotations and citations omitted), it specifically held in *Sykes v. United States* that the government could not justify delaying disclosure of information that was both exculpatory and impeaching simply by characterizing it as the latter: “[U]nder our precedents, . . . the [withheld] grand jury testimony . . . should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence.” 897 A.2d 769, 778 (D.C. 2006).
- 3) Although impeachment evidence is sometimes referred to as *Giglio* evidence in the Superior Court, advocates should remember that *Giglio* information, as the term is used in this manner, is merely one subset of important *Brady* information. Delay in disclosure cannot be justified by calling *Brady* information by another name.

C. Favorable information can relate to pretrial litigation of suppression of the government’s evidence or the admission of defense evidence:

¹⁵ The only exception is *United States v. Ruiz*, 536 U.S. 622 (2002), in which the Court held that the government could legitimately require a defendant to waive her right to impeaching information or information supporting an affirmative defense prior to entering into a pre-indictment, fast-track plea agreement. The foundation for the Court’s ruling was its determination that *Brady* is “part of [the Constitution’s] basic ‘fair trial’ guarantee.” *Id.* at 628. *Ruiz* should be interpreted to have limited import, bounded by its facts. Where a case has progressed beyond the very preliminary stages and there is every indication that a case *is* going to trial – *i.e.*, defendant has been indicted and defense counsel has made *Brady* requests – *Ruiz* should have no application. For further discussion of *Ruiz*, see VIII.B. *infra*.

1. *Brady* encompasses information relevant to the admissibility of evidence, including any information relevant to evidentiary questions or important pretrial constitutional motions, such as motions to suppress.
 - a. *Gaither v. United States*, 759 A.2d 662 (D.C. 2000), *mandate recalled and opinion amended by*, 816 A.2d 791 (D.C. 2003) (remanding for an evidentiary hearing, *inter alia*, to determine if *Brady* information had been withheld regarding suggestive procedures used in the identification process); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (witness statement should have been disclosed under *Brady* because it called into question whether prosecution’s evidence could be admitted as a “spontaneous utterance”); *James v. United States*, 580 A.2d 636 (D.C. 1990) (same);
 - b. *See also United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated in pretrial context by suppression of report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred—and thus, crucial to the admissibility of the confession); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (nondisclosure of *Brady* information may have affected fact finder’s findings at the suppression hearing).
2. The government’s policy acknowledges this. USAM § 9-5.001.C.2 (requiring disclosure of information that “might have a significant bearing on the admissibility of prosecution evidence”).

D. *Brady* encompasses ALL favorable information whether or not it is admissible at trial or even previously documented:

1. Although *Brady* itself uses the term “evidence,” the *Brady* doctrine encompasses *any* information, directly admissible or not, that would be favorable to the accused in preparing her defense, including information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. *See Wood v. Bartholomew*, 516 U.S. 1 (1995) (polygraph results showing possible deception not *Brady* because they were inadmissible and because they would not have affected defense counsel’s strategy or preparation).
 - a. This is implicit in D.C. case law holding that *Brady* information is to be used in the defense investigation or preparation of its case – at a time when admissibility is not the immediate or primary concern: *Miller*, 14 A.3d at 1108 (“An important purpose of the prosecutor’s obligations under *Brady* is to ‘allow[] defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.’”) (citation omitted); *Sykes*, 897 A.2d at 777, 781 (noting the importance of using the information in preparation of a case and highlighting that earlier disclosure would have enabled defendant to conduct additional pretrial investigation); *see also Leka v. Portuondo*, 257 F.3d 89, 101-02 (2d. Cir. 2001) (discussing the need to use favorable information for “full exploration

and exploitation” and that *Brady* must consider the impact of new information on “existing strategies and preparation”).

- b. Federal cases explicitly acknowledge that *Brady* information need not be admissible to trigger the prosecution’s disclosure obligation. *See, e.g., Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003) (prosecution withheld double-hearsay note that complainant had made false allegations in the past and, even though inadmissible, it might have led to admissible evidence); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (*Brady* information includes competent evidence, material that could lead to competent evidence, or any information that “would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise.”); *United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999) (“[T]o refute Bowie’s contention that the undisclosed information was ‘material’ in the *Brady* sense, it is not enough to show that the [suppressed information] would be inadmissible.”); *see also Coleman v. Calderon*, 150 F.3d 1105, 1116-17 (9th Cir. 1998); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999); *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012); *Johnson v. Folino*, 2013 U.S. App. LEXIS 1072 (3d Cir. Jan. 16, 2013).
 - c. The government’s own policy requires prosecutors to disclose favorable, material information regardless of admissibility, although the government takes the position that this policy obligation exceeds the constitutional disclosure obligations imposed by *Brady*. USAM § 9-5.001.C.
2. Relatedly, the mandate of *Brady* is not limited to requiring the production of certain pre-existing documents (like Rule 16), *but see VI infra* (discussing the form in which *Brady* disclosures should be made in order to be effectively used by the defense).
- a. *Brady* “is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. . . . [that] is necessary to ensure the effective administration of the criminal justice system.” *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (internal quotations and citations omitted).
 - b. Thus, *Brady* requires the prosecution to disclose certain favorable information, even if that information has not previously been recorded and has only been communicated orally to a member of the prosecution team. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007); *See* DAG Guidance Memo Step 1.B.5 (acknowledging that “the format of the information does not determine whether it is discoverable”; the government must search for favorable information in “factual reports” “factual discussions” or “factual information obtained during interviews”; and “information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.”)

E. Examples of favorable information – what the defense should ask for and what it is entitled to receive:

NOTE: The law is now clear that the prosecution has a nondelegable duty to disclose *Brady* information in the possession of the prosecution team, and the defense has no obligation to make specific *Brady* requests. See *Strickler*, 527 U.S. at 281-82 (setting forth the elements of a *Brady* claim – no requirement that the defense make a request); *Bagley*, 473 U.S. at 668 (rejecting a different standard of review for *Brady* claims based on whether defendant made a specific *Brady* request); see also *Miller*, 14 A.3d at 1107 (*Brady* is a “rule of fairness and minimum *prosecutorial* obligation”) (quoting *Curry*, 658 A.2d at 197; emphasis added).

Nevertheless, in order to ensure a defendant obtains the *Brady* information that he is due, or at the very least, to preserve and substantiate a *Brady* claim on appeal, defense counsel will always want to make written *Brady* requests tailored to the specific facts of the defendant’s case.

- Such requests focus the prosecution on the categories of favorable information the defense is seeking and thereby reduce the possibility that the prosecution will overlook this information,
- In addition, making such requests will only benefit the defense in pretrial materiality assessments – the fact that the defense asked for a specific type of information demonstrates that the defense considers such information important – and may hasten the timing of disclosure. See IV *infra*.
- Finally, the fact that the defense has made a specific request and received nothing from the government can assist in demonstrating prejudice. Nondisclosure in the face of explicit requests strikes courts as unfair. As the Supreme Court explained in *Bagley*:

[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant’s case.

473 U.S. at 682-83.

The following is a non-exhaustive list of sometimes overlapping categories of favorable information the defense may want to ask for:

1. **Any information that tends to cast doubt on the defendant’s guilt with respect to any essential element in any charged count.** *Brady*, 373 U.S. at 87; USAM § 9-5.001.C.1 (requiring disclosure of “information that is inconsistent with any element of any crime charged”); see also D. Mass. L. R. 116.2(A)(1).
2. **Any physical evidence, testing, or reports tending to make guilt less likely.** See, e.g., *Benn v. Lambert*, 283 F.3d 1040, 1060 (9th Cir. 2002) (failure to disclose investigative report that fire was *not* caused by an arson); *Sawyer v. Hofbauer*, 299 F.3d 605 (6th Cir.

2002) (testing withheld by prosecution demonstrated that semen stain in forced fellatio case belonged to a person different than the defendant); *Mitchell v. Gibson*, 262 F.3d 1036, 1063-64 (10th Cir. 2001) (State actively withheld and misled about DNA testing by different lab that completely contradicted forensic testimony of police examiner at trial); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (withheld ballistics results showing that alleged firearm was inoperable); *Johnson v. State*, 38 S.W.3d 52, 56-58 (Tenn. 2001) (withheld police report concluding that bullet came from different direction than where defendant was standing); *State v. Larimore*, 17 S.W.3d 87 (Ark. 2000) (withheld original medical examiner opinion on time of death).

3. **Any information regarding the failure of any percipient witness to make a positive identification of a defendant:**
 - a. **If the perpetrator is known to the witness, in any statement regarding the crime.** *Shelton v. United States*, 26 A.3d 216, 222 (D.C. 2011) (government violated *Brady* when it failed to disclose that complainant, who knew defendant, initially stated he was unable to identify the perpetrator); *see also, e.g., Slutzker v. Johnson*, 393 F.3d 373, 387 (3d Cir. 2004) (witness statement that man she saw talking to decedent before the murder was not defendant was *Brady* information).
 - b. **If a stranger identification, in any identification procedure.** *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011) (witness's failure to identify defendant in a photo array coupled with statement that the shooter "sort of look[ed] like" the photographs of two other people in the photo array was exculpatory); *Jackson v. United States*, 650 A.2d 659, 661 n.4 (D.C. 1994) (government "wisely conceded" that failure to disclose witness's inability to identify defendant coupled with the witnesses description of the perpetrator that was inconsistent with defendant "violated both the letter and spirit of *Brady*"); *see also Boyette v. Lefevre*, 246 F.3d 76, 85 (2d Cir. 2001) (the fact that complainant's "description of her attacker did not fit [defendant] and that she had not been able to identify [defendant] from photos" constituted *Brady* information).

NOTE: At present, in tension with other jurisdictions, the law in D.C. appears to be that a simple failure to identify – *i.e.*, a witness looks at photographs and does not choose defendant, without any other helpful facts – is not exculpatory. *Mackabee*, 2011 WL 4975109 *7; *Johnson v. United States*, 544 A.2d 270, 275 (D.C. 1988); *but see United States v. Jernigan*, 492 F.3d 1050, 1056 (9th Cir. 2007) (noting fact that "victim teller in the October 11, 2000 robbery could not identify the woman who robbed her from the photo spread containing Jernigan" was exculpatory); *United States v. Waagner*, 104 Fed. Appx. 521, 525 (6th Cir. 2004) ("The outcome of the unsuccessful pretrial identification constituted *Brady* material"); *United States v. Collazo-Aponte*, 216 F.3d 163, 189 (1st Cir. 2000) (witness's failure to identify defendant in a photo array was *Brady* information that should have been disclosed pretrial), *judgment vacated on other grounds, Collazo-Aponte v. United States*, 532 U.S. 1036 (2001); D. Mass L. R. 116.2(B)(1)(f) (requiring pre-trial disclosure of "[a] written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue"). Thus,

counsel should be prepared to argue why a non-identification is significant based on the facts of defendant's case. Assuming that a witness had an adequate opportunity to view the perpetrator (a fair assumption if the police chose to expend the effort to conduct an id procedure with the witness), the defense should argue that a non-id of a defendant in an array is the equivalent to saying "that doesn't look like the perpetrator," which surely would be *Brady* if the witness said this out loud. See II.E.4 *infra*. Counsel should still request this information, however, because the Court of Appeals' statement on the issue is contradicted by the great weight of authority and itself lacked any explanation or analysis. It is likely that, when pressed, the Court of Appeals would come to a different conclusion in a properly preserved case because such evidence is clearly favorable to the defense.

4. **Any eyewitness's description of the perpetrator which differs from the defendant's appearance.** *Kyles*, 514 U.S. at 441-44 (*Brady* violated when prosecution failed to disclose eyewitness descriptions of perpetrator that were not consistent with defendant); *Mackabee*, 2011 WL 4975109 at *3 & n.11 (observing that Court was "at a loss to understand th[e] reasoning" of the prosecution that videotaped statement of witness who gave police "a physical description [of the shooter] that could not match Mr. Mackabee" "was not the kind of exculpatory information that we would immediately go around and turn over"); *id.* at *5 (acknowledging inconsistent description "was exculpatory"); *Miller*, 14 A.3d at 1109 ("There can be no doubt – and all members of the court agree – that the government had an obligation under *Brady* to disclose" information that shooter was left handed); *Curry*, 658 A.2d at 195, 197 (government conceded error when it failed to disclose until two days prior to trial statements of eyewitness whose description of the perpetrator was inconsistent with defendant); *see also White v. Helling*, 194 F.3d 937 (8th Cir. 1999) (*Brady* violation when prosecutor failed to disclose that witness had initially identified another person as performing key actions during the robbery); *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988) (*Brady* violated by failure to disclose that initial witness statement had indicated perpetrator was a different race than defendant).
5. **An eyewitness' initial inability to provide a description of the perpetrator.** *Smith v. Cain*, No. 10-8145, 2012 U.S. LEXIS 576 (evidence "plainly material" when only eyewitness, who had testified at the murder trial that he was sure of his identification, had told police the night of the murder and a few days later that he could not make an identification"); *Shelton*, 26 A.3d at 222-23 (government had an obligation to disclose pretrial that complainant, who positively identified defendant as the shooter at trial, initially told police "I don't know or I didn't see or all's I saw was a dark colored, someone shoot at me from a dark-colored car"); *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) (forceful condemnation of prosecutor's conduct, which was "beyond reprehension" for failing to disclose police report taken "eight days after the murder that [witness] did not see the assailant's face, that he saw only his silhouette, and that because of this circumstance viewing photographs would be useless," where witness testified at trial that "he did see Lindsey's face" and that he was sure on the night of the murder that he could identify the shooter).
6. **Any information that links someone other than the defendant to the crime.** *Miller*, 14 A.3d at 1109, 1112 ("There can be no doubt – and all members of the court agree –

that the government had an obligation under *Brady* to disclose” information that shooter was left handed in case where defense sought to show that government witness, who was left handed, was the actual perpetrator); *Jernigan*, 492 F.3d at 1053 (*Brady* violation where prosecution failed to “disclos[e] the existence of a phenotypically similar bank robber who had been robbing banks in the same area after Jernigan’s incarceration”); *Trammell v. McKune*, 485 F.3d 546, 551-52 (10th Cir. 2007) (*Brady* violation where prosecution failed to disclose gas station receipts that supported defendant’s trial theory linking another person to the crime); *Jamison v. Collins*, 291 F.3d 380, 389 (6th Cir. 2002) (*Brady* violated because prosecution failed to disclose “positive identification of different suspects by an eyewitness to the crime”); *DiLosa v. Cain*, 279 F.3d 259, 265 (5th Cir. 2002) (prosecution withheld foreign hair samples and evidence of another neighborhood break-in that supported defendant’s assertion that two men robbed his house and killed his wife; this was particularly “unsettling” because the state had argued that the prosecution theory had to be credited in the absence of any evidence of a break-in – evidence it knew existed); *Mendez v. Artuz*, 303 F.3d 411, 412-13 (2d Cir. 2002) (prosecutors withheld evidence that contradicted their motive theory of the case and established that someone else had a motive); *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002) (state withheld evidence that another person had confessed to the crime); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997) (state withheld internal prison communication stating that another inmate had observed a different person commit the stabbing); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995) (state failed to disclose the evidence that suggested that two people previously arrested for the same murder had committed the crime); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801 (10th Cir. 1995) (Failure to disclose information indicating that uncharged third party had committed the offense); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (state withheld significant evidence of investigation into the guilt of another, which warranted reversal even though petitioner had chosen, without that exculpatory information, to plead not guilty by reason of insanity); *Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. Okla. 1986) (granting habeas relief because withheld evidence of a different suspect created a “reasonable doubt” and “in the hands of the defense, it could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders”); *cf. Winfield v. United States*, 676 A.2d 1, 4 (D.C. 1996) (evidence showing reasonable possibility of a third party perpetrator is relevant and admissible at trial).

7. **Any information that tends to support an affirmative defense.** *Mahler v. Kaylo*, 537 F.3d 494, 500-01 (5th Cir. 2008) (*Brady* violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off); *United States v. Spagnuolo*, 960 F.2d 990 (11th Cir. 1992) (government withheld psychiatric report demonstrating that defendant may have a disorder, which could have made an insanity defense viable and otherwise changed defense strategy); *Finley v. Johnson*, 243 F.3d 215 (5th Cir. 2001) (prosecution withheld fact that there had been a restraining order placed against victim to protect his wife and child, which would have supported defendant’s affirmative defense that he kidnapped victim in order to protect the victim’s wife and child); *United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) (government withheld information that person defendant claimed coerced her was a known, prominent drug-trafficker and government target); USAM § 9-5.001.C.1 (requiring disclosure of information “that establishes a recognized affirmative defense”).

8. **Any information that tends to cast doubt on the admissibility of the government’s evidence.** *Gaither v. United States*, 759 A.2d 655, 663 (D.C. 2003) (remanding because motions court “ignored the *Brady* consequences” of allegations of use of suggestive identification procedures by the police); *mandate recalled and amended by* 816 A.2d 791 (D.C. 2003) (again directing remand); *Smith*, 666 A.2d at 1224-25 (information that could have undermined admission of statement as excited utterance “require[d] disclosure under *Brady*”); *James v. United States*, 580 A.2d 636 (D.C. 1990) (same); USAM § 9-5.001.C.2 (requiring disclosure of information that “might have a significant bearing on the admissibility of prosecution evidence”); *see also* D. MASS. L. R. 116.2(A)(2) (requiring disclosure of any information that “tends to . . . [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief”).

9. **Any information that tends to support the defendant’s pretrial constitutional motions or tends to show that defendant’s constitutional rights were violated.** *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated where prosecution suppressed report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred—and thus, crucial to the admissibility of the confession).

10. **Any information that tends to diminish culpability and/or support lesser punishment.** *Cone v. Bell*, 129 S. Ct. 1769, 1783-86 (2009) (evidence that defendant “was impaired by his use of drugs around the time his crimes were committed” constituted *Brady* information; remand to assess its materiality as mitigation evidence in sentencing); *Brady*, 373 U.S. at 87 (requiring disclosure of information that is “favorable . . . and material . . . to . . . punishment”); *United States v. Quinn*, 537 F.Supp.2d 99 (D.D.C. 2008) (prosecution’s plea deal with another target was *Brady* information where it showed sentencing disparity); *see also* D. MASS. L. R. 116.2(A)(4) (requiring disclosure of any information that “tends to . . . [d]iminish the degree of the defendant’s culpability”).

11. **Inconsistent statements by government witnesses regarding the facts of the crime or the alleged conduct of the defendant.** *Kyles*, 514 U.S. at 445 (*Brady* violated when prosecution failed to disclose multiple inconsistent statements by key witness); *see also id.* at 444 (“[T]he evolution over time of a given eyewitness’s description can be fatal to his reliability”); *United States v. Kohring*, 637 F.3d 895, 906 (9th Cir. 2010) (reversing conviction for extortion and bribery where prosecution suppressed, *inter alia*, notes “that tend to show [prosecution witness] had difficulty remembering the details of key events,” for example, the amounts of cash payments, or whether any payment was made at all on certain occasions.); *United States v. Quinn*, 537 F.Supp.2d 99, 109 (D.D.C. 2008) (“the government itself concedes that when it has information about a witness who it is planning to call in its case in chief that indicates the witness has lied to the government about material matters during the course of the investigation, that information is *Brady* material.”); *Black v. United States*, 755 A.2d 1005 (D.C. 2000) (deceptive statements about the offense made by key witness made during a voice stress analyzer lie detector

test constituted favorable *Brady* information; remand to determine if suppressed statements were material); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (*Brady* violated when government suppressed inconsistent statement by key witness: his admission that his initial claim that robber had stuck a gun in his face was false); DAG Guidance Memo Step 1.B.7 (requiring review for potential disclosure of “[p]rior inconsistent statements” and “[s]tatements or reports reflecting witness statement variations”); *id.* at Step 1.B.8 (clarifying that “witness interviews should be memorialized,” and that “agent and prosecutor notes” should be reviewed); *see also* D. Mass L. R. 116.2(B)(2)(b) (requiring disclosure of “[a]ny inconsistent statement . . . made orally or in writing by any witness whom the government anticipates calling in its case-in-chief”).

12. **Statements by others that are inconsistent with statements of government witnesses regarding the facts of the crime or the alleged conduct of the defendant.** *Boyd v. United States*, 908 A.2d 39, 54-56 (D.C. 2006) (statements of witnesses who saw three rather than four persons present at the time of the abduction, contradicting government witness’s account, constituted *Brady* information that should have been disclosed to the defense); *Sykes v. United States*, 897 A.2d 769, 778-79 (D.C. 2006) (grand jury testimony of two witnesses contradicting government informant’s account of defendant’s alleged confession constituted *Brady* information that should have been disclosed to the defense); *see also Norton v. Spencer*, 351 F.3d 1 (1st Cir. 2003) (*Brady* violated when prosecutor failed to disclose that a witness, who ultimately did not testify, claimed that he and the other witness had made up their stories of molestation at the suggestion of the other witness); *United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997) (*Brady* violation where government failed to disclose interview with individual who was not called as a witness at trial that undermined credibility of witness whose testimony was key to one of the counts of conviction); D. Mass L. R. 116.2(B)(2)(c) (requiring disclosure of “[a]ny statement . . . made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief”).
13. **Any information that relates to the potential mental or physical impairment of any witness.** *Perez*, 968 A.2d at 65 (government should have disclosed pretrial key witness’s statements to the grand jury that he was drunk at the time of the incident and had no memory of it); DAG Guidance Memo Step 1.B.7 (requiring review for disclosure of “[k]nown substance abuse or mental health issues or other issues that could affect the witness’s ability to perceive and recall events.”); *see also Silva v. Brown*, 416 F.3d 980, 984 (9th Cir. 2005) (failure to disclose deal that prosecution agreed with witness to prevent the witness from undergoing a psychiatric examination prior to testifying); *East v. Johnson*, 123 F.3d 235, 239-40 (5th Cir. 1997) (failure to disclose complete criminal record that would have led to information concerning serious mental health problems of key witness); *United States v. Smith*, 77 F.3d 511, 513-17 (D.C. Cir. 1996) (failure to disclose dismissal of state charges in exchange for federal testimony and mental health history of witness concerning depression); D. MASS. L. R. 116.2(B)(2)(a) &(g) (any information that “tends to . . . [c]ast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-

chief,” including but not limited to “[i]nformation known to the government of any mental or physical impairment [or substance abuse] of any witness”).

14. **Any information relating to potential witness bias, including:**

- a. **Benefits received by a witness.** *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004) (*Brady* violation when government failed to disclose witness status as paid informant); *Giglio v. United States*, 405 U.S. 150 (1972) (*Brady* violation where government failed to disclose nonprosecution agreement with cooperating witness); DAG Guidance Memo, Step 1.B.7 (requiring disclosure of benefits to any testifying witness including but not limited to: “[d]ropped or reduced charges, [i]mmunity, [e]xpectations of . . . reduce[d] . . . sentence[s], [a]ssistance in . . . [other] criminal proceeding[s], [c]onsiderations regarding forfeiture of assets, [s]tays of deportation or other immigration status considerations, S-Visas, [m]onetary benefits, [n]on-prosecution agreements, [l]etters to other law enforcement officials (. . . [including] parole boards), setting forth the extent of a witness’s assistance or making substantive recommendations on the witness’s behalf, [r]elocation assistance, [c]onsideration or benefits to . . . third parties”); *Lindsey v. United States*, 911 A.2d 824, 839 (D.C. 2006) (government made “substantially incomplete” *Brady* disclosures pretrial; “[e]ach of the eyewitnesses had been treated favorably by the government in exchange for their testimony by garnering plea agreements on other charges or being paid with federal witness vouchers, but impeachment evidence on three of the four eyewitnesses was not disclosed before trial and had to be supplemented by the government as the trial progressed”); *see also Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010) (*Brady* violation where prosecution failed to disclose details of informant’s plea bargaining process – specifically, the fact that he independently negotiated a separate deal with the prosecution that was more favorable than the deal negotiated by his lawyer; information contradicted his representations of naiveté and indicated he was a sophisticated jailhouse informant); *Robinson v. Mills*, 592 F.3d 730, 738 (6th Cir. 2010) (*Brady* violation where prosecution suppressed evidence of “State’s star witness” status as a confidential informant); *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (*Brady* violation where prosecution failed to disclose understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes; rejecting argument that there was no *Brady* violation in the absence of an express promise); D. MASS. L. R. 116.2(B)(1)(c) (requiring disclosure of information regarding “any promise, reward, or inducement . . . given to any witness whom the government anticipates calling in its case-in-chief”).
- b. **“Other known conditions that could affect the witness’s bias such as: [a]nimosity toward defendant[,] [a]nimosity toward a group of which the defendant is a member or with which defendant is affiliated[,] [r]elationship with [the] victim[,] [k]nown but uncharged criminal conduct.”** DAG Guidance Memo, Step 1.B.7; *see also* D. Mass R. 116(B)(2)(d) (requiring disclosure of “[i]nformation reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief”); D. Mass. L. R. 116.2(B)(2)(e) (requiring disclosure of “[a] written description of any prosecutable...offense known by the government to

have been committed by any witness whom the government anticipates calling in its case-in-chief”).

- c. **Information that calls into question efforts to present the witness as neutral and disinterested.** *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (reversing conviction where prosecution failed to disclose that key witness to alleged extortion and bribery scheme was under investigation for sexual exploitation of minors which shed light on his incentive to cooperate with law enforcement); *Schledwitz v. United States*, 169 F.3d 1003, 1015-16 (6th Cir. 1999) (*Brady* violation when government presented witness as disinterested expert but witness had been actively involved in the criminal investigation).
- d. **Impeachment information that officers or others had “fed” parts of a witness’s story to the witness during questioning.** *See, e.g., Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012) (reversing conviction and death sentence and emphasizing “momentous” nature of *Brady* violation when officers not only told the witness that he could avoid the death penalty by implicating the person who allegedly hired him, but also mentioned to the witness that officers thought Justin Wolfe was involved, thereby potentially feeding the witness the person the witness was supposed to inculcate). **This phenomenon is common, and often subtle, and it should lead to specific questions by defense counsel about the ways in which witnesses were questioned to determine whether and when specific facts were introduced by officers into the conversation.**

15. **Any information related to a witness’ dishonesty and/or criminality.**

- a. **Acts of a witness that are probative of untruthfulness.** *United States v. Cuffie*, 80 F.3d 514, 515 (D.C. Cir. 1996) (prosecution violated its *Brady* obligations where it failed to disclose fact of key witness’s perjury in a Superior Court proceeding to expunge the arrest record of his cousin); *United States v. Quinn*, 537 F.Supp.2d 99, 109 (D.D.C. 2008) (government conceded and court held that when the prosecution “has information about a witness who it is planning to call in its case in chief that indicates the witness has lied to the government about material matters during the course of the investigation, that information is *Brady* material”)¹⁶; *Bennett v. United States*, 797 A.2d 1251, 1255-58 (D.C. 2002) (*Brady* violation because government suppressed information that key witness had lied to the police or the grand jury about an unrelated murder); DAG Guidance Memo, Step 1.B.7 (requiring review for

¹⁶ In *Quinn*, the court rejected the government’s argument that “nothing was suppressed at Quinn’s trial or sentencing because it did not know with absolute certainty at that time that Tatum had lied.” *Quinn*, 537 F.Supp.2d at 109. The court observed that “[t]he government’s strained dichotomy between ‘knowing’ and being ‘highly suspicious’ constitutes no excuse here since the failure to pinpoint a precise statement that would support a false statement charge was due to the lack of timely investigation by the government—an action that ‘constituted a breach of the government’s duty to search for *Brady* information.’” *Id.* at 110.

- potential disclosure “[p]rior acts under Fed. R. Evid. 608”); *see also Benn v. Lambert*, 283 F.3d 1040, 1055 (9th Cir. 2002) (*Brady* violation for failing to disclose prior acts of theft and lying by government witness and citing cases noting that such failures are material even if separate impeachment evidence concerning such a witness is disclosed).
- b. **A copy of any criminal record of any witness, including witness’s prison records and probation records, as well as a written description of any criminal cases pending against any witness.** *Lewis v. United States*, 408 A.2d 303 (D.C. 1978) (setting up prophylactic rule concerning disclosure of criminal histories of prosecution witnesses); DAG Guidance Memo, Step 1.B.7 (requiring review for potential disclosure of “[p]rior convictions under Fed. R. Evid. 609”); *see also* D. Mass. L. R. 116(B)(1)(d); D. Mass. L. R. 116(B)(1)(e)
- c. **Any information concerning a law enforcement officer’s misconduct and/or abuse of authority:** *Cf. Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (complaint regarding police officer to Civilian Complaint Review Board could be *Brady* information, observing complaint procedures require officer to be notified of complaint against him and his actual knowledge could be imputed to prosecution team, and remanding to determine if suppression of complaint in this case violated *Brady*); *Bullock v. United States*, 709 A.2d 87, 93 (D.C. 1998) (inviting defendant to file §23-110 to litigate whether suppression of pending internal investigation of law enforcement officer violated *Brady*); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (prosecutor must search internal police files for possible impeachment information about officers important to the case); *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) (*Brady* violation when prosecutor withheld investigation into officer’s sleeping on the job, role in thefts from police, and other nefarious firearms transactions because his credibility was key to suppression hearing on *Miranda*); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (requiring review of Postal Officer’s personnel file for impeachment evidence when he was prosecution’s key witness); International Association of Chiefs of Police (“IACP”) Model *Brady* Policy IV.B.1.1 (recommending disclosure of “[a]n officer’s excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer.”).¹⁷

III. WHERE MUST THE GOVERNMENT LOOK FOR FAVORABLE INFORMATION?

- A. **It is the trial prosecutor’s duty to learn of *Brady* information:** A prosecutor’s *Brady* disclosure obligation is not limited to information of which a prosecutor has actual knowledge; rather, a prosecutor has a nondelegable “duty to learn of” *Brady* information in the case. *Kyles*, 514 U.S. at 437.
1. The argument that a trial prosecutor’s duty of disclosure to favorable information is limited to that which he/she has actual knowledge of has been rejected because

¹⁷ Metropolitan Police Department Chief Cathy Lanier is a member of the IACP. <http://www.dwatch.com/mayor/061120.htm>.

- a. It would not serve the fairness goals of the *Brady* mandate, *see Brooks*, 966 F.2d at 1503 (“an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure”); *Barbee v. Maryland*, 331 F.2d 842, 846 (4th Cir. 1964) (“The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State’s attorney, were guilty of the nondisclosure” and “[f]ailure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld.”).
 - b. It would create a perverse incentive for a prosecutor to shield him/herself from *Brady* information in the case. *Brooks*, 966 F.2d at 1502.
2. It is illegitimate for a prosecutor to assert pretrial that it may withhold *Brady* information because the defense should be able to learn of this favorable information through other means.
 - a. In *Strickler*, 527 U.S. at 283 n.23, 284, the Supreme Court rejected the argument that defense counsel should have uncovered *Brady* information, stating that counsel was entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor’s constitutional duty of disclosure. Likewise, in *Banks*, 540 U.S. at 695-698, the Court declared that “[a] rule . . . declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”
 - b. In *In Re Sealed Case (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999), the D.C. Circuit rejected the government’s argument that *Brady* was not violated because defense counsel could have learned of details of cooperation agreements with witness through “reasonable pre-trial preparation.” That the witness had been called to testify for the defense was “irrelevant.” Defense was entitled to obtain information about deals directly from the government and defense counsel “was no more required to subpoena the [police] officers to learn of their agreements [with the witness] than she was to subpoena the prosecutor to learn of her [agreements with the witness]. The appropriate way for counsel to obtain such information was to make a *Brady* request of the prosecutor, just as she did.” Other federal courts around the country have likewise held that the government’s disclosure obligations are independent of what the defendant or even a defendant’s witness may know or remember. *See, e.g., Gantt v. Roe*, 389 F.3d 908, 913 (9th Cir. 2004); *Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995); *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001).

B. It is the prosecutor’s duty to learn of *Brady* information in the possession of the entire “Prosecution Team”:

1. **A prosecutor “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in a case,”** *Kyles*, 514 U.S. at 437, aka “the prosecution team.” DAG Guidance Memo, Step 1.A; *Brooks*, 966 F.2d at 1503 (duty

to search for *Brady* extends to “branches of government closely aligned with the prosecution”) (internal quotations and citation omitted); *United States v. Bryant*, 439 F.2d 642, 650 (1971) (“The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies.”); *see also Cook v. United States*, 828 A.2d 194, 202 (D.C. 2003) (quoting *Bryant*); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (“If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do.”); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (imputing knowledge of FDA to federal prosecutors because FDA was agency that administered the statute and had consulted with the prosecutor at times during prosecution); *United States v. Kattar*, 840 F.2d 118,127 (1st Cir. 1988) (“The Justice Department's various offices ordinarily should be treated as an entity, the left hand of which is presumed to know what the right hand is doing.”); *United States v. Barkett*, 530 F.2d 189 (8th Cir. 1976) (“[O]ne office within a single federal agency must know what another office of the same agency is doing. This is no more than to hold the Government to the same standard of conduct as governs private individuals in transmitting notice from agent to principal.”); *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (imputing knowledge of witness protection team and of the attorney general’s department to the prosecutor).

2. **The prosecution team:**

- a. **Necessarily encompasses the MPD**, “[g]iven the close working relationship between the Washington Metropolitan Police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts).” *Brooks*, 966 F.2d at 1503; *see also Kyles*, 514 U.S. at 437 (“the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police”); *In re Sealed Case (Brady Obligations)*, 185 F.3d 887, 892, (D.C. Cir. 1999) (quoting *Kyles*); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (“pursuant to *Kyles*, the government is responsible for knowing what the police know”).
- b. **May extend beyond police officers working directly on the defendant’s case.** *Brooks*, 966 F.2d at 1503 (in drug case where prosecution’s chief witness (a police officer) was subsequently shot and there was “some link between the death and her work, and thus (by extension) to some trouble connected with her work,” duty to search extended to homicide and Internal Affairs Division files); *see also Robinson v. United States*, 825 A.2d 318, 314 (D.C. 2003) (citing *Brooks* and acknowledging “the *Brady* doctrine requiring disclosure of exculpatory information has been extended to situations where a division of the police department not involved in a case has information that could easily be found by the prosecutors if they sought it out”) (internal quotations and citation omitted).
- c. **Includes other prosecutors and their agents.** *In re Sealed Case (Brady Violations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (imputing knowledge to prosecutors in Superior Court and federal court, as well as to MPD, FBI, DEA, or any other agency operating

on behalf of the same government); *Smith v. Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) (*Brady* “encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor’s entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture”) (internal citation omitted).

- d. **May extend across state-federal jurisdictional boundaries.** *United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (imputing knowledge in state hands to federal prosecutors because of degree of cooperation and interaction among the various authorities during the general course of the investigation); *United States v. Naegele*, 468 F.Supp.2d 150, 154 (D.D.C. 2007) (in case where defendant was charged with making false statements in a bankruptcy proceeding, government had an obligation under *Brady* to search the files of the main office of the Region 4 [U.S.] Trustee in Columbia, South Carolina). A general test is set forth in *United States v. Risha*, 445 F.3d 298, 303-06 (3d Cir. 2006): “(1) whether the party with knowledge of the information is acting on the government’s ‘behalf’ or is under its ‘control’; (2) the extent to which state and federal governments are part of a ‘team,’ are participating in a ‘joint investigation’ or are sharing resources; and (3) whether the entity charged with constructive possession has ‘ready access’ to the evidence.

3. The prosecutor’s “duty to learn” of favorable information in possession of the prosecution team extends to information that has not been memorialized.

- a. *Brady* is not a rule of discovery, see II.D.2. *supra*, and thus is not limited to a review and production of pre-existing documents. As the government’s own policy states, “material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.” DAG Guidance Memo, Step I.B.5; *see also id.* at Step I.B.8.b (noting that prosecutor’s “[t]rial preparation meetings with witnesses generally need not be memorialized” but that prosecutors “should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session” and that such information may be subject to disclosure).
- b. Thus, as the government’s own policy acknowledges, the “duty to learn” encompasses the duty to speak to members of the prosecution team to become aware of previously undocumented favorable information. DAG Guidance Memo, Step I.B.6 (“Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues. . . .”); *see also id.* (requiring prosecutors to review “case-related communications” which “*may be* memorialized in emails, memoranda, or notes”) (emphasis added); *Cf. Benton v. United States*, 815 A.2d 371 (D.C. 2003) (declining to endorse government argument that police officer’s perjury was not disclosable under *Brady* because it was known only to the officer himself).

NOTE: The government’s policy is that all witness interviews *should be* memorialized:

Witness interviews should be memorialized by the agent. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement.

DAG Guidance Memo, Step 1.B.8.

4. **The prosecutor’s constitutional “duty to learn” of favorable information extends to documents that are otherwise privileged or protected from disclosure by statute or court rules.**¹⁸
 - a. **The prosecution has a duty to review documents that are otherwise privileged or protected from disclosure by statute or court rule.** *United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2010 (“prosecution ha[d] a duty to disclose the non-cumulative underlying exculpatory facts in the [prosecutor’s] email”) (internal quotations and citation omitted); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995) (*Brady* violation when government failed to disclose IRS filing information for people, even though protected by statute, because those people’s prior false returns could have helped defendant show that the new falsities were not his doing, but rather, a continuation of their prior improper conduct); *Hammon v. United States*, 695 A.2d 97, 105 (D.C. 1997) (acknowledging that “under certain circumstances, records in confidential juvenile case files are subject to *Brady* disclosure” & citing cases); *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (relying on *Brady* cases, Court holds defendant’s due process entitlement to favorable material documents potentially extended to documents in statutorily-protected Children and Youth Services file and affirming remand for in camera review); *United States v. Williams Companies, Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (acknowledging that *Brady* “contemplates a role” for the trial court vis-à-vis disclosures of privileged information, and directing that “[u]pon remand the district court can flesh out the details as to which documents must be disclosed . . . and determine whether a protective order should be issued with respect to any of those documents”).
 - b. **This includes factual information in the prosecutor’s notes.** *Kohring*, 637 F.3d at 908; *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 (D.D.C. 1991) (noting that case law “suggest[s] that internal materials possibly constituting work product may not automatically be exempt from *Brady* requirements”); *see also* DAG Guidance Memo, Step 1.B.1 (requiring review of an investigative agency’s files and noting that if favorable “information is contained in a document that the agency deems to be an ‘internal’ document . . . it may not be necessary to produce the internal document,

¹⁸ Similarly, privilege or statutory restrictions on disclosure are not a legitimate basis for withholding *Brady* information from the defense. *See V.D. infra.*

but it will be necessary to produce all of the discoverable information contained in it”); DAG Guidance Memo, Step 1.B.5 (requiring review of “[s]ubstantive communications” between prosecutors and agents, including “factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility”).

- c. **Privilege or statutory restrictions on disclosure are not a legitimate basis for disregarding *Brady* disclosure obligations.** Rather, where *Brady* compels disclosure, a prosecutor may seek court permission and/or a protective order from the court to limit disclosure of this information. *United States v. Williams Companies, Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (acknowledging that *Brady* “contemplates a role” for the trial court vis-à-vis disclosures of privileged information, and directing that “[u]pon remand the district court can flesh out the details as to which documents must be disclosed . . . and determine whether a protective order should be issued with respect to any of those documents”); *see also Boyd*, 908 A.2d at 61 (generally affirming trial courts’ oversight power over *Brady* disclosures); DAG Guidance Memo Step 3.A. (noting that when “considerations [militating against disclosure] conflict with the[ir] discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures”).

C. Pursuant to the government’s own policy, specific documents federal prosecutors should examine include:

1. “[T]he investigative agency’s files,” including any emails/electronic documents. DAG Guidance Memo, Step 1.B.1.
2. All files relating to a “confidential informant,” “not just the portion relating to the current case,” “including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information.” *Id.* at Step 1.B.2.
3. All “[e]vidence and [i]nformation [g]athered [d]uring the [i]nvestigation,” including but not limited to anything obtained during searches or via subpoenas. *Id.* at Step 1.B.3
4. All “[s]ubstantive [c]ase-[r]elated [c]ommunications” including communications “(1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims.” *Id.* at Step 1.B.5.

NOTE: In April 2011 the USAO acknowledged that it had failed to disclose recordings of radio communications in a number of cases because it thought the radio channels used (which it described as “tactical radio communications”) were not recorded. Be advised that it is PDS’s understanding that the Office of Unified Communications currently records ALL radio communications.

5. Any “[p]otential *Giglio* [i]nformation [r]elating to [l]aw [e]nforcement [w]itnesses.” Step 1.B.6; *see also* USAM § 9-5.100.1 (requiring “[e]ach investigative agency employee

. . . to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case” but noting that “in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency”). This includes:

“(a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;” USAM § 9-5.100.5

“(b) any past or pending criminal charge brought against the employee; and,” *id.*

“(c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.” *Id.*

6. Any “[p]otential *Giglio* [i]nformation [r]elating to [n]on-[l]aw [e]nforcement [w]itnesses” or declarants of hearsay admitted into evidence, including “[p]rior inconsistent statements,” “[s]tatement variations,” “benefits provided to witnesses,” “[o]ther known conditions that could affect the witness's bias,” prior bad acts, prior convictions, and “[k]nown substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.” Step 1.B.7
7. Any “[i]nformation [o]btained in [w]itness [i]nterviews,” or “[t]rial [p]reparation [m]eetings” with witnesses. DAG Guidance Memo, Step 1.B. 8. “Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.” *Id.* “Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview.” *Id.*; *see also United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 165 (2d Cir. 2008) (reversing conviction where prosecution failed to disclose agent’s notes from cooperating witness’s proffer session containing information favorable to defendant).

IV. HOW MUST PROSECUTORS ASSESS MATERIALITY PRE-TRIAL?

A. Distinguishing pre-trial from appellate/post-conviction assessments of materiality

1. To prevail on a *Brady* claim on appeal or in post-conviction proceedings, a defendant must establish that (a) the prosecution was in possession (actual or constructive) of favorable information, (b) the prosecution failed to disclose this information to the defense in a timely fashion or at all, and (c) the withheld favorable information was material to the outcome of the trial. *Strickler*, 527 U.S. at 281-82. The notion of “materiality” is the attempt by courts to quantify the importance of withheld information or, put another way, the prejudice to the defense at trial from the suppression or delayed disclosure of this information. *Bagley*, 473 U.S. at 682 (*Brady* information is “material” “if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different.”). This means, therefore, whether there is a reasonable chance that one juror might have had a reasonable doubt. *United States v. Agurs*, 427 U.S. 97, 112 (1976) (“[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.”).

2. The pretrial materiality calculus presents distinct challenges and considerations.
 - a. Pretrial, it is difficult if not impossible to say what the importance of any one piece of withheld favorable information is to the outcome of a trial—because the trial has yet to occur.
 - b. Pretrial, the prosecution’s focus should be to ensure that the due process guarantee is fulfilled—not to conduct speculative, *ex ante* assessments of prejudice if certain information is strategically withheld.
3. Accordingly, the Supreme Court and the D.C. Court of Appeals have recognized that the pre-trial materiality assessment differs from—and encompasses more information than¹⁹ – the materiality assessment made on appellate review or in post-conviction proceedings. *See IV.B infra*.

B. The Pretrial Materiality Standard in D.C.: Prosecutors must disclose all “arguably material” favorable information.

1. **The pretrial materiality analysis is more inclusive:** Both the Supreme Court and the Court of Appeals have recognized that the prosecution’s “duty of disclosure” pretrial under *Brady* is “broad,” *Strickler*, 527 U.S. at 281, and “exists even when the items disclosed later prove not to be material” on appeal. *Boyd*, 908 A.2d at 60. In *Boyd*, the Court of Appeals explained:

¹⁹ Even if a trial court erroneously determines that it should apply the post-conviction materiality standard pretrial, counsel should be prepared to educate the court that this standard is itself not a high one. It merely requires the defense to show that, had the *Brady* information been timely disclosed, there is a “reasonable probability” that the jury would have reached a different result – *i.e.*, a reasonable probability that the jury would have had reasonable doubt as to defendant’s guilt. A reasonable probability *does not* mean more likely than not. *Kyles*, 514 U.S. at 434. As the Supreme Court explained in *Kyles*:

Bagley’s touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

Kyles, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); *id.* at 543 (the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury’s verdict would have been the same).

the Supreme Court in *Strickler* contemplated the existence of a broad “duty of disclosure,” but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. The Court thus recognized that *a duty of disclosure exists even when the items disclosed later prove not to be material.*

Id. (emphasis added); accord *Miller*, 14 A.3d at 1109 (“[A]s we explained in *Boyd*, [and as] the Supreme Court recognized in *Strickler*, . . . there is a duty of disclosure even when the items disclosed subsequently prove not to be material. . . . We further stated in *Boyd* that the language in *Strickler* “can fairly be read only as recognizing that a duty of disclosure exists even if it later appears that reversal is not required.”)²⁰

2. The broader interpretation of materiality pretrial requires prosecutors:

- a. To “make the materiality determination . . . with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense” and**
- b. “[I]n arguable cases, . . . to provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for in camera inspection.”**

Boyd, 908 A.2d at 61; see also *Cone v. Bell*, 129 S. Ct. 1769, 1783 at n.15 (2009) (prosecutors must “resolv[e] doubtful questions in favor of disclosure”); *Kyles*, 514 U.S. at 439-40 (same).

This broad interpretation of materiality takes into account the reality, acknowledged by the Court of Appeals over thirty years ago in *Lewis v. United States*, 408 A.2d 303, (D.C. 1979), that

a defendant’s actual use of [*Brady* information] at trial before the jury decides is a better test of materiality than a retrospective inquiry by an appellate court. . . . It follows, in the words of [*United States v. Agurs*, 427 U.S. 97, 106 (1976)] that a defendant is entitled to disclosure because “a substantial basis for claiming materiality exists. . . .” In short, the defendant, not the post-trial reviewing court, should have control over materiality to outcome.

²⁰ The Supreme Court justices appear to understand the requirement in similar terms. After a number of justices made similar points, Justice Kennedy summed up his understanding of *Brady* during the oral arguments in the Supreme Court’s most recent *Brady* decision: “I think you mispoke when you . . . were asked what is the test for when *Brady* material must be turned over. And you said whether or not there’s a reasonable probability . . . that the result would have been different. That’s the test for when there has been a *Brady* violation. You don’t determine your *Brady* obligation by the test for the *Brady* violation. You’re transposing two very different things.” Transcript of Oral Argument at 49, *Smith v. Cain*, 132S.Ct. 627(2012)(No. 10-8145), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf.

Id. at 308.

3.□ The broader interpretation of materiality pretrial is consistent with the government’s own policy.

- a. The government’s own policy acknowledges “that it is sometimes difficult to assess the materiality of evidence before trial,” and thus directs that “prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.” USAM § 9-5.001.B.1.
- b. Pursuant to the government’s policy, prosecutors “must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.” USAM § 9-5.001.C.1.
- c. Pursuant to the government’s policy, prosecutors “must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.” USAM § 9-5.001.C.2.
- d. The government’s policy acknowledges that “items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in [USAM § 9-5.001.C.1 & 2], [but that] several items together can have such an effect. If this is the case, all such items must be disclosed.” USAM § 9-5.001.C.4.

4.□ The broader interpretation of materiality pretrial does not, as of now, dispense with the materiality inquiry entirely.

- a. The same considerations (*see* IV.A *supra*) that have led the Court of Appeals to acknowledge a broader interpretation of materiality pretrial, have led other courts to dispense with the materiality inquiry entirely pretrial. For example, in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005), the Court held that “the only question before (and even during) trial is whether the evidence at issue may be ‘favorable to the accused’; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial. *See also United States v. Carter*, 313 F. Supp. 2d 921 (E.D. Wisc. 2004) (rejecting pretrial materiality analysis); *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999) (same).
- b. At least for the time being, the Court of Appeals has rejected this approach. In *Boyd*, the Court of Appeals stated that it “would be inclined to follow *Safavian* if we considered ourselves to be at liberty to do so. We believe, however, that the opinion in *Safavian* cannot be reconciled with *Agurs*, *Bagley*, and *Kyles*. Indeed,

the reasoning in *Safavian* parallels and expands upon that of Justice Marshall's *dissenting* opinion in *Bagley*.” 908 A.2d at 61 n.32.

NOTE: Despite its omission of any mention of materiality, D.C. R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor cannot be cited as imposing an obligation on prosecutors to make disclosures of favorable information regardless of materiality. The rule states that the prosecution has an obligation “to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, *any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense.*” *Id.* (emphasis added). A comment to this rule, however, states that the rule is not intended to increase the prosecutor’s obligations beyond those required by the constitution, statute, or local court rules. Comment[1] to Rule 3.8. (No such limitation is imposed on the corresponding ABA rule.)

C. Trial courts have the power and the obligation pretrial to ensure that the government is broadly interpreting the materiality component of the *Brady* analysis.

1. The Court of Appeals in *Boyd* affirmed the trial court’s authority and obligation to oversee *Brady* disclosures and to ensure that the government is properly assessing materiality pretrial: “[T]he trial court must take into account the reality that the prosecutor has no crystal ball, and must review the exercise of prosecutorial discretion accordingly.” *Boyd*, 908 A.2d at 61; *see also id.* at 59 (regarding *Brady* disclosures, prosecutorial “discretion is not unlimited, and courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial”).
 - a. *United States v. Edwards*, 887 F. Supp. 2d 63 (D.D.C. 2012) (Kollar-Kotelly, J.), recently applied these principles. Taking a broad view of pretrial materiality because “neither the Government nor the Court is in a position to conclusively determine at this stage” whether the information “will not be favorable to the Defendant in preparing his defense,” *id.* at *5-7, the District Court ordered the government to produce any information concerning “the purported failure of one or more co-conspirators to name Williams as a member of the conspiracy.”
2. One means for the trial court to exercise its oversight over the prosecution’s materiality assessments is to review documents *in camera*.
 - a. “In arguable cases” the prosecution is supposed to “provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection.” *Boyd*, 908 A.2d at 61.
 - b. But even when the prosecution does not request it, “when the issue appears to be a close one,” the court “*should insist upon reviewing*” arguable *Brady* information

and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure

may affect the outcome. All such rulings must be made in full recognition of the reality that *Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation, and that compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system.

Boyd, 908 A.2d at 61 (emphasis added; internal quotations and citation omitted); *see also Smith v. United States*, 665 A.2d 962, 969 (D.C. 2008) (abuse of discretion for court to refuse to review a transcript in camera where prosecution conceded there were “‘minor inconsistencies in the testimony as to how the shooting happened’[;] [a]t that point it was incumbent on the trial court to review the transcript and determine whether the inconsistencies were indeed ‘minor’ or whether they were material to appellant's guilt or innocence. Without knowledge of what those inconsistencies were, the court was not in a position to make an informed decision ‘relevant to the exercise of its discretion.’”) (internal quotations and citations omitted).

3. Another option short of *in camera* review is for the trial court to order the prosecution to file a nonmateriality log (akin to a privilege log in civil litigation) that lists all the information that the government has identified as favorable to the defense but nonetheless decided to withhold on the grounds that it is not arguably material.
 - a. There is some precedent for this in Superior Court. For example, in *United States v. Ralph Price*, 2008 CF1 18280 (Weisberg, J.), the government filed *ex parte* a document (later disclosed to the defense by the court) in which it detailed “things that the government has and has not turned over to the defense and reasons for each,” so that the trial court could assess whether the government had satisfied its disclosure obligations under *Brady*. Tr. 3 (9/14/09).
 - b. In other jurisdictions prosecutors are required to file declination notices when they decide to withhold discovery and *Brady* information. For example, in the District of Massachusetts, if either the government or a defendant determines that disclosures “required by the Local Rules” (which includes disclosures of *Brady* information²¹) “would be detrimental to the interests of justice,” they must file a declination notice “before or at the time that disclosure is due.” D. MASS. L. R. 116.6(a). The party withholding information has the option of either “advis[ing]” the opposing party “in writing, with a copy filed in the Clerk’s Office, of the specific matters on which disclosure is declined and the reasons for declining,” or “fil[ing] its submissions in support of declination under seal . . . for the Court’s in camera consideration.” *Id.* The government is required to follow similar declination procedures in other jurisdictions when it opts not to disclose *Brady* information.²²

²¹ D. MASS. L. R. 116.2; *see also United States v Jones*, 620 F.Supp.2d 163, 170 (D. Mass. 2009) (noting that “[t]he government is required to provide . . . exculpatory information automatically . . . unless a declination procedure is invoked or an *ex parte* protective order is obtained.”).

²² *United States v. Thomas*, 2006 WL 3095956 *1-2 (D.N.J. 2006) (court ordered the government to disclose, *inter alia*, *Brady* information, and to “advise[]” defense counsel “in writing of the

D. What the defense can do to establish materiality pretrial.

In order for the defense to obtain favorable information from the prosecution, the prosecution – or if court intervention is sought, the trial court – must conclude that the information is at least arguably material, see IV.B *supra*. The defense may need to persuade the government or a court that this is the case. Similarly, if the government belatedly discloses favorable information on the eve of trial, the defense will have to establish that the withheld favorable information is material and that the delay in its production was prejudicial in order to obtain a remedy for the belated disclosure. See V.E *infra*.

1. Actions the defense should take.

- a. Make *Brady* requests with as much specificity as possible.
 - 1) Although the defense has no obligation to request *Brady* information, see II.E. *supra*, defense counsel should, to the best of his/her ability make specific requests in writing – and should update *Brady* letters/emails as the defense investigation progresses.
 - 2) Requests put the prosecution on notice as to what to look for and show that this information is important to the defense – almost by definition a demonstration of materiality. See *Zanders*, 999 A.2d at 163-64 (“It should by now be clear that in making judgments about whether to disclose potentially exculpatory information, the guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel... It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder.”); *Boyd*, 908 A.2d at 57 (holding that materiality determinations should be made “with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense”).

declination,” within 5 days of the discovery conference); W.D. TEX. L. Crim. R. 16-1 (requiring parties to file a “disclosure agreement checklist” which includes lines for “exculpatory material” and “impeachment material”; the government may indicate it has been “disclosed,” that it “will disclose upon receipt,” “that it refuses to disclose” or that this is “not applicable”); N.D. W.VA. L. Crim. R. 16.02 (“A declination of any requested disclosure shall be in writing, set forth specific reasons therefore, directed to defendant’s counsel, and signed personally by the United States Attorney or the Assistant United States Attorney assigned to the case, and shall specify the specific types of disclosures that are declined”); *id.* 16.05 & 16.06 (requiring disclosure of *Brady* and *Giglio* information); N.M. R. Crim. P. 5-501 (requiring disclosure, *inter alia*, of any favorable material information and also requiring the prosecutor to “file with the clerk of the court” at least 10 days prior to trial “a certificate stating that all information required to be produced has been produced, except as specified”).

- 3) Counsel can use the prosecutor's responses (or failures to respond) in any pleadings/argument to the trial court, see IV.D.2.C. *infra*.
- 4) Specific requests may demonstrate that any subsequent failure by a trial court to conduct an *in camera* review was an abuse of discretion. See *Smith v. United States*, 665 A.2d 962 (D.C. 2008).

b. Ask for judicial assistance early and often.

- 1) The defense should file its *Brady* letters and any responses from the prosecution with the court.
- 2) The defense should move to compel production of favorable information that it has a good faith belief is in the prosecution's actual or constructive possession and should be prepared to make a fact-specific showing (*ex parte* if necessary) why this information might be favorable to the defense in the investigation or preparation of the defense case.
- 3) The defense should request *in camera* review of favorable information that the government refuses to disclose.

2. Arguments the defense should be prepared to make (if applicable).

a. The materiality of the favorable information should be “considered collectively, not item by item.” *Kyles*, 514 U.S at 436; see also *Boyd*, 908 A.2d at 61 (quoting *Kyles*).

1. In *Kyles*, the Supreme Court explained that favorable information should not be considered in isolation.
2. Even if a single piece of favorable information on its own may be deemed immaterial, the combination of two or more pieces of favorable information may be arguably material such that disclosure is constitutionally required. *Id.* at 437 (prosecution has responsibility to “gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached”).

b. The favorable information is material because it generally undermines the quality of the prosecution's investigation.

- 1) In addition to explaining why the favorable information is important vis-à-vis the prosecution's theory of the case or the defense's theory of the defense, counsel may want to argue that the information could help the defense attack the quality of the investigation in the case.
- 2) The Supreme Court endorsed such an argument in *Kyles*, 514 U.S. at 445 (suppressed information was material because “it would have raised opportunities to attack not only the probative value of crucial physical

evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well”); *see also id.* at 446 n.15 (“indications of conscientious police work will enhance probative force [of the prosecution’s evidence] and slovenly work will diminish it”).

- 3) *See also Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) (“The defendant could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation. . . . Presented with detailed information about a contract murder plot and no indication that Mendez was involved or even associated with the participants, the police essentially did nothing.”); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (finding *Brady* information would have enabled trial counsel to raise serious questions concerning the “manner, quality, and thoroughness of the investigation that led to Bowen’s arrest and trial”); *Workman v. Commonwealth*, 272 Va. 633, 646 (Va. 2006) (*Brady* material may have been inadmissible hearsay, but it was admissible in order to “discredit the police investigation.”).

c. The government’s “no *Brady*” response or silence misled/harmed the defense.

As the Supreme Court in *Bagley* specifically acknowledged,

the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.

Bagley, 473 at 682-83.

d. The government’s statements/actions demonstrate that the information is material (or that the court cannot defer to the government’s materiality determinations).

- 1) Use failures to respond to *Brady* requests as evidence that the government is ignoring/not taking its *Brady* disclosure obligations seriously and their pretrial materiality calculations must be scrutinized. *Agurs*, 427 U.S. at 106 (“When the prosecutor receives a specific and relevant [*Brady*] request, the failure to make any response is seldom, if ever, excusable.”).
- 2) Use “no *Brady*” responses coupled with subsequent *Brady* disclosures, as evidence that the government is not carefully reviewing the information in its possession – again demonstrating a need for scrutiny by the court – and/or evidence that information that the government is trying to hide is material. *See Silva v. Brown*, 416 F.3d 980, 990 (9th Cir. 2005) (prosecution’s efforts to suppress *Brady* demonstrates its materiality: noting with respect to a secret deal with a witness, “Presumably, the importance to the State’s case of [the

witness] James’s testimony is what initially led the prosecution to make the secret deal; likewise, the importance to James’s credibility of his false testimony regarding the absence of a deal is what led the prosecution to endeavor to keep that deal secret.”) (internal quotations and citation omitted).

- 3) To the extent the prosecutor acknowledges that information may be *Brady* but that defense is not entitled to it *yet*, use this response to show that the government is concerned that the defense may effectively use it if given time, thereby acknowledging materiality. See V *infra* (discussing timing of disclosures and why the government should not be permitted to strategically delay disclosure).

3. Arguments the defense should be prepared to rebut.

- a. The favorable information is not material because the prosecution deems it not to be credible.
 - 1) The Court of Appeals has held that “[i]t is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder.” *Zanders v. United States*, 999 A.2d 149, 1664 (D.C. 2010) (emphasis added); *Smith v. Cain*, 132 S. Ct. 627 (U.S. 2012) (rejecting arguments that speculated on ways in which the jury “could” have discounted the undisclosed
 - 2) Other jurisdictions have similarly rejected the prosecution’s attempt to usurp the jury’s function of weighing the evidence and assessing credibility. See, e.g., *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) (“It was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible, especially where-as here-they were in the nature of an admission against the state's interest in prosecuting Lindsey. On such grounds as these, prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting *Brady* at nought. Such an explanation is laughable, offering it an effrontery. It does not wash, nor do we believe for a moment that the prosecutor could have been so simple-minded as to have believed it would.”).
- b. The favorable information is not material because it is cumulative.
 - 1) Emphasize how the sought-after information is of a different nature than what the defense already has or that it comes from a source that is neutral or not subject to the same impeachment. E.g., *Boss v. Pierce*, 263 F.3d 734, 744-46 (7th Cir. 2001) (when either of those two factors present, case for materiality is very strong); see also *United States v. Boyd*, 55 F.3d 239, 244-46 (7th Cir. 1995) (The receipt by government prisoner witnesses of “a continuous stream of unlawful, indeed scandalous, favors from staff at the U.S. Attorney's office” – including allowing witnesses to meet with visitors with virtually no

supervision at the U.S. Attorney’s office at which time witnesses obtained drugs from and had sex with visitors – was material and not cumulative of other impeachment information where witnesses “claimed to have ‘seen the light’ when, having been arrested and sentenced or threatened with severe punishment for their activities . . . , they had decided to cooperate with the government.”).

- 2) If the sought-after information might strengthen evidence the defense already has, emphasize that it is often precisely the accumulation of evidence that leads to persuasion. *See United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) (the fact that a witness was impeached does not render additional impeachment information immaterial, particularly if that new information is impeachment evidence of a different kind).
- c. The favorable information is not material because it is inadmissible.

The disclosure obligation under *Brady* extends to information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. *See* Point II.D. *supra*.

V. □ WHEN MUST THE PROSECUTION DISCLOSE *BRADY* INFORMATION?

A. □ The government has an obligation to provide “timely, pretrial disclosure,” *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009); and timeliness is assessed from the perspective of the defense’s ability to meaningfully use the information. *Id.*; *Miller*, 14 A.3d 1094, 1111 (D.C. 2011).

1. In *Perez*,

- a. The Court of Appeals noted that it had been “repeatedly confronted with complaints of tardy disclosure of exculpatory material,” *Perez*, 968 A.2d at 65, and clarified that at-trial disclosure of *Brady* information is presumptively untimely:

This Court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under *Brady*, or that if such disclosure is made, the burden may then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.

Id. at 66 (emphasis added) (internal quotation and citation omitted).

- b. The Court explained that “timely, *pretrial* disclosure,” *id.* (emphasis added), is necessary because:

the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity

to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.

Id. at 66 (emphasis added).

c. *Perez* is in line with earlier decisions acknowledging that *Brady* information must be disclosed “at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case.” *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) (quoting *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (quoting *Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993)). But *Perez* is ground-breaking in its explicit recognition that to permit meaningful use, the defense must have *Brady* information pretrial.

1) Subsequent to *Perez*, the Court of Appeals in *Zanders*, 999 A.2d 149 (D.C. 2010), affirmed the obligation of timely, pretrial disclosure.

a) The Court specifically noted that **the defense must have “a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the defense.”** *Id.* at 164 (emphasis added).

b) Accordingly, the court stated that “[a]ny doubts should be resolved in favor of full disclosure made **well before the scheduled trial date**, unless there is good reason to do otherwise (such as substantiated grounds to fear witness intimidation or risk to the safety of witnesses), upon request by the defense.” *Id.* at 164 (emphasis added).

2) Most recently, the court in *Miller* affirmed the obligation of timely, pretrial disclosure to permit use by the defense of the disclosed information, “not only in the presentation of its case, but also in its trial preparation.” 14 A.3d at 1111.

a) Although the court declined to set uniform deadlines for all cases, it made clear that **the most important factor to determine timeliness is “the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made.”** *Id.*

b) The court unequivocally rejected a “better late than never” timing analysis employed by the trial court:

As a practical matter the adoption of the trial court’s analysis that so long as the prosecution provides exculpatory material to the defense on the eve of trial and in time for a skilled attorney to make some use of it, then no matter how long the government has delayed disclosure, and regardless of how compressed defense counsel’s opportunity to make new investigative, strategic and tactical decisions in mid-trial, based on the new evidence, may be, the prosecution has satisfied its obligations under *Brady*. The truism “better late than never,” assessed from such a perspective, can too

readily be expanded to embrace the notion that even “very late is good enough.” We reject such a theory as inconsistent with *Brady*.

Id.

- c) **The court in *Miller* recognized that at the most basic level, the defense needs time to think about *Brady* disclosures and to make “new investigative, strategic and tactical decisions.”** 14 A.3d at 1111; *see also id.* at 1112 (*Brady* information should have been “disclosed in time to permit *Miller*’s attorneys to contemplate its implications”). The Court explained

that “the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.” [*Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir.2001)]. This is so, in part, because “new witnesses or developments tend to throw existing strategies and preparation into disarray.” *Id.* at 101. The sequence of events in this case, like the record in *Leka*, “illustrates how difficult it can be to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available.” *Id.* “The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing,” and counsel may not be able, on such short notice, to assimilate the information into their case. *Id.* Further, “[t]he more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an ‘opportunity for use,’” *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006), *i.e.*, “the opportunity for a responsible lawyer to use the information with some degree of forethought.” *Leka*, 257 F.3d at 103.

Miller, 14 A.3d at 1111-12.

- d) Moreover, the court in *Miller* recognized that counsel cannot be expected to incorporate *Brady* information on the fly at trial. The issue in *Miller* was whether the defense should have been able to connect information disclosed as Jencks that the shooter was left handed to an already-disclosed videotape of an interview with a witness and potential alternate suspect, showing him signing his waiver-of-rights card with his left hand. The court explained that

“[O]nce trial comes, the prosecution may not assume that the defense is still in its investigatory mode.” [*Leka*, 257 F.3d] at 100. As the Supreme Court observed in *Banks*, 540 U.S. at 695, 124 S. Ct. 1256, “[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” To adapt slightly

language from the court's opinion in *Leka*, “the prosecution is in no position to fault the defense for [not spotting the evidence on the videotape in time] when the prosecution itself created the hasty and disorderly conditions under which the defense was forced to conduct its essential business.”

Id. at 1113.

B. □ The defense should argue that “timely pretrial disclosure” requires, at least as a default, disclosure early in the life of a case – within weeks of arraignment.

Given that timeliness is viewed from the perspective of the defense’s ability to make meaningful use of the information, see V.A *supra*, the defense view of when it needs *Brady* information should carry great weight. Indeed, in *Zanders*, the Court of Appeals indicated that the defense’s view of when it needs *Brady* information in an individual case should be dispositive and that the prosecution should disclose *Brady* information “well before the scheduled trial date . . . upon request by the defense.” 999 A.2d at 164. The defense should press for disclosure within weeks of arraignment and, *in addition to fact-specific arguments as to why such a schedule is warranted*, it may justify this request on the following grounds:

1. Early-in-the-case disclosure accommodates the reality that it takes time “to investigate the facts of the case and . . . craft an appropriate defense,” *Perez*, 968 A.2d at 66 – work that cannot be done on the eve of trial, as the Court of Appeals and others have acknowledged.
 - a. As noted above the Court of Appeals in *Perez*, *Zanders* and *Miller* have made clear *Brady* disclosures must be made early in the life of a case to permit meaningful use. Similarly, in *Sykes v. United States*, 897 A.2d 769, 781 (D.C. 2006), the Court held that the government should have revealed the identities of exculpatory witnesses “to the defense *shortly after their 1996 grand jury appearance*” when the government first learned they possessed information favorable to the defense; the court found this would have given the defense “an opportunity to interview them, and to conduct additional pre-trial investigation . . . based on those interviews.” (emphasis added).
 - b. Beyond the Court of Appeals, the Second Circuit’s opinion in *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001),²³ cited by the Court of Appeals in *Miller*, has an excellent discussion of why the defense needs *Brady* information sooner rather than later. See also *United States v. Snell*, 899 F. Supp. 17, 20 (D. Mass. 1995) (“Exculpatory information affects the defense investigation, how it will allocate its resources, the *voir dire* questions the defense will seek, the framing of opening statements, the nature of the pre-trial research on evidentiary issues and jury

²³ Judge Jacobs wrote the opinion in *Leka* on behalf of a panel that included himself, Judge Parker and now-Justice Sotomayor.

instructions, in short, all of the strategic decisions which must be made long in advance of trial.”).

2. Early-in-the-case disclosure is consistent with “the ABA standards for Criminal Justice, The Prosecution Function, which directs that ‘disclosure of exculpatory information is to be made at the earliest feasible opportunity’ and ‘as soon as practicable following the filing of charges’” and which were favorably cited by the Court of Appeals in *Miller*, 14 A.3d at 1108; *see also id.* at n.16 (quoting the Supreme Court’s observation in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010), that the ABA standards capture the “prevailing norms of practice” and “are guides to determining what is reasonable”).
3. Early-in-the-case disclosure is consistent with other local rules²⁴ that federal prosecutors operate under around the country.²⁵

²⁴ *See, e.g.*, M.D. ALA. Standing Order on Criminal Discovery § (1)(B)&(C) (requiring disclosure of “*Brady*” and “*Giglio*” material “at arraignment, or on a date otherwise set by the Court for good cause shown”); S.D. ALA. L. R. 16.13 § (b)(1)(B)&(C) (same); D. Conn. L. Crim. R. Appx. § (A)(11) (requiring disclosure of “[a]ll information known to the government which may be favorable to the defense” within 10 days of arraignment); N.D. FLA. L. R. 26.3(D)(1)&(2) (requiring disclosure of “*Brady*” and “*Giglio*” material within 5 days of arraignment “or promptly after acquiring knowledge thereof”); S.D. FLA. L. Crim. R. 88.10(C)&(D) (requiring disclosure of *Brady* and *Giglio* information); *id.* 88.10(Q)(2) (requiring discovery in connection with trial not later than 14 days after arraignment); S.D. GA. L. Crim. R. 16.1(f) (requiring disclosure of “any evidence favorable to the defendant” within 7 days of arraignment); D. NEV. L. Crim. R. 16-1 (requiring disclosures required by the Constitution within 5 days of filing the Joint Discovery Statement (to be filed within 5 days of arraignment)); E.D. N.C. L. Crim. R. 16.1 (b)(1)(7) (requiring disclosure of all “exculpatory evidence” at pretrial conference which must be held within 21 days of indictment or initial appearance); W.D. OK. L. Crim. R. 16.1 & Appx. V (requiring counsel to hold discovery conference within 14 days after a plea of not guilty is entered and to file within 7 days of conference a joint statement that complies with form in appendix; joint statement form requires certification of the fact of disclosure of “all materials favorable to the defendant or the absence thereof within the meaning of *Brady* . . . and related cases”); W.D. PA. L. R. 16.1 (requiring disclosure of “exculpatory evidence” at the time of arraignment); M.D. Tenn. L. Crim. R. 16.01(d) (requiring disclosure within 14 days of arraignment, all information “favorable to the defendant on the issues of guilt or punishment within the scope of *Brady* . . . and *Agurs*”); W.D. TEX. L. Crim. R. 16(b)(1)(c) (requiring government to provide discovery “in connection with trial . . . not later than 14 days after arraignment”; discovery checklist includes exculpatory and impeachment information); W.D. WASH. L. Crim. R. 16(a)(1)(K) (requiring disclosure of evidence favorable to defendant and material to guilt or punishment to which he is entitled under *Brady* . . . and *Agurs*” within 14 days of arraignment); S.D. W. VA. L. Crim. R. Standard Discovery Request Form III.1(H) & 2 (requiring disclosure of “all favorable evidence to the defendant, including impeachment,” within 14 days of filing Standard Discovery Request Form (filed at arraignment)); *see also* D. E.D. OK. L. Crim. R. 16.1 & Disclosure Agreement Checklist (“it is anticipated that the government will provide discovery to the Defendant contemporaneously with arraignment”; Disclosure Agreement Checklist includes “exculpatory” and “impeachment” material); D. ID.

4. Early-in-the-case disclosure is consistent with the government’s policy.
 - a. The government’s policy acknowledges that “[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases.” USACRM, Section 165, Step 3.A.
 - b. Both the DAG Guidance Memo and the U.S. Attorney’s Manual specify that all exculpatory information should be disclosed “reasonably promptly after discovery.” DAG Guidance Memo, Step 3.B.; USAM § 9-5.001.D.1 (same).

NB: The government’s policy specifies separate timing requirements for the disclosure of impeaching information. DAG Guidance Memo, Step 3.B

General Order No. 242 § I.5.A-C. (“strongly encourage[ing] the government to produce” within 7 days of arraignment “all material evidence within the scope of *Brady*,” all *Giglio* information, and the criminal record of any government witnesses).

²⁵ Although a number of jurisdictions distinguish between the timing of disclosure of “exculpatory” and “impeachment” information, disclosure of impeaching information is still required well in advance of trial. D. MASS. L. R. 116.1 & 116.2 (requiring disclosure of exculpatory information within 28 days of arraignment and disclosure of impeachment information no later than 21 days before trial); D. N.H. L. Cr. R. 16.1(d) (requiring disclosure of “any evidence material to issues of guilt or punishment within the meaning of *Brady* . . . and related cases” and any impeachment material as defined in *Giglio* . . . and related cases . . . at least” 21 days before trial); N.D.N.Y. L. R. 14.1 (requiring disclosure of *Brady* information 14 days after arraignment and *Giglio* information no less than 14 days prior to jury selection); D. VT. L. R. 16.1(a)(2) & (d)(1) (requiring disclosure of *Brady* information within 14 days of arraignment and *Giglio* information no later than 14 days before trial); N.D. W.VA. L. Crim. R. 16.01(b)&(d), 16.05 & 16.06 (requiring disclosure of *Brady* within 10 days of filing Standard Discovery Request Form (filed at arraignment), and disclosure of *Giglio* information no later than 14 days before trial); *See, e.g., United States v. Rodriguez*, 2008 CR 1311, 2009 WL 2569116, *12 (S.D.N.Y. 2009) (court ordered government to turn over “*Giglio* material . . . twenty-one days before the commencement of trial”); *United States v. Lekhtman*, 2008 CR 508, 2009 WL 5095379, *1 (E.D.N.Y. 2009) (government ordered to turn over “*Giglio* material . . . two weeks before the commencement of trial”); *United States v. Martinez-Martinez*, 2001 CR 307, 2001 WL 1287040, *5 (S.D.N.Y. 2001) (ordering disclosure of “*Giglio* material . . . not later than fourteen days before trial” to “ensure that the defendants have sufficient time to make effective use of . . . [it and to] enable the parties and the Court to proceed to trial without undue delay or unnecessary continuances.”); *United States v. Johnson*, 2008 CR 285, 2010 WL 322143, *9 (W.D. Pa. 2010) (court ordered government to “disclose all *Brady* impeachment material . . . no later than ten days prior to trial”); *cf. United States v. McNeil*, 2009 CR 320, 2010 WL 56096, *5 (M.D. Pa. Jan. 5, 2010) (rejecting government’s proposal to delay disclosure of impeachment material until 72 hours before trial, noting that the government had provided “no reason why the relevant material could not be provided immediately,” and that “[s]uch information may require more than three days for the defendant to examine and make use of”).

(impeaching information “will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently”).

- c. The Government’s policies require not only early disclosure promptly upon learning of information, but they require supervisory approval and notice to the defendant if disclosure is to be delayed. USAM § 9-5.001.D.4.

NOTE: D.C. R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor would also seem to support early-in-the-case disclosure because it requires “upon request” disclosure. But as noted above, the comment to the rule states that the rule is not intended to increase the prosecutor’s obligations beyond those required by the constitution, statute, or local court rules. So the rule itself provides no independent grounds for early-in-the-case disclosure.

C. The defense may want to ask the trial court to issue a *Brady* scheduling order that requires the prosecution to turn *Brady* information by a date certain and for any later acquired information, promptly upon discovery.

1. The Court of Appeals has made clear that timing of *Brady* disclosures is critical, *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (“a prosecutor’s timely disclosure obligation with respect to *Brady* material cannot be overemphasized”) (internal quotation and citation omitted), thus warranting judicial oversight. *See Boyd*, 908 A.2d at 59 (observing that “courts have the obligation to assure that [prosecutorial discretion in making *Brady* disclosures] is exercised in a manner consistent with the right of the accused to a fair trial”); *see also id.* at 57 (The “practice of delayed production must be disapproved and discouraged.”).
2. The trial court unquestionably has the authority to issue a *Brady* scheduling order pursuant to its case management authority as well as its obligation to oversee *Brady* disclosures and to ensure a defendant’s effective representation of counsel. *See VII.A.3 infra.*
3. Other jurisdictions in which federal prosecutors practice have such deadlines. *See V.C.3 supra* (discussing other jurisdictions with deadlines set by local rule or standing order).
4. A huge potential benefit from issuing a *Brady* scheduling order is conservation of judicial resources – the bulk of *Brady* litigation stems from disagreement or misunderstanding about what the prosecution’s due process duty is. There will be no such disagreement or misunderstanding, if the Court has ordered production pursuant to a set schedule.

D. Whether or not the trial court issues a scheduling order, the prosecution cannot make unilateral decisions to delay disclosure of *Brady* information until the eve of trial.

1. Where *Brady* compels disclosure, a prosecutor should seek court’s permission to limit/delay disclosure.

- a. *Boyd*, 908 A.2d at 61 (generally affirming trial court’s oversight power over Brady disclosures); DAG Guidance Memo Step 3.A. (noting that when “considerations [militating against disclosure] conflict with the[ir] discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures”).
 - b. As one District Court judge explained, when the government “elect[s] to prosecute defendant . . . [the] defendant’s due process rights bec[o]me dominant.” *United States v. Feeney*, 501 F. Supp. 1324, 1325 (D. Colo. 1980). The prosecution “can, if it wishes, dismiss th[e] case, but so long as [the trial court] must decide the defendant’s fate,” it has an obligation to “provide [the defendant with all of the rights . . . [that] are guaranteed him by the Constitution and by the United States Supreme Court.” *Id.*
2. In particular, witness-safety concerns should be reviewed by a trial court.
- a. The Court of Appeals has acknowledged that in a small subset of cases it may be appropriate for the government to delay disclosure of *Brady* information “to protect the safety of witnesses” but has noted that even in such cases “defense counsel [must be] afforded sufficient time to consider any leads and to make use of exculpatory evidence.” *Miller*, 14 A.3d at 1111 n.20.
 - b. But, to justify such a delay, **the government must have “substantiated grounds to fear witness intimidation or risk to the safety of witnesses.” *Zanders*, 999 A.2d at 164 (emphasis added).**
 - c. The prosecution should be required to present those “substantiated grounds” to the trial court.
 - 1) This rightly makes early disclosure the default, preserves judicial oversight over *Brady* disclosures, *see Boyd*, 908 A.2d at 59, 61 (generally affirming trial courts’ oversight power over *Brady* disclosures), and precludes the government from using the rare case of witness intimidation as a blanket justification for delayed disclosure in every case.
 - 2) This is the practice in federal court. *See United States v. Edelin*, 128 F.Supp.2d 23, 30-31 (D.D.C. 2001) (delay in production of *Brady* information justified where the government “proffer[ed] examples of other known attempts made by the defendants and their associates to interfere with the judicial process,” and thus established by a preponderance of evidence that earlier disclosure of this information might jeopardize witness safety); *Snell*, 899 F. Supp. at 20 n.5 (noting that the government’s anticipated concerns about witness safety “can be dealt with in motions for protective orders or motions for exemption from pretrial disclosure” on a case-by-case basis).
3. Even if the government can “substantiate” security concerns, the defense may want to counter:

- a. That any security concerns will eventually have to be dealt with at trial, and that, to accommodate the defendant's due process rights, the prosecution must deal with them now;
 - b. If any delay is in fact justified, it should be clearly delineated (not left to the prosecution's discretion) and brief, *see Miller*, 14 A.3d at 1111 n.20;
 - c. If any delay is in fact justified, the trial date should likewise be adjusted (if this is in the client's best interest).
4. As an alternative to delayed disclosure, counsel may want to propose a protective order narrowly tailored to any legitimate security concern.
 - a. For example, security concerns from general disclosure, should not preclude disclosure to the defendant and his legal team.
 - b. Although far from ideal, there should never be a basis for the government to object to protective order that limits the scope of a *Brady* disclosure to defense counsel.

E. If despite the defense's best efforts to obtain timely access to *Brady* information, the prosecution produces this information late – at or on the eve of trial – the defense must make a record of prejudice from that delay.

1. When a *Brady* claim is premised on delayed disclosure of information, "the defendant must show prejudice from the delay itself." *Miller*, 14 A.3d at 1094.
2. Thus, when litigating a belated disclosure, is it important to develop a narrative about what specifically would have been done if the information had been produced earlier and why the incentive to look for similar information might not have been apparent or of the same priority. See V.A. *supra*. For example, as a result of late disclosure, the defense
 - a. May have "abandon[ed] lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued," *Bagley*, 473 U.S. at 682;
 - b. Lost access to witnesses. *Sykes*, 897 A.2d at 777-78; *see also United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997) (late disclosure deprived defendant the opportunity to depose the author of a report that contradicted a government witness and to prepare strategy and testimony appropriately);
 - c. Or simply have been unable to capitalize on evidence that would have reinforced the defense's theory of the case. *Miller*, 14 A.3d 1094; *United States v. Washington*, 263 F.Supp.2d 413, 422 (D. Conn. 2003) (Because of belated *Brady* disclosure, "there was no opportunity for the defense to weave [prosecution witness'] conviction into its overall trial strategy.").

3. Because it may be difficult on the eve or in the midst of trial to fully appreciate how a belated *Brady* disclosure impaired the defense, counsel should consider filing a post-trial motion to flesh out the record. *See, e.g., Washington*, 263 F.Supp.2d at 420 (*Brady* violation found where government withheld prior conviction of witness until first day of trial and defense investigator submitted an affidavit to trial judge stating that he was helping for trial and thus could not investigate the prior conviction but that, after trial, he had been able to investigate the prior conviction which had led him to more relevant impeachment information).

F. The Prosecution's obligation to disclose *Brady* information extends beyond trial.

1. Throughout the trial and at least until a conviction is final, the Government's duty to disclose exculpatory evidence is unchanged. *Barnes v. United States*, 760 A.2d 556, 562 (D.C. 2000) (court states that it "would expect [the government] to disclose . . . [*Brady*] information to the defense – now [on appeal] as then" because "the government's obligation to disclose exculpatory evidence under *Brady* is continuous").
2. In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct 2308 (2009), the Supreme Court indicated that the government does not have a continuing *Brady* obligation to seek and develop exculpatory evidence after a defendant's conviction has been affirmed on appeal (or the time to appeal has lapsed) and his conviction has become final. In *Osborne* the Court had been asked to determine if a habeas petitioner whose conviction had been affirmed decades earlier had a constitutional right to post-conviction DNA testing. The Court reasoned that *Brady* provided no support for such a constitutional right, and that "once a defendant has been afforded a fair trial and convicted. . . the presumption of innocence disappears." 129 S. Ct. at 2320 (internal quotation and citation omitted). *Osborne* may shield the prosecution from a constitutional post-conviction obligation to develop and disclose new exculpatory information, but it did not address the circumstance where the government comes into possession of such information – or has had exculpatory information in its possession all along, which would clearly call into question the fairness of a defendant's trial. Indeed, numerous cases suggest that the government does have a continuing obligation to disclose *Brady* violations that had already occurred. *See generally, e.g., Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

VI. □ IN WHAT FORM MUST THE PROSECUTION MAKE *BRADY* DISCLOSURES?

A. *Brady* is not a rule of discovery BUT the format in which information is disclosed is critical to fulfilling its due process guarantee.

- 1) Unlike Rule 16 or Jencks, "*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation." *Miller*, 14 A.3d at 1107 (quoting *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995)). It does not require the production of specific documents. It requires the production of information. *See II supra*.

- 2) That said, form matters just as much as properly identifying what is favorable information and timely disclosing that information. If the prosecution defines what is *Brady* too narrowly, if it turns over *Brady* information too late, or if it gives only the most skeletal summary disclosure (particularly while it withholds names and/or contact information) – there is a real danger that the defense will not be able to make meaningful use of the information and consequent possibility of a miscarriage of justice.
 - a. The key in fulfilling the due process mandate of *Brady* is the “sufficiency, under the circumstances, of the defense’s opportunity to use the [*Brady* information] when disclosure is made.” *Miller*, 14 A.3d at 1111; *Perez* 968 A.2d at 66 (“[T]he due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.”).
 - b. It is simply inevitable that when documents or recordings are summarized, detail and nuance are lost. The power of a statement comes from the context in which it is given, the precise wording of the question asked, and the answer given.
 - 1) In *Kyles*, for example, the force of the “many inconsistencies and variations among Beanie’s [undisclosed] statements” came from the statements themselves, 514 U.S. at 430; the Court specifically noted that Kyle’s had been prejudiced because he had been precluded from “*expos[ing the jury] to Beanie’s own words.*” *Id.* at 449 n.19 (emphasis added).
 - 2) *See also Wiggins v. United States*, 386 A.2d 1171, 1178 (D.C. 1978) (Ferren, J. concurring) (“The fact that the government told [the defense] the names of grand jury witnesses and summarized their testimony did not necessarily meet defendant’s needs. . . . we [cannot] assume that the prosecutor summarized the grand jury statements with every detail that might have been relevant to defense counsel’s preparation as counsel viewed the case.”).
 - c. Summaries cannot be used at trial for impeachment or if a witness unexpectedly becomes unavailable.

B. □ At a minimum, the government is required to make *Brady* disclosures that are “sufficiently specific and complete” to permit effective use by the defense. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007).

1. Court of Appeals precedent demonstrates that the prosecution must make sufficiently specific and complete disclosures. For example,
 - a. In *Zanders v. United States*, 999 A.2d 149 (D.C. 2010), the Court of Appeals determined that the prosecution’s summary disclosure did not satisfy the government’s pretrial disclosure obligations under *Brady*:
 - 1) The prosecutor had provided the defense a summary disclosure stating that:

[Attorney] Betty Ballester represents an individual who was interviewed by the [MPD] [who said that] . . . [Allen] Lancaster was involved in some sort of altercation/argument with [Shawn] LNU in the days immediately preceding his murder. This information was investigated and found to have no bearing on the case. Therefore the government does not believe this information is in any way *Brady* material. However, I am disclosing it now in an excess of caution.

Brief for Appellee, *Thomas Zanders v. United States*, District of Columbia Court of Appeals No. 05-CF-246 at 58. The summary disclosure did not reveal “significant exculpatory information,” *id.* at 163, contained in the notes of the witness interview, namely, that the altercation had taken place in the exact location of the decedent’s shooting the following night. 999 A.2d at 161.

2) The Court of Appeals concluded that the prosecution’s summary *Brady* disclosures were “incomplete and late,” *id.* at 164; *see also id.* (admonishing that “[a]ny doubts [regarding *Brady* disclosures] should be resolved in favor of *full* disclosure made well before the scheduled trial date”) (emphasis added).

3) The Court declined to reverse in the absence of a showing of prejudice.

b. In *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011), the Court of Appeals held that the prosecution had not timely disclosed all the information it should have pretrial.

1) The Court reviewed whether the government had fulfilled its *Brady* obligations where it disclosed a year before trial notes documenting a description of the shooter that did not match the defendant but withheld until a week before trial the full transcript of the videotaped interview with the witness who provided this description, and where it disclosed a year before trial notes indicating that another witness had failed to identify the defendant in a photo array, but withheld until weeks before trial information that the witness had stated that two other people in the array looked like the shooter.

2) The Court firmly rejected the argument that the videotaped interview was only “potentially exculpatory” and thus did not need to be disclosed pretrial. *Id.* at n.11 (“We are at a loss to understand this reasoning.”).

3) The Court also held that the verbatim statements of the witness who had viewed the photo array was “evidence of a kind that would suggest to any prosecutor that the defense would want to know about it.” *Id.* at 962 (internal quotation omitted).

4) The Court concluded that the defense was not prejudiced by the prosecution’s delay in making full *Brady* disclosures. *Id.* at 958-963.

c. By contrast, in *Matthews v. United States*, 629 A.2d 1185 (D.C. 1993), and *Wiggins v. United States*, 386 A.2d 1171 (D.C. 1978), the Court of Appeals held

that the prosecution had fulfilled its *Brady* obligations where the prosecutor “explained to appellant *exactly what* the [exculpatory] statement said,” *Matthews*, 629 A.2d at 1199 (emphasis added), and where the prosecutor disclosed the Grand Jury testimony containing *Brady* information “*substantially verbatim.*” *Wiggins*, 386 A.2d at 1173 (emphasis added).

2. Other federal courts have likewise found that the government violated its *Brady* obligations where it provided the defense with inadequate summary *Brady* disclosures.
 - a. In the government’s failed prosecution of Senator Stevens, Judge Sullivan found that “the use of summaries” for disclosure of favorable information created “an opportunity for mischief and mistake,” and was a significant contributor to the government’s *Brady* misfeasance in that case. *United States v. Stevens*, Docket No. 08-231, Tr. 4/7/09 at 8-9 (on file with PDS).
 - b. *See also Leka*, 257 F.3d at 103 (government violated *Brady* where it “failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use”); *United States v. Service Deli*, 151 F.3d 938, 942-44 (9th Cir. 1998) (*Brady* violation when government produced mere summaries of interviews instead of the actual interview notes); *Jean v. Rice*, 945 F.2d 82, 85-87 (4th Cir. 1991) (withheld audio tapes of hypnosis of key witnesses was *Brady* violation even though the fact of the hypnosis was disclosed because the audio tapes would have been much stronger and more persuasive physical evidence going toward impeachment).
3. The government has conceded in litigation that its *Brady* obligations “do include a fairly precise identification of what the information is and the source of the information” *United States v. Jonathan Phillips*, 2008 F 21826, Tr. 4 (D.C. Super. 7/1/09).

C. Government’s own policy acknowledges original format is best:

1. The government’s policy correctly assumes that the best way for the government to provide sufficiently specific and complete *Brady* disclosures is to provide the defense with “information in its original form.” DAG Guidance Memo Step 3.C.
2. The government’s *Brady* policy notes that in some cases this may be “[in]advisable,” but warns that if disclosure “is not provided in its original form . . . prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.” *Id.*

D. To make sufficiently specific disclosures prosecutors must disclose the names and contact information for *Brady* witnesses.

1. At least two Superior Court judges have ruled that the government typically must disclose names and contact information for *Brady* witnesses.

- a. In 2010 CF1 2883,²⁶ Judge Fisher held that the USAO could not satisfy its *Brady* disclosure obligations by unilaterally deciding to make anonymous witnesses available to the defense for an interview at the US Attorney’s office.
 - 1) In 2010 CF1 2883, the government explained that it had “contacted . . . the witness[] and I asked them their preference, whether or not we would set up a meeting at the US Attorney’s Office, [or] whether they would prefer I provide their name and contact information.” Tr. 4/8/11 at 13.
 - 2) The court responded “that’s not what you’re required to do. If you have a witness who has exculpatory material, you have to turn it over. If there’s a danger, you legitimately believe that there’s a risk of danger to them, then you bring it to the Court’s attention and then maybe some sort of secondary circumstance is arrived at. But you just don’t have the right to sort of determine where under what circumstances they’re going to be interviewed. . . that’s not what *Brady* I think commands. So I think you have to provide the information so they can try to talk to them individually.” Tr. 4/8/11 at 14-15. The court subsequently reiterated that “[m]y viewpoint on this . . . is if there are legitimate safety concerns about witnesses, I think the government should then bring those to my attention. I can determine whether I agree with that.” *Id.* at 18.²⁷
 - 3) The court also rejected the government’s argument that it had made sufficient disclosure of contact information because the defense had the anonymous *Brady* witness’ cell phone number (but not her name or address). The court ruled that the government had to “give [the defense] whatever contact information you have.” Tr. 4/8/11 at 15.
- b. In *United States v. Burts*, 2010 CF1 7811, Judge Leibovitz likewise acknowledged that disclosure of name and contact information is required in the typical case:
 - 1) The court acknowledged that: “the whole point of *Brady* disclosure is, one way or another, A, that witness has to be available to the defense to present that witness’ testimony at trial, if that’s what they want; and B, the defense has to be in a position to use whatever investigative leads it wants to and is capable of using, if that’s what they want to do. Tr. 4/18/11 at 3.

²⁶ The identifying information from this case has been omitted because, subsequent to the *Brady* disclosures, the court sealed the defendant’s criminal records in the case on the grounds that the defendant was actually innocent.

²⁷ As far as safety concerns, neither the fact that the *Brady* witness was “a young woman who resides with her parents” who had “general concerns” about the disclosure of her identity and nor the fact that her parents “are concerned” was a sufficient basis for the Court to endorse the withholding of identifying or contact information in this case. *Id.* at 16.

- 2) However because the “government ha[d] proffered to me [a] very specific basis for believing that there are security concerns of this particular individual,” Tr. 4/18/11 at 11, the court found that this was not the typical case.
 - 3) Even so the court “hesitate[d] to order the defense to stand down and let you serve the witness” because in so doing the court would “have failed to put in the defense hands the very information that *Brady* disclosure puts in their hands.” Tr. 4/18/11 at 12.
 - 4) Ultimately the issue mooted out, because counsel, who was sensitive to these concerns and did not want to give the witness further cause for anxiety, did not press for contact information. Thus even though the government agreed to provide the defense with contact information pursuant to a protective order, *id.* at 5, counsel instead agreed to allow the government to put the witness under subpoena. *Id.* at 14. Even so, Judge Leibovitz ordered the government to disclose contact information for the *Brady* witness to the defense if the government was unable to put the witness under subpoena by the end of the day. *Id.* at 12-14, 17.
2. The Court of Appeals has never directly addressed this issue, but has repeatedly indicated that the government must disclose identifying information of *Brady* witnesses.
 - a. See *Kerry J. Jackson v. United States*, 650 A.2d 659, 661 n.4 (D.C. 1994) (noting that the government had “wisely conceded . . . that, by failing to reveal the identity of a potentially important exculpatory witness, it violated both the letter and the spirit of *Brady*”); *Wiggins*, 386 A.2d at 1173 (holding that the government had properly discharged its *Brady* obligation where it, *inter alia*, “disclosed to the defense the identity of witnesses whose grand jury testimony might be favorable”); *John L. Jackson v. United States*, 329 A.2d 782, 788 (D.C. 1974) (observing that *Brady v. Maryland* “would seem to require that the prosecutor provide the names of exculpatory witnesses upon request” but withholding in this case was harmless error).
 - b. In *Johnson v. United States*, 980 A.2d 1174, 1188 n. 4 (D.C. 2009), the government “point[ed] out in its brief” that it had disclosed favorable information without identifying the source, apparently as a basis for arguing that it had fulfilled its *Brady* obligations. But the Court, having explicitly noted this argument, conspicuously declined to adopt it as a reason for rejecting the appellants’ *Brady* claim.
 3. Disclosure of identifying information is compelled by Supreme Court and Court of Appeals precedent.
 - a. As the Court of Appeals has made clear, the key to fulfilling the mandate of *Brady* is ensuring the defense’s opportunity to use favorable information; but the

defense cannot meaningfully use favorable information if it does not know its source.

- b. At a minimum, the defense cannot assess the value of the *Brady* information in a witness' possession without knowing who the witness is, what his basis of knowledge is, and what biases he has. As the Supreme Court explained in *Smith v. Illinois*, 390 U.S. 129, 131 (1968), "when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth . . . must necessarily be to ask the witness who he is and where he lives." *See also id.* at 132 (internal quotation and citation omitted) ("Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise [the facts of the case].").²⁸
- c. Without a *Brady* witness' name the defense cannot conduct its own investigation or place the witness under subpoena and thereby ensure that he or she appears in court.
 - 1) As Chief Judge Satterfield noted, one of the dangers when the government keeps "under wraps" the identities of "witnesses who are exculpatory, or who may give exculpatory information" is that "you get in this posture where you lose track of the witness and the defense has never had an opportunity to really track them down." *United States v. James Carter*, 2006 CF1 10651, Tr. 10/16/06 at 4.
 - 2) This is precisely what happened in *Sykes v. United States*, 897 A.2d 769, 773-76 (D.C. 2006), where the government, which had no interest in calling the *Brady* witnesses in its case-in-chief, delayed disclosure of their existence until the eve of trial by which time neither the government nor the defense could locate them. *See also Curry*, 658 A.2d at 196-98 (government conceded and the Court held that the Government had violated its duty of disclosure when prosecution withheld for over a year and failed to disclose until two days before trial the fact that on the night of the charged murder, an eyewitness gave a description of the shooter that did not match the defendant, by which time the witness could not be found).
- d. Allowing the government to withhold the names of *Brady* witnesses denies the defense equal access to *Brady* witnesses. The law is clear that witnesses to a

²⁸ The Court in *Smith* addressed the defendant's right to obtain a witness' name and address in the context of a defendant's right to confrontation, but the same analysis applies to a *Brady* witness who, if sponsored by the defense, would be subject to cross-examination and potential impeachment by the prosecution. Defense counsel must fully investigate that witness to determine, for example, if anyone else saw or was with the witness who corroborates or contradicts the witness, or if the witness has a history of substance abuse or a criminal record with which he could be discredited. *Id.* at 131 ("The witness' name and address open countless avenues of in-court examination and out-of-court investigation.").

crime do not belong to the prosecution; rather, as the court acknowledged in *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), “[b]oth sides have an equal right, and should have an equal opportunity, to interview them.” This is certainly *no less true* when those witnesses possess information that is material and favorable to the defense.²⁹

- e. Disclosing the names of *Brady* witnesses does not implicate limits on requiring the prosecution to disclose its witnesses. *See Will v. United States*, 389 U.S. 90, 101 (1967) (“The reason for requiring disclosure of their names . . . is not that they will or may be witnesses, but that defendant requires” this information “in order to prepare his defense.”) (internal quotation and citation omitted).
- f. *See, e.g., United States v. West*, 790 F. Supp. 2d 673 (N.D. Ill. 2011) (holding that *Brady* required government to disclose contact information of *Brady* witnesses).

VII. PRETRIAL ORDERS, REMEDIES, AND NEW LINES OF DEFENSE.

A. □ Pretrial Orders:

In the wake of the well-publicized *Brady* violations in the prosecution of Senator Stevens, United States District Court Judge Emmet Sullivan called on his “judicial colleagues on every trial court everywhere . . . to consider entering an exculpatory evidence order at the outset of every criminal case.” *United States v. Stevens*, 2008 CR 231, Tr. 8 (4/7/09).³⁰

²⁹ That *Brady* requires the disclosure of identifying and contact information is further evident from case law discussing when the government must disclose such information for confidential informants who possess *inculpatory* information. Prior to its decision in *Brady*, the Supreme Court in *Rovario* adopted a balancing test to determine when the government must disclose the identity of an informant, weighing “the public interest in protecting the flow of information against the individual’s right to present a defense.” *Rovario v. United States*, 353 U.S. 53, 62 (1957). But the Court also noted that the government’s “privilege” to keep secret the identity of a confidential informant “gives way” where the informant possesses “information [that] is relevant and helpful to the defense of an accused or [that] is essential to a fair determination of a cause.” *Id.* at 60-61; *see also id.* at 64 (determining that access to identifying information was required in a drug case because the informant “might have” provided information supporting a defense of entrapment, or “might have thrown doubt on petitioner’s identity or on the identity of the package”). The Court’s subsequent decision in *Brady*, requiring the government to disclose all favorable and material information to the defense, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), only expanded what must be disclosed to the defense pursuant to the same “the fundamental requirements of fairness,” *Rovario*, 353 U.S. at 60, and necessarily requires the disclosure of the *Brady* witness’ identifying and contact information.

³⁰ After the *Stevens* case was dismissed, the Court appointed a special prosecutor, Henry F. Schuelke to investigate the government’s misconduct. Mr. Schuelke recently completed his investigation and “concluded that the investigation and prosecution of Senator Stevens were “permeated by the systematic concealment of significant exculpatory evidence.” *United States v. Stevens*, 2008 CR 231, Order dated November 21, 2011, at 4 (internal quotation and citation omitted). Mr. Schuelke detailed his findings in a 500 page report, filed under seal, which has yet

1. □ Rationale: As the Court of Appeals recognized in *Boyd*, “the most effective mechanism for enforcing the due process rights of criminal defendants and avoiding the needless expenditure of judicial resources is to require strict compliance with the demands of *Brady* . . . in the first instance[.]” 908 A.2d at 63 (emphasis added).

- a. A pretrial *Brady* order clarifies obligations by providing the government with a checklist and/or a timetable to follow in making its *Brady* disclosures.³¹
- b. In so doing, a pretrial *Brady* order promotes fairness and confidence in the courts.
 - 1) The failure to timely and completely disclose information that is favorable and material to a defendant not only undermines the fundamental fairness of his particular prosecution and the legitimacy of any conviction, but also calls into question the validity of the criminal justice system as a whole.
 - 2) As the government itself has recognized,

Any discovery lapse, of course, is a serious matter. . . . [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the

to be released to the public. *Id.*; see also <http://legaltimes.typepad.com/blt/2011/11/judge-ted-stevens-investigation-reveals-prosecutorial-misconduct.html> (last accessed December 4, 2011). On February 8, 2012, Judge Sullivan, citing the egregious and repeated conduct of the government and the importance of the matter for the “fair administration of justice,” denied the government’s request to seal and ordered that the report and related filings were to be made public on March 15, 2012. *In Re Special Proceedings*, Misc. No. 09-0198 (EGS) (Feb. 8, 2012), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009mc0198-73.

Despite his conclusion that the prosecution had concealed *Brady* information, and that some of this concealment was willful, Mr. Scheulke did not recommend prosecution of the government attorneys for criminal contempt. Mr. Scheulke reasoned that to prove criminal contempt, “the contemnor must disobey an order that is sufficiently ‘clear and unequivocal at the time it is issued.’” *Id.* at 4. In the *Stevens* case, however, no such order was given; “[r]ather, the Court accepted the repeated representations of the subject prosecutors that they were familiar with their discovery obligations, were complying with those obligations, and were proceeding in good faith.” *Id.* at 4-5.

³¹ To the extent the government’s new policy reforms provide prosecutors with better guidance regarding their *Brady* obligations, they still do not obviate a court order since they are wholly unenforceable. The DAG Guidance Memo, like the revisions to USAM before it, specifically states that it “is not intended to have the force of law or to create or confer any rights, privileges, or benefits.” DAG Guidance Memo, Introduction; see also USAM § 9-5.001.E (USAM *Brady* policy “does [not] provide defendants with any additional rights or remedies”); cf. *Jones*, 620 F. Supp.2d at 173 (quoting from 2007 Report to the Advisory Committee on Criminal Rules, n.4 *infra*, which, for this reason, recommended a revision to Rule 16 even after the USAM revisions).

individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.

David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors dated January 4, 2010 re: Issuance of Guidance and Summary of Actions Taken in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group.³²

- c. A pretrial *Brady* order also promotes judicial efficiency.
 - 1) Just as “[p]roviding broad and early discovery . . . promotes the truth-seeking mission of the Department [of Justice] and fosters a speedy resolution of many cases,” DAG Guidance Memo, Step 3.A, providing belated and/or incomplete *Brady* information complicates cases and slows them down.
 - 2) Litigating *Brady* disputes pretrial is time-consuming. The court may be forced to schedule additional hearings, to adjudicate additional motions, and/or to review contested documents *in camera*.
 - 3) When a *Brady* violation is uncovered in the midst of trial, the costs to the court and the community, particularly jurors and witnesses, are even greater. The court may have to interrupt the presentation of evidence to allow the defense to process the information and/or to conduct further investigation, witnesses may have to be recalled to the stand, or if some other remedy is needed, the court and the parties will have to take the time to determine what that remedy is, which may include ordering a mistrial.³³
 - 4) Even worse than the multiplication of court proceedings, pretrial or midtrial delay, or even mistrying a partially tried case, is the cost of negating a conviction following a trial – especially when the *Brady* information gives rise to a concern that the resources of the judiciary and executive have been spent prosecuting the wrong person while the true perpetrator remains at liberty, free to commit more crimes.

2. □ Because it makes infinite sense, regulating *Brady* disclosures pretrial is commonplace in federal court.

- a. *See, e.g.,* United States v. *Johnson*, 2010 WL 322143, *9 (W.D. Pa. 2010) (court ordered government to “disclose all *Brady* exculpatory material forthwith” and “all *Brady* impeachment material . . . no later than ten days prior to trial”); *United States v. Lekhtman*, 2009 WL 5095379, at *1 (E.D.N.Y. 2009) (court ordered

³² Available at <http://www.justice.gov/dag/dag-memo.html>.

³³ *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006) is an example of a trial derailed by late *Brady* disclosures.

government to turn over “*Brady* material . . . as it is discovered,” and “*Giglio* material . . . two weeks before the commencement of trial”); *United States v. Rodriguez*, 2009 WL 2569116, at *12 (S.D.N.Y. 2009) (court ordered government to turn over “*Brady* material . . . as it is discovered by the Government” and “*Giglio* material . . . twenty-one days before the commencement of trial”); *United States v. Libby*, 432 F.Supp.2d 81, 86-87 (D.D.C. 2006) (ordering the government to “produce, forthwith” “[a]ll documents, from any individuals, whether or not they will be called as witnesses in the government’s case-in-chief, that are discoverable under *Brady*”); *United States v. Thomas*, 2006 CR 553, 2006 WL 3095956, *1 (D.N.J. 2006) (unreported) (ordering the government to disclose within ten days of the issuance of the order “[a]ny material evidence favorable to the defense related to issues of guilt, lack of guilt or punishment which is known or that by the exercise of due diligence may become known to the attorney for the United States, within the purview of *Brady v. Maryland* and its progeny”);

- b. In a number of jurisdictions, pretrial *Brady* orders have been incorporated into the local rules with the result that a number of United States Attorney’s Offices, including those in large metropolitan areas like Boston and Miami, operate under such orders *in every case*. See, e.g., M.D. ALA. Standing Order on Criminal Discovery § (1)(B)&(C) (requiring disclosure of “*Brady*” and “*Giglio*” material “at arraignment, or on a date otherwise set by the Court for good cause shown”); S.D. ALA. L. R. 16.13 § (b)(1)(B)&(C) (same); D. Conn. L. Crim. R. Appx. § (A)(11) (requiring disclosure of “[a]ll information known to the government which may be favorable to the defense” within 10 days of arraignment); N.D. FLA. L. R. 26.3(D)(1)&(2) (requiring disclosure of “*Brady*” and “*Giglio*” material within 5 days of arraignment “or promptly after acquiring knowledge thereof”); S.D. FLA. L. Crim. R. 88.10(C)&(D) (requiring disclosure of *Brady* and *Giglio* information); *id.* 88.10(Q)(2) (requiring discovery in connection with trial not later than 14 days after arraignment); S.D. GA. L. Crim. R. 16.1(f) (requiring disclosure of “any evidence favorable to the defendant” within 7 days of arraignment); D. HAW. L. R. 16.1(a)(7) (requiring disclosure of *Brady* material within 7 days of arraignment and impeachment material upon court order); D. MASS. L. R. 116.1 & 116.2 (requiring disclosure of exculpatory information within 28 days of arraignment and disclosure of impeachment information no later than 21 days before trial); D. NEV. L. Crim. R. 16-1(b)(1) (requiring disclosures required by the Constitution within 5 days of filing the Joint Discovery Statement (to be filed within 5 days of arraignment)); D. N.H. L. Cr. R. 16.1(d) (requiring disclosure of “any evidence material to issues of guilt or punishment within the meaning of *Brady* . . . and related cases” and any impeachment material as defined in *Giglio* . . . and related cases . . . at least” 21 days before trial); N.D.N.Y. L. R. 14.1 (requiring disclosure of *Brady* information 14 days after arraignment and *Giglio* information no less than 14 days prior to jury selection); E.D. N.C. L. Crim. R. 16.1 (b)(1)(7) (requiring disclosure of all “exculpatory evidence” at pretrial conference which must be held within 21 days of indictment or initial appearance); W.D. OK. L. Crim. R. 16.1 & Appx. V (requiring counsel to hold discovery conference within 14 days after a plea of not

guilty is entered and to file within 7 days of conference a joint statement that complies with form in appendix; joint statement form requires certification of the fact of disclosure of “all materials favorable to the defendant or the absence thereof within the meaning of *Brady* . . . and related cases”); W.D. PA. L. R.16.1 (requiring disclosure of “exculpatory evidence” at the time of arraignment); M.D. Tenn. L. Crim. R. 16.01(d) (requiring disclosure within 14 days of arraignment, all information “favorable to the defendant on the issues of guilt or punishment within the scope of *Brady* . . . and *Agurs*”); W.D. TEX. L. Crim. R. 16(b)(1)(c) (requiring government to provide discovery “in connection with trial . . . not later than 14 days after arraignment”; discovery checklist includes exculpatory and impeachment information); D. VT. L. R.16.1(a)(2) & (d)(1) (requiring disclosure of *Brady* information within 14 days of arraignment and *Giglio* information no later than 14 days before trial); W.D. WASH. L. Crim. R. 16(a)(1)(K) (requiring disclosure of evidence favorable to defendant and material to guilt or punishment to which he is entitled under *Brady* . . . and *Agurs*” within 14 days of arraignment) N.D. W.VA. L. Crim. R. 16.01(b)&(d), 16.05 & 16.06 (requiring disclosure of *Brady* within 10 days of filing Standard Discovery Request Form (filed at arraignment), and disclosure of *Giglio* information no later than 14 days before trial); S.D. W. VA. L. Crim. R. Standard Discovery Request Form III.1(H) & 2 (requiring disclosure of “all favorable evidence to the defendant, including impeachment,” within 14 days of filing Standard Discovery Request Form (filed at arraignment)); *see also* E.D. OK. L. Crim. R. 16. 1 & Disclosure Agreement Checklist (“it is anticipated that the government will provide discovery to the Defendant contemporaneously with arraignment”; Disclosure Agreement Checklist includes “exculpatory” and “impeachment” material); D. ID. General Order No. 242 § I.5.A-C. (“strongly encourage[ing] the government to produce” within 7 days of arraignment “all material evidence within the scope of *Brady*,” all *Giglio* information, and the criminal record of any government witnesses).

3. □ **The Superior Court has the authority to issue pretrial *Brady* orders.**

- a. *Brady* itself is the first foundation for the Superior Court’s authority.
 - 1) The Superior Court not only has the broad authority to fashion “appropriate remedial sanctions” when the government fails to disclose *Brady* information in a timely fashion, *United States v. Odom*, 930 A.2d 157, 158 (D.C. 2007), it also has the power *ex ante* to regulate disclosures under *Brady* pretrial and to make certain that this constitutional rule – which exists “to ensure that a miscarriage of justice *does not occur*,” *United States v. Bagley*, 473 U.S. 667, 675 (1985) (emphasis added) – is working as it should.
 - 2) Indeed, in *Boyd*, the Court directed that trial courts must, “as a constitutional matter,” exercise such oversight. 908 A.2d at 61; *see also id. at 59* (holding that the government’s “discretion” in determining how to fulfill its *Brady* obligations “is not unlimited, and courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial.”); *see also United States v. Starsuko*, 729 F.2d 256, 261 (3d Cir. 1984) (“The

district court may dictate by court order when *Brady* material must be disclosed, and absent an abuse of discretion, the government must abide by that order.”).

- b. The Superior Court’s obligation to protect a defendant’s right to the effective assistance of counsel is another foundation for a pretrial *Brady* order.
 - 1) As the Court of Appeals has acknowledged the government’s disclosure obligations under *Brady* implicate a defendant’s Sixth Amendment right to effective representation. *Boyd*, 908 A.2d at 61 (discussing prosecutor’s *Brady* obligations “[i]n light of the defendant’s Fifth Amendment right to due process, as well as his Sixth Amendment right to the effective assistance of counsel”); *see also United States v. Snell*, 899 F.Supp. 17, 20 n.5 (D. Mass. 1995) (ordering immediate disclosure of *Brady* information and noting that “the civil discovery rules recognize that effective advocacy and case management depend upon effective trial preparation. On the criminal side, where liberty is at risk, this conclusion is no less clear.”).
 - 2) The Court of Appeals has also acknowledged that “the right to [effective] assistance” of counsel is of such importance that it “invokes, of itself, the protection of a trial court,” and confers upon the trial court the power “to take steps to eliminate any deficiencies in the representation of counsel before the resources . . . have been invested in a full-blown trial.” *Monroe v. United States*, 389 A.2d 811, 816, 818 (D.C. 1978) (internal quotation and citation omitted).
- c. A third foundation for the court’s authority to issue a pretrial *Brady* order is the court’s general inherent power “to effectuate . . . the speedy and orderly administration of justice.” *United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975) (affirming trial court’s authority to order the disclosure of the government’s witnesses both on grounds of “fundamental fairness” and “administrative efficiency”).³⁴
 - 1) The Supreme Court has acknowledged that trial courts are empowered “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotations and citations omitted); *see also Geders v. United States*, 425 U.S. 80, 86 (1976) (The trial court “must have broad power to cope with the complexities and contingencies inherent in the adversary process . . . [and] [i]f truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.”).

³⁴ Rule 57(b) of the Superior Court Rules of Criminal Procedure acknowledges this inherent power and provides that “[w]hen [t]here [i]s [n]o [c]ontrolling [l]aw,” “[t]he [trial] court may regulate practice in any manner consistent with applicable law and these Rules.”

2) Similarly, the Court of Appeals has recognized that a “trial court has inherent authority . . . to control the conduct of the proceedings before it, in order to ensure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done.” *Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. 1994).

3) Pursuant to this “broad power,” a trial court has

the authority to enter pretrial case management and discovery orders designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly.

United States v. W.R. Grace, 526 F.3d 499, 509 (9th Cir. 2008) (affirming trial court’s order requiring government to disclose its finalized witness list a year prior to trial as an exercise, *inter alia*, of the court’s “general inherent authority to manage its docket”); *see also United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001) (acknowledging that a trial court has “discretion to order pretrial disclosures as a matter of sound case management”); *United States v. Rigas*, 779 F.Supp.2d 408, 414 (M.D. Pa. 2011) (“district courts have general discretionary authority to order the pretrial disclosure of *Brady* material to ensure the effective administration of the criminal justice system) (internal quotation and citation omitted); *United States v. Cerna*, 633 F.Supp.2d 1053, 1057 (N.D. Cal. 2009) (applying *W.R. Grace* to *Brady* disclosures and ruling that it had power to issue a pretrial *Brady* order); *United States v. Thomas*, 2006 WL 3095956, *1 (D.N.J. 2006) (issuing pretrial order regulating, *inter alia*, *Brady* disclosures “[i]n order to eliminate unnecessary motions for discovery in this case [and] to eliminate delays in the presentation of evidence and the examination of witnesses”).

d. Cases the government may try to cite in opposition to a pretrial order:

1) *Miller*: The case for a pretrial order is not undermined by the Court of Appeals’ observation in *Miller* that “factual scenarios vary . . . and constitutionally, it is not feasible or desirable to specify the extent or timing of disclosure *Brady* and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made.” *Miller*, 14 A.3d at 1111 (internal quotation and citation omitted). First, the Court made this comment in the context of rejecting the government’s “very late is good enough” argument, *id.*; it was never asked in *Miller* to weigh in on the issue of a trial court’s authority to issue pretrial *Brady* orders; second, any suggestion that it might be “constitutionally” impermissible to set default deadlines to apply to all cases is questionable given that a number of courts do this, *see VII.A.2 supra*; third and most importantly, this dicta should not preclude a pretrial order issued in a particular case that *is* tailored to defense needs in a particular case.

- 2) The government may also try to rely on *United States v. Coppa*, 267 F.3d 132, 136-37 (2d Cir. 2001), where the Second Circuit held that the trial court did not have authority to issue an order directing immediate production, before a trial date had been set, of all impeaching information, without regard to materiality, and without regard to the defendant's need to use it to prepare his case. Notably, the government did not seek appellate review of the provision in the trial court's order requiring immediate disclosure of all exculpatory information regardless of materiality. 267 F.3d at 136. *Coppa* is distinguishable where the pretrial order is tailored to the needs of the defense in a particular case and preserves the pretrial materiality inquiry (as discussed above *see* IV *supra*).
4. The substance of a pretrial *Brady* order:
 - a. Depending on the needs of the case, a pretrial *Brady* order could provide checklists addressing what constitutes favorable information and where the government must look for this information, how the government must assess materiality, when *Brady* information must be disclosed, and in what format.
 - 1) The most common orders govern timing of disclosure, see VII.A.2 *supra*.
 - 2) Massachusetts' local rule is an example of a more comprehensive approach. *See* D. MASS. L. R. 116.1 & 116.2.
 - b. In addition to case law and local rules, the government's own policy obligations may serve as the foundation of a proposed order.
 - 1) Certainly, the government should be hard-pressed to object to provisions of a proposed order that simply mirrors "the government's own stated sense of fairness vis-a-vis criminal defendants." *Miller*, 14 A.3d at 1109-10.
 - 2) Indeed, if the government is actually following its policy, an order that renders its policy enforceable by a court should be of no concern.

B. Remedies:

1. The trial court has broad discretion to remedy the government's failure to fulfill its *Brady* obligations pretrial:

In lieu of granting a continuance or a mistrial or striking the government's evidence, a trial court has discretion to fashion other appropriate remedial sanctions for the government's failure to make timely disclosure of apparently material, exculpatory evidence as the Constitution requires. . . . The trial judge enjoys a broad range of possible sanctions, *with the sole limitation being that the sanction be just under the circumstances*.

Odom v. United States, 930 A.2d 157, 158-159 (D.C. 2007) (emphasis added).

2. **The remedy the defense gets will depend on the record it makes.**

- a. To get a remedy, the defense must show harm that needs to be remedied: *e.g.*, witnesses it needs to interview that it did not know about previously, a criminal record that needs to be investigated, an opening statement or a line of cross that would have been different if the defense had known about the *Brady* information.
- b. It is difficult to generalize about prejudice – the defense must think about the particulars of its case and ask:
 - 1) What would it have done differently in the investigation and preparation of its case and if trial has started, what would it have done differently in the presentation of its case?
 - 2) Have any witnesses died, gone missing or become otherwise unavailable?
 - 3) Has any evidence been destroyed?
 - 4) Has so much time passed that memories are now lost, witnesses are too difficult to locate?
 - 5) Has the prosecution gained some strategic advantage, and if so, how could the playing field be leveled?
- c. Be prepared to push back against the argument that there is no need to remedy the belated disclosure of impeaching information because the defense does not need more time either to investigate this information or incorporate it into its theory of the defense.
 - 1) For example, prior inconsistent statements about an incident may provide an investigative lead to others who could corroborate that the inconsistent statement is the truth. *See, e.g., Sykes*, 897 A.2d at 781.
 - 2) Even evidence of prior criminal convictions may need to be investigated. For example, there may be pleadings in those prior cases where the government makes representations about the witness' lack of veracity.

3. **Possible remedies:**

a. **Mistrial, Dismissal & Vacatur:**

- 1) To convince a court to grant a mistrial/dismissal, the defense must show that the harm the defense has suffered cannot be remedied by any lesser means and/or that any lesser remedy will only allow the government to profit from its *Brady* violation.
- 2) It is best to acknowledge that in the vast majority of the cases a mistrial/dismissal/vacatur will not be a realistic possibility.

- a) The defense should preserve the argument, but do not expect that the court will grant your request.
 - b) The defense should ask for a lesser remedy in the alternative.
- 3) That said, courts have granted mistrials and have dismissed cases and vacated convictions as a remedy for *Brady* violations:
- a) Superior Court judges have granted mistrials: *United States v. Antonio Linder*, 2005 F 5706 (Christian, J.) (November 28, 2006, court ordered a mistrial in second-degree murder case), *United States v. Antonio Clark*, 2003 F 6781 (Puig-Lugo, J.) (April 18, 2006, court ordered mistrial in a first degree murder case); *United States v. Leroy Beach*, 2005 F 984 (Johnson, J.) (February 17, 2006, court ordered a mistrial in an assault with a deadly weapon case).
 - b) Superior Court judges have **dismissed cases pretrial**, *United States v. Leandrew Randolph*, 2011 CMD 1216 (Wynn, J.) (May 9, 2011, case dismissed with prejudice); *United States v. Theresa Green aka Tracy Tobin*, 2004 F 6457 (Holeman, J.) (November 14, 2008, court dismissed with prejudice this robbery and simple assault case); *United States v. Leonardo Delacruz*, 2008 CF2 10259 (Gardner, J.) (August 7, 2008, court dismissed with prejudice assault on a police officer case midtrial); *United States v. Tracy Vandyke*, 2004 F 7347 (Christian, J.) (September 11, 2006, in a second degree murder case, court dismissed indictment without prejudice);
 - c) Superior Court judges have **vacated convictions**, *United States v. Dwight Grandson*, 2004 F 5751 (May 11, 2010, court vacated convictions for premeditated murder, obstruction of justice, and related offenses and ordered a new trial); *United States v. Joseph Harrington*, Crim. No. 2007-CF1-22855 (April 17, 2009, court vacated a jury's verdict for first-degree murder and ordered a new trial for *Brady* violations); *United States v. Lamont Johnson*, 2001 F 5105 (Ross, J.) (February 23, 2005, in an assault with intent to kill case, court vacated the conviction, and ordered a new trial).

More detailed descriptions of a number of these cases may be found in a letter posted on the PDS website from Avis Buchanan to The Honorable Richard C. Tallman, Chair of Judicial Conference Advisory Committee On The Rules of Criminal Procedure, dated July 16, 2010 (<http://www.pdsdc.org/Resources/SLD/PDS%20Letter%20to%20Judge%20Tallman,%20%20Chair,%20Judicial%20Conference%20Advisory%20Committee,%20on%20amending%20Rule%2016.pdf>).

NOTE: Because these cases are often not published in reported opinions, the special litigation division at PDS asks that trial attorneys consider

notifying us when judges make findings of *Brady* violations or other prosecutorial misconduct (Obviously, counsel must first determine if publicizing this fact is in the best interest of the client or at least not adverse to the client's interests). SLD is also interested in the cases in which the government voluntarily dismisses to avoid a ruling that it violated its *Brady* obligations. Only by recording, compiling, aggregating, and analyzing these cases can any real change come to the system.

d) Federal courts have also dismissed cases: *see, e.g., United States v. Fitzgerald*, 615 F.Supp.2d 1156 (S.D. Cal. 2009) (Lorenz, J.); *United States v. Diabate*, 90 F.Supp.2d 140 (D. Mass. 2000); *United States v. Dollar*, 25 F.Supp.2d 1320 (N.D. Ala. 1998); *United States v. Raming*, 915 F.Supp 854 (S.D. Tex. 1996); *United States v. Lyons*, 352 F.Supp.2d 1231 (M.D. Fla. 2004); *United States v. Cheng Yong Wang*, 1999 U.S. Dist. LEXIS 2913 (S.D.N.Y. Mar. 15, 1999); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), and vacated convictions and granted new trials, *see, e.g., United States v. Quinn*, 537 F.Supp.2d 99 (D.D.C. 2008) (Bates, J.) (finding that the government had violated its *Brady* obligations and ordering a new trial where the government (1) failed to inform the defendant that a “critical” witness had made false statements and would no longer be called at trial because the witness had become the target of an investigation and (2) withheld information about the same witness’s plea negotiations).

b. Lesser remedies:

1) Possible lesser remedies include:

- * A continuance;
- * An order precluding the government from introducing particular evidence;
- * An order requiring the government to make a witness available to the defense;
- * Admission of an otherwise inadmissible statement, *Odom*, 930 A.2d at 159; *see also, e.g., United States v. Joseph Brown*, 2008 CMD 21398 (Morrison, J.) (May 31, 2010, ordering admission of hearsay statements as remedy for *Brady* violation);
- * An instruction to the jury that the government withheld evidence from the defense to explain, for example, why defense counsel may not have had the ability fully to prepare for the information or why a certain exculpatory witness could not be located and did not testify. (Such an instruction is distinct from a *Shelton*-type instruction, *see VII.C. infra*).

- 2) Defense counsel should think strategically about what is best for the defendant. For example, the court may be willing to grant a continuance – but does the defense want it?
 - a) Perhaps yes, because there are many seemingly fruitful lines of investigation to be pursued, or because client is out and this will give the defense more time to prepare.
 - b) But perhaps no, because client is being held pretrial, it does not appear that the defense will be able to unearth any more information, and the defense feels it has at least a temporary strategic advantage because the government has not yet determined how it is going to respond to newly discovered *Brady* information. Counsel may want to make release of the defendant a condition of accepting a continuance caused by the government’s failure to disclose.

4. Be careful to distinguish the defense request for a remedy from any request for a sanction.

- a. Remedies are a realistic possibility; sanctions are not a priority for Superior Court judges. Few if any judges are interested in punishing the prosecution for their conduct. Their focus is on the trial over which they are presiding. Sanctions are considered collateral to that proceeding.
- b. By requesting sanctions, the defense takes on an additional burden of proving bad faith. A showing of bad faith is *not* required to establish a *Brady* violation. *Brady*, 373 U.S. at 87 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); *see also, e.g., Virgin Islands v. Fahie*, 419 F.3d 249, 254 (3d Cir. 2005) (holding that dismissal with prejudice can be appropriate sanction for a willful *Brady* violation).

C. A new line of defense – admission by conduct.

1. The defense may want to present evidence concerning the prosecution’s untimely disclosure of *Brady* information to support an argument and possible jury instruction that the Government’s suppression constituted an admission by conduct that its case was weak.
 - a. This is a defense that a panel of the Court of Appeals endorsed in *Shelton v. United States*, 983 A.2d 363 (D.C. 2009) – although the opinion was subsequently modified and superseded on rehearing. 26 A.3d 216 (D.C. 2011).
 - 1) In *Shelton*, the government suppressed the complainant’s initial statement to the police at the hospital that: “I don’t know or I didn’t see or all’s I saw was . . . someone shoot at me from a dark-colored car.” 983 A.2d at 366. At trial, though, the complaining witness identified Mr. Shelton as the shooter.

Although Mr. Shelton was tried twice (the first case mistried after the jury hung), the government did not disclose the complainant’s exculpatory statement until the eve of the second trial. At the second trial, the defense sought to question the detective about the government’s suppression of *Brady* information, but the trial court precluded this line of inquiry.

- 2) The panel reversed noting that such a line of questioning/defense was akin to permitting a party to present evidence to support an inference of a party's consciousness of guilt:

It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. *The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. . . .*

We are persuaded by the analysis in the cases we have discussed and conclude that defense counsel had a basis in law to argue that the government's nondisclosure of exculpatory information was akin to an admission by conduct that the government was conscious that its case was weak (and that it was in fact weak) and that appellant should have been allowed to present that evidence.

983 A.2d at 370-71 (emphasis added) (internal citation and quotation omitted).

- b. In making a consciousness of weakness argument it is important:
 - 1) To make clear that developing the evidence to support this inference is neither a remedy nor a sanction, but a separate line of defense. *See Shelton*, 983 A.2d at 369 (citing *Kyles* and noting that attacking the quality of the investigation is a long-standing line of defense).
 - 2) To support this “consciousness of weakness” inference with evidence that the prosecution knew about the *Brady* information and deliberately did not disclose it. BUT the defense need *not* establish that the prosecution acted in “bad faith.” *See United States v. Shelton*, Opposition to Petition for Rehearing en Banc, dated May 19, 2010.
2. Whether this is a viable line of defense in the District is an open question – and one the defense should press courts to decide in our favor.
 - a. As noted above, a panel of the Court of Appeals approved such a defense argument in *Shelton*, 983 A.2d 363 (D.C. 2009). But the Court subsequently

granted rehearing and vacated its opinion, *United States v. Shelton*, 26 A.3d 233 (D.C. 2011).

- b. Although the Court acknowledged that this was “a difficult question of first impression as to which reasonable judges may disagree,” 26 A.3d at 233, it did not reject the earlier panel’s analysis – it simply held that the issue did not need to be reached in this case:
 - 1) Because any error was harmless. *Id.* (“Resolution of that question is unnecessary to the disposition of this appeal, since all members of the division agree that any error in excluding such evidence was harmless, and that appellant’s conviction must be affirmed”);
 - 2) And because “[t]here is substantial doubt whether this claim of error was preserved.” *Id.*
 - 3) Accordingly, the Court determined that “resolution of the above-described question of first impression should not be undertaken” *id.*, and the court issued a modified opinion in which it declined to “decide . . . whether the claim was adequately preserved because, assuming, without deciding, that the trial court erred in excluding the evidence and precluding counsel from arguing its relevance to the jury, we conclude that the error was harmless.” 26 A.3d at 222.
 - 4) Judge Ruiz concurred in affirming the conviction but disagreed with the panel’s decision to vacate its original opinion because “there is evidentiary relevance to a prosecutor’s purposeful failure to disclose exculpatory evidence.” 26 A.3d at 224 (Ruiz, J. concurring). The opinion in *Shelton I* was included as an Appendix to Judge Ruiz’s concurrence.

VIII. Significant Cases:

A. □ Pre-*Brady* Supreme Court Cases:

1. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (The deliberate use of perjured evidence and suppression of impeaching evidence by state prosecutors constitutes a due process violation).
2. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (A defendant makes a viable due process claim if his imprisonment resulted from “perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him.”).
3. *Mesarosh v. United States*, 352 U.S. 1 (1956). Government acknowledged after trial that informant/witness had given false testimony in several other proceedings in different courts concerning the general subject matter of his testimony at trial (relating to Communist Party activities). Government argued that his testimony at defendant’s trial was truthful and that there was sufficient other evidence. In

- rejecting this argument the Court observed that the informant “by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity.” *Id.* at 14. “The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.” *Id.* The Court ordered a new trial because “it cannot be determined *conclusively* by any court that his testimony was *insignificant* in the general case against the defendants.” (emphasis added).
4. *Alcorta v. Texas*, 355 U.S. 28 (1957). Defendant argued that he stabbed his wife only after seeing her with another man. That other man, who was the only witness, testified that he had no romantic relationship with the wife and was just driving her home. The prosecutor knew about the romantic relationship but told the man not to volunteer that information but to testify truthfully if asked about it. His testimony, however, implied falsely that there was no relationship. The prosecutor did not disclose that the witness had admitted to the sexual relationship, which would have seriously corroborated the “heat of passion” defense. That defense could have made him ineligible for the death sentence that he had received. Court held due process violation because the testimony, even if not knowingly false, certainly gave a “false impression” that prejudiced the defendant. *Id.* at 31.
 5. *Napue v. Illinois*, 360 U.S. 264 (1959). Key witness testified that he was offered no consideration for his testimony. Even though prosecutor had actually promised him consideration, the prosecutor did nothing to correct the false testimony on that question.
 - a. When government uses false evidence or allows it to go uncorrected, the conviction “must fall under the Fourteenth Amendment.” *Id.* at 269.
 - b. Impeachment is just as important as any other evidence. “The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.” *Id.* at 269. The question is whether the testimony “may have had an effect on the outcome.” *Id.* at 272.
 - c. “It is of no consequence that the falsehood bore upon the witness’ credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.* . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.” *Id.* at 269-270 (internal quotations and citation omitted) (emphasis added).
 - d. The fact that witness was impeached by testimony that a public defender had promised to help him after testifying did not cure the violation because the word of the prosecutor was much stronger and more effective impeachment. Thus,

evidence that defendant had access to some impeachment information does not render additional, important impeachment evidence immaterial.

B. *Brady* and Supreme Court Progeny:

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

- a. Brady confessed to murder but argued that he should not get the death penalty because he did not perform the actual killing. The Government did not disclose to Brady that the co-defendant admitted to performing the killing.
- b. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” *Id.* at 87.
- c. It is often overlooked that the Court employed a fairly lenient materiality standard in *Brady*. The suppressed confession by the co-defendant also stated that Brady likewise wanted to kill the victim, but that Brady wanted to strangle the victim and the co-defendant wanted to shoot him. Even so, the Court held that the confession would have been favorable to *Brady* and found a due process violation.

2. *Giglio v. United States*, 405 U.S. 150 (1972).

- a. Key witness testifies that he and Mr. Giglio forged \$2300 in money orders, and that witness believes witness “still could be prosecuted,” *id.* at 151; and Government argues in closing that witness “received no promises that he would not be indicted.” *Id.* at 152. But, in fact, grand jury prosecutor had, unbeknownst to trial prosecutor, promised witness that if he testified before grand jury he would not be indicted. The trial prosecutor denied any knowledge of the promise and thus any knowing use of false testimony.
- b. The Court clarifies that the *Brady* disclosure obligation does not turn on the trial prosecutor’s actual knowledge of the information. The Court imputed the promise of the first prosecutor to the entire office, holding that the burden should be placed on the Government to develop “procedures” to ensure that “all relevant information” is communicated to each lawyer who handles any case. *Id.* at 154.
- c. The Court clarifies that impeachment information falls under *Brady*: “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*].” *Id.* at 154.
- d. The court clarifies that reversal under *Brady* requires a finding of materiality (though what “materiality” means will evolve), which is defined as a showing that

the withheld evidence could “in any reasonable likelihood have affected the judgment of the jury.” *Id.* at 154 (internal quotation and citation omitted).

3. *United States v. Agurs*, 427 U.S. 97 (1976).

- a. Agurs was convicted of murder after she and a man had checked into a motel. Witnesses heard Agurs screaming for help and came to the room to find Agurs and the man struggling for a knife. The man was on top of Agurs, and he was bloody and was trying to jam the knife into Agurs’ chest. The man died of multiple stab wounds, and Agurs was not wounded. The evidence established that the man had been carrying two knives with him when he checked into the hotel. The prosecutor did not disclose the man’s prior criminal record, including assault with a deadly weapon and carrying a deadly weapon (both knives).
- b. The Court holds that there are three different standards of review for *Brady* violations.
 - 1) The highest level of scrutiny is reserved for cases involving knowing perjury and false evidence. Reversal is warranted “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.* at 103.
 - 2) An intermediate level of scrutiny is used in cases where a specific *Brady* request is made. A failure to disclose evidence that had been specifically requested is “seldom, if ever, excusable.” *Id.* at 106.
 - 3) For all other cases, including when no *Brady* request is made or when just a general request for “*Brady* information” is made, the prosecutor still has an independent disclosure obligation. But, in those cases, the Court applies a less stringent standard: whether, after viewing everything, there is any reasonable doubt about the conviction. *Id.* at 112-13. Applying this standard *the court finds that the suppressed evidence was not material*: Evidence of guilt was strong, given that Sewall had multiple stab wounds and Agurs had none. Sewall’s criminal record did not contradict any evidence offered by the prosecution and was largely cumulative of other evidence about Sewall’s violent character, including undisputed evidence that he arrived at the hotel room with two knives.

NOTE: The bright-line distinction between specific request and “no request” or “general” request has since been abolished by *Bagley*, see below.

- c. The Court also notes in *Agurs* that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” *Id.* at 108.
- d. The court reiterates that the heart of the *Brady* inquiry is about fairness not bad faith: Suppression violates constitution because of “character of the evidence, not the character of the prosecutor.” *Id.* at 110. Failure to disclose highly probative

evidence violates the constitution even if it was wholly inadvertent, and failure to disclose trivial evidence is not a constitutional violation even if prosecutor is trying to suppress a vital fact.

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

- a. Government's two key witnesses on narcotics and firearms charges testify that their statements have been made without any promise of reward. Post-trial defense learns (via FOIA request) that witnesses had agreements with ATF to receive financial "rewards" for their cooperation. Court of Appeals holds that automatic reversal is required when government fails to disclose impeachment evidence of this sort because its suppression also amounts to a Confrontation Clause violation.
- b. The Supreme Court explains that *Brady* is a rule of fairness that is a "departure from a pure adversary model," *id.* at 675 n.6, that "requir[es] the prosecutor to assist the defense in making its case." *Id.*
- c. The Court reaffirms holding of *Giglio*: "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *Id.* at 676. But the Court holds that the failure to disclose impeachment evidence is of the same – not of greater or lesser – constitutional import, under *Brady*, as the failure to disclose exculpatory evidence. In fact, the Court is so concerned about the prejudice to the defense from the suppression of this impeachment information it remands the case for a reassessment of materiality under the correct standard (see below).
- d. The Court discards the *Agurs* distinction between specific request and general/no request situations. Standard of materiality to show a *Brady* violation is the same: whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682.
 - 1) Even so, the Court holds that specific requests matter, because the prosecution's failure to respond may mislead the defense and thus impair the adversary process:

the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

Id. at 682-83.

- 2) The standard for false evidence and testimony still remains the same: it is material unless the government can show beyond a reasonable doubt that it was harmless. *Id.* at 678-79.
- e. The Court remanded the case because it “think[s] there is a significant likelihood that the prosecutor's response to respondent’s discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government.” *Id.* at 683. The Court notes that “the fact that the [witnesses’] stake [in the outcome] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.” *Id.*

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

- a. A woman is murdered in a parking lot, and her car is stolen. Six eyewitnesses give statements containing physical details that are inconsistent with Kyles but consistent with another man named Beanie. Beanie, using different names, contacts police several times and tells several different stories. He claims that he bought the victim’s car from Curtis Kyles and expresses concern that he, himself, is a suspect. Beanie also knows a number of details about the crime, asks for a reward, and, curiously, goes to Kyles’ apartment before telling police where exactly particular inculpatory items will be located, including the murder weapon. Police prepare a photo lineup with Kyles’ picture, not Beanie’s. Some witnesses identify Kyles but others do not or are not asked. Kyles is tried twice based on eyewitness testimony alone; Beanie is never called to testify. The first trial concludes with a hung jury and a mistrial is declared. Kyles is convicted after the second trial.
- b. Government failed to disclose the six exculpatory eyewitness statements, records of police dealings with Beanie, recording of Beanie’s inconsistent statements, a written statement by Beanie, a computer printout of cars from a parking lot that shows Kyles’ car was not there, an internal memo in which police plotted to seize Kyles’ trash at the suggestion of Beanie, and evidence linking Beanie to other crimes in the same location, including another murder.
- c. *Kyles* is the source of the understanding that the duty of disclosure extends to the prosecution team: The Court clarifies that prosecutors are charged with knowledge of information in the possession of police and that they have “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in a case.” *Id.* at 437.
- d. The Court discusses the materiality component of the *Brady* inquiry in depth and clarifies:

- 1) “A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . *Bagley's* touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.” *Id.* at 434 (internal quotations and citation omitted).
 - 2) “It is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* at 434-35.
 - 3) In assessing materiality, *Brady* information must be evaluated cumulatively, not item by item. *Id.* at 436.
- e. The Court rejects the State’s invitation to limit the prosecution’s duty of disclosure pretrial:
- 1) The State had “asked [the Court] at oral argument to raise the threshold of materiality because the *Bagley* standard “makes it difficult ... to know” from the “perspective [of the prosecutor at] trial ... exactly what might become important later on.” *Id.* at 438.
 - 2) But instead of giving the State “a certain amount of leeway in making a judgment call as to the disclosure of any given piece of evidence” as requested, the Court shifted the disclosure equation in the other direction:

A prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See Agurs*, 427 U.S. at 108 (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure”). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. at 439-40.
- f. The Court concludes that disclosure of suppressed evidence in *Kyles* would have made a different result reasonably probable. In so doing:

- 1) The Court acknowledges that inconsistent eyewitness statements are material because the “evolution over time of a given eyewitness’s description can be fatal to its reliability,” *id.* at 444, and “the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others.” *Id.* at 445.
- 2) Information can be material if its disclosure could help a defendant attack the thoroughness of the police investigations. The disclosure of the information in *Kyles* “would have revealed a remarkably uncritical attitude on the part of the police.” *Id.* at 445.

6. *Strickler v. Greene*, 527 U.S. 263 (1999).

- a. This case involved evidence of guilt that was overwhelming, but the government failed to disclose important impeachment information of the sole eyewitness to the abduction, including correspondence with police and notes from interviews that establish that her confidence about her trial testimony was highly questionable. In state post-conviction proceedings, government said that disclosure was unnecessary because it maintained an “open file.”
- b. The Court reiterates three elements of a *Brady* violation on appeal: 1) favorable evidence is 2) suppressed by government 3) resulting in prejudice. The court also makes clear that the prosecution has a “broad” duty of disclosure pretrial that is not limited to that which establishes a *Brady* violation post-trial:

This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term “*Brady* violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called “*Brady* material”—although, strictly speaking, there is never a real “*Brady* violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Id. at 281.

- c. The Court rejects state court and 4th Circuit arguments that the *Brady* claim was defaulted because habeas petitioner was not “diligent” in discovering this information himself. Diligence is not an element of *Brady*. If the “suppression” prong of *Brady* is met—and a defendant is relying on the state’s representations, implicit or explicit, that no *Brady* material exists—a court cannot expect or require a defendant to investigate to find out if the state is lying. The defense is entitled to rely on the representations of the prosecution. *Id.* at 284 (“[I]t was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination.”).

- d. Justice Souter, concurring in part and dissenting in part, attempts to clarify the materiality standard employed by the Court in *Brady* and its progeny. He argues that “significant probability” rather than “reasonable probability” is the legal shorthand for establishing prejudice under *Brady*. He expresses concern that the use of “reasonable probability” risks confusion with the far more demanding “more likely than not.” *Id.* at 297-301.

7. *United States v. Ruiz*, 536 U.S. 622 (2002).

- a. Defendant enters guilty plea after initially refusing to accept a more favorable “fast track” plea bargain, under which government would recommend downward departure under Sentencing Guidelines if she pleaded guilty, because government demanded waiver of *Brady* right to disclosure of impeachment evidence and any information supporting an affirmative defense. (The rejected fast-track plea agreement provided that the government would “provide any information establishing the factual innocence of the defendant regardless.” *Id.* at 631).
- b. The Court holds that because “[t]he principle supporting *Brady* was ‘avoidance of an unfair trial’ . . . [and] that concern is not implicated at the plea stage,” *Brady* does not require disclosure of impeachment information prior to plea negotiations pursuant to plea deal where government had promised to disclose all evidence of innocence at time of plea. *Id.* at 634 (Thomas, J. concurring).
- c. Likewise with respect to information supporting an affirmative defense, the Court held “*in the context of this agreement*, the need for this information is more closely related to the fairness of a trial than to the voluntariness of the plea.” *Id.* at 632 (emphasis added).
- d. *Ruiz* should be interpreted to have limited import, bounded by its facts. It was looking at the voluntariness of a plea prior to indictment, not the impact of withheld information on the fairness of a trial (indeed there was no allegation that any information had been withheld). See *United States v. Ohiri*, 133 Fed. Appx. 555 (10th Cir. 2005) (*Ruiz* did not excuse suppression of exculpatory (not impeachment) information where plea was executed the day jury selection was to begin (not pre-indictment as part of a “fast-track” plea)); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (Given *Ruiz*’s distinction between exculpatory and impeachment evidence, “it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.”).

8. *Banks v. Dretke*, 540 U.S. 668 (2004).

- a. In a capital murder case, State represents that it would provide all discovery to which the defendant was entitled but fails to disclose evidence that would have allowed Banks to discredit key government witnesses – the status of Farr as a paid government informant and a pre-trial transcript revealing that Cook’s testimony had

been intensively coached. State further fails to correct false statements made by the witnesses on cross-examination regarding these facts. In penalty phase, the government relied heavily on Farr's testimony about his and Bank's supposed future plan to commit an armed robbery. However, in a 1999 affidavit Farr represented that he had received \$200 from a police officer to stage a set up. Farr asked Banks to obtain a gun for Farr to commit robbery. He further stated that he believed that if he didn't help the officer with his investigation, he would be arrested for drug charges. The Court reverses a denial of habeas relief, finds that there was a *Brady* violation, and overturns the death sentence. The Court remanded for further proceedings on the guilt-phase *Brady* claim.

- b. Where as here "prosecutors represented at trial and in state post conviction proceedings that the State had held nothing back," *id.* at 698, the Court holds that defendants need not "scavenge for hints of undisclosed *Brady* material." *Id.* at 695. Defendants can reasonably rely on representations and conduct of government officials. "A rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.
- c. The Court also stresses importance of being able to impeach and fully cross-examine informants because of the suspect nature of their testimony. Here, the informant's status was withheld, and his testimony was critical to the penalty phase. Even though there was some impeachment of the informant, the Court stresses that impeachment was quantitatively and qualitatively different than it would have been had the information been disclosed. *Id.* at 699-703.

9. *Cone v. Bell*, 556 U.S. 449 (2009).

- a. Prosecutor suppressed various evidence tending to show that defendant had a drug problem and may have been drunk or high when committing the murders.
- b. This evidence was not material to guilt, but Court holds that it may have been material to punishment because it tended to mitigate culpability, and the government had tried to discount any idea that Cone was affected by drugs. The Court remanded to have the lower court decide the issue in the first instance.
- c. The suppressed evidence amounts to a few statements that merely would have helped the defendant establish that he was a serious drug user. *Cone* is thus important because it demonstrates that evidence need not be overwhelming in the slightest to be *Brady* material—it just needs to speak to one of the many things that courts have found to be material to mitigation.

10. *Smith v. Cain*, No. 10-8145, 2012 U.S. LEXIS 576 (January 10, 2012).

- a. The Supreme Court reversed a conviction pursuant to a straightforward application of *Brady*. Eight members of the Court easily rejected the position urged by the State of Louisiana and by Justice Thomas, the sole dissenter.

- b. The only eyewitness, who had testified at the murder trial that he was sure of his identification, had told police the night of the murder and a few days later that he could not make an identification. The Court called this information, which revealed inconsistent statements by the only eyewitness to the crime, “plainly material.”
- c. The rest of the justices rejected the prosecution’s argument—supported by Justice Thomas—that the prosecution may have been able to provide other evidence that could have led to the jury discounting the undisclosed inconsistent statements. The Court refused to “speculate” about whether the prosecution could have explained away the inconsistencies or which of the inconsistent statements a jury would believe, confirming that *Brady* requires disclosure even if the prosecutor can think of reasons that she does not find the evidence convincing.

C. Significant D.C. Court of Appeals *Brady* cases:

1. *Mackabee v. United States*, 29 A.3d 952 (D.C. 2011).

- a. In this murder case, the court reviewed whether the government had fulfilled its *Brady* obligations where it disclosed a year before trial notes documenting a description of the shooter that did not match the defendant but withheld until a week before trial the full transcript of the videotaped interview with the witness who provided this description, and where it disclosed a year before trial notes indicating that another witness had failed to identify the defendant in a photo array, but withheld until weeks before trial information that the witness had stated that two other people in the array looked like the shooter.
- b. The Court of Appeals held that the prosecution had not timely disclosed all the information it should have pretrial but ultimately affirmed the conviction because of its conclusion that the defense had not been prejudiced by the government’s untimely disclosures.
- c. The Court firmly rejected the argument that the videotaped interview was only “potentially exculpatory” and thus did not need to be disclosed pretrial. *Id.* at 956 n.11 (observing that Court was “at a loss to understand th[e] reasoning” of the prosecution that videotaped statement of witness who gave police “a physical description [of the shooter] that could not match Mr. Mackabee” “was not the kind of exculpatory information that [the government] would immediately go around and turn over”).
- d. The Court also held the witness’s failure to identify defendant in a photo array coupled with statement that the shooter “sort of look[ed] like” the photographs of two other people in the photo array was exculpatory in that it was “evidence of a kind that would suggest to any prosecutor that the defense would want to know about it.” *Id.* at 962.

2. *Miller v. United States*, 14 A.3d 1094 (D.C. 2011).

- a. Defendant was charged with assault with intent to commit murder and related offenses arising out of a shooting. Notwithstanding multiple *Brady* requests, the government withheld until the evening before opening statements, grand jury testimony in which the government’s principal eyewitness stated that the gunman held the pistol in his left hand. Defendant is right-handed. The defense argued that it was unable to effectively use this information at trial, and in particular, that it did not have time to appreciate that another prosecution witness, Lindsay, who was a potential suspect, had given the police a videotaped statement in which he signed his rights card with his left hand. The Court found a *Brady* violation and reversed.
- b. The Court begins its opinion by emphasizing the importance of the *Brady* rule in ensuring fairness and avoiding wrongful convictions, stressing that “the principles of *Brady* must therefore be conscientiously applied not only by judges, but by prosecuting attorneys,” and noting that “*Brady* unambiguously prescribes the prosecutor’s priorities: The prosecutor’s obligation is to see justice before victory.” 14 A.3d at 1107 (internal quotation and citation omitted).
- c. Regarding what is exculpatory information, the Court endorses a simple, “eminently sensible standard”: Evidence is “exculpatory for *Brady* purposes because it [i]s of a kind that would suggest to any prosecutor that the defense would want to know about it.” *Id.* at 1110 (quoting *Leka v. Portuondo*, 257 F.3d 89, 99 (2d Cir. 2001)).
- d. The Court rejects the government’s claim, “remarkable for its breadth,” that the prosecution was not obligated to disclose the information about the shooter being right-handed because the government had determined this information was not material. *Id.* at 1109.
 - 1) The Court reaffirms its analysis in *Boyd* that the duty of disclosure pretrial is broader than what ultimately constitutes a *Brady* violation post-conviction. *Id.* at 1109.
 - 2) The Court also reiterates its admonition in *Zanders* that “*It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact-finder.*” *Id.* at 1110 (quoting *Zanders*, 999 A.2d at 164; adding emphasis).
 - 3) In the course of its materiality discussion, the Court notes that the government’s own policy requires that prosecutors take a broad view of what must be disclosed, and also notes the “telling contrast between the government’s own stated sense of fairness vis-a-vis criminal defendants [as documented by the government’s *Brady* policy] and its unqualified assertion, in this case, that it was not obliged to disclose to the defense Taylor’s plainly exculpatory testimony before the grand jury.” *Id.* at 1109-10.

- e. Regarding timing, the Court emphasizes the importance of timely pretrial disclosure.
 - 1) The Court reiterates its statement in *Perez*, 968 A.2d at 66, that the object of the *Brady* is to “allow defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense” and condemns “[p]rosecutorial resort to a strategy of delay and conquer” as “not acceptable.” 14 A.3d at 1108.
 - 2) The Court subsequently rejects the “very late is good enough” arguments made by the government in support of eve or midst of trial disclosure as “inconsistent with *Brady*,” *id.* at 1111, and cogently explains why the defense needs *Brady* information early enough in the life of the case so that it can actually make use of it. The Court also acknowledges that once trial has begun, defense counsel is distracted with other matters, is not in investigative mode, and may not be able to incorporate new exculpatory information into its case. *Id.* at 1111-13.
 - 3) Although the Court acknowledges that where “a *Brady* claim is predicated upon the timing of the disclosure, the defendant must show prejudice from the delay itself,” *id.* at 1115, the Court also makes clear that the defense’s ability to make some use of the information is not equivalent to “effective use.” *Id.* at 1115. In *Miller*, the Court determined that the good job defense counsel did under challenging circumstances could not be held against the defense in the context of the materiality inquiry. Timely disclosure would have helped the defense make an even more persuasive case that the government had not met its burden of proof and indeed that another man might have been responsible for the shooting. *Id.* at 1115-16.

3. *Zanders v. United States*, 999 A.2d 149 (D.C. 2010).

- a. In this murder case, the Court of Appeals determined that the prosecution’s summary disclosure did not satisfy the government’s pretrial disclosure obligations under *Brady*, but declined to reverse in the absence of a showing of prejudice.
- b. The prosecutor had provided the defense a summary disclosure stating that:

[Attorney] Betty Ballester represents an individual who was interviewed by the [MPD] [who said that] . . . [Allen] Lancaster was involved in some sort of altercation/argument with [Shawn] LNU in the days immediately preceding his murder. This information was investigated and found to have no bearing on the case. Therefore the government does not believe this information is in any way *Brady* material. However, I am disclosing it now in an excess of caution.

Brief for Appellee, *Thomas Zanders v. United States*, District of Columbia Court of Appeals No. 05-CF-246 at 58. The summary disclosure did not reveal “significant exculpatory information,” 999 A.2d at 163, contained in the notes of

the witness interview, namely, that the altercation had taken place in the exact location of the decedent's shooting the following night. *Id.* at 161.

- c. The Court of Appeals concluded that the prosecution's summary *Brady* disclosures were "incomplete and late." *Id.* at 164; *see also id.* (admonishing that "[a]ny doubts [regarding *Brady* disclosures] should be resolved in favor of *full* disclosure made well before the scheduled trial date") (emphasis added).
- d. Regarding what the government must disclose as *Brady* information:
 - 1) The Court observes that "[i]t should by now be clear that in making judgments about whether to disclose potentially exculpatory information, the guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel." 999 A.2d at 163-64.
 - 2) The Court also admonishes the government for withholding information because it has decided that the information is not creditable: "It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder." *Zanders*, 999 A.2d at 164.
- e. Regarding when the government must disclose *Brady* information:
 - 1) The Court specifically noted that the defense must have "a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the defense." *Id.* at 164.
 - 2) Accordingly, the Court stated that "[a]ny doubts should be resolved in favor of full disclosure made well before the scheduled trial date, unless there is good reason to do otherwise (such as substantiated grounds to fear witness intimidation or risk to the safety of witnesses), upon request by the defense." *Id.* at 164.

4. *Perez v. United States*, 968 A.2d 39 (D.C. 2009).

- a. In murder case, government withheld pretrial, among other things, key witness's statements to the grand jury that he was drunk at the time of the incident and had no memory of it. Court holds that government should have disclosed this information pretrial, *id.* at 66 ("There is no question here that Alemán's grand jury testimony should have been disclosed before trial."), but affirms after concluding that the defense was not prejudiced from the belated disclosure of this information.
- b. Regarding timing, the Court of Appeals:
 - 1) Admonishes the government, noting that it had been "repeatedly confronted with complaints of tardy disclosure of exculpatory material," *id.* at 65;

- 2) Clarifies that at trial disclosure of *Brady* information is presumptively untimely:

This Court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under Brady, or that if such disclosure is made, the burden may then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.

Id. at 66 (emphasis added);

- 3) And explains that “timely, *pretrial* disclosure,” *id.* (emphasis added), is necessary because:

the due process obligation under Brady to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.

Id. at 65-66 (emphasis added).

5. *Lindsey v. United States*, 911 A.2d 824 (D.C. 2006).

- a. In this first degree murder case, the government concedes and the Court holds that the prosecution made *Brady* disclosures that were both incomplete and late.
- b. The Court reiterates that impeachment information is *Brady* information and “may well be determinative of guilt or innocence.” *Id.* at 838 (quoting *Giglio*, 405 U.S. at 154).
- c. Here, “the government had given the defense some *Brady* evidence prior to trial, but it became clear as the proceedings progressed that the disclosures were substantially incomplete.” *Id.* at 839. Specifically,
 - 1) “Each of the eyewitnesses had been treated favorably by the government in exchange for their testimony by garnering plea agreements on other charges or being paid with federal witness vouchers, but impeachment evidence on three of the four eyewitnesses was not disclosed before trial and had to be supplemented by the government as the trial progressed.” *Id.*
 - 2) “The failures were the most egregious with regards to eyewitness Kevin Perry, who had to be excused twice during his testimony when defense counsel uncovered further evidence of Perry's cooperation with police officers that the government had not disclosed.” *Id.*
 - 3) “Finally, the trial court delayed the proceedings for an entire day mid-trial so that the government could supplement their deficient disclosures.” *Id.*

- d. The Court affirms the conviction however because it finds that there is no reasonable probability that the result would have been different had the government fulfilled its *Brady* obligations.

6. *Sykes v. United States*, 897 A.2d 769 (D.C. 2006).

- a. In this murder case, Court reverses and remands for a new trial where government belatedly discloses impeachment information.
 - 1) Sykes and two co-defendants were charged with armed robbery and murder outside the Bulgarian Embassy. Government witness Williams claims the defendants confessed crime to him at a boarding house and showed him jacket stolen from victim, and that two other witnesses, Parrott and Sellers, were also there. A year before trial, Parrott and Sellers testify before the grand jury and say that they weren't at the boarding house and never heard the defendants confess. Government doesn't disclose that grand jury testimony exists until two days before trial and defense doesn't get transcripts until after trial has started.
 - 2) At trial, government relies heavily on Williams and states that Sellers is in custody in MD and under writ to testify and detectives are trying to locate Parrott. Trial judge offered a continuance, which defense rejected in light of Sykes' long incarceration pending trial and belief that Sellers would testify. Sellers is then released and neither he nor Parrott can be located by detectives or defense investigators to testify at trial. Trial judge allows only "substantially redacted" grand jury testimony of both to come in.
- b. The Court notes that the fact that this information was impeaching did not weaken the government's disclosure obligation: "[U]nder our precedents, . . . the [withheld] grand jury testimony . . . should have been disclosed to the defense at an earlier point in time, whether it was considered to be potentially exculpatory information or favorable impeaching evidence." 897 A.2d at 778.
- c. The Court held that the government should have revealed the identities of exculpatory witnesses "to the defense *shortly after their 1996 grand jury appearance*" when the government first learned they possessed information favorable to the defense; the court found this would have given the defense "an opportunity to interview them, and to conduct additional pre-trial investigation . . . based on those interviews." *Id.* at 781 (emphasis added).
- d. The Court also held the fact that the jury heard substantially redacted grand jury testimony of the witnesses did not make up for the lack of having those impeachment witnesses testify live, subject to direct and cross examination:

While Mr. Sykes had an opportunity to conduct rigorous cross-examination of Mr. Williams, he had no opportunity to present Mr. Sellers or Mr. Parrott, or both, to the jury. Hence, their credibility was not tested by direct or cross-examination, and the prosecutor was able to cast doubt on their credibility by suggesting that

they were not being truthful in saying that they did not hear the appellants discuss the October 23, 1995 events at the Bulgarian Embassy. And, the substantially redacted grand jury testimony of Mr. Sellers and Mr. Parrott, which the jury heard, did not provide a complete picture of them, or afford the jury the opportunity to see their demeanor.

Id. at 780-81.

7. *Boyd v. United States*, 908 A.2d 39 (D.C. 2006).

- a. In this murder case, where defense theory was that three people (not including defendant) had committed the crime, not four, government withheld multiple witness statements supporting defense theory of the case (some statements were not revealed until the appellate litigation).
- b. The Court mandates trial court oversight over pretrial *Brady* disclosures. After an extensive discussion of the prosecution and defense theories, in which the court agrees with the defense that the prosecution is too pinched in its assessment of what might have been helpful to the defendant at trial, the Court observes that:

[t]he government is not in a position to be a perfect arbiter of defense strategy. . . . Although we are required to leave the prosecutor “with a degree of discretion” in identifying information that must be turned over to the defendant pursuant to *Brady* . . . that discretion is not unlimited, and *courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial.*

Id. at 59 (emphasis added).

- c. Although the Court rejects the approach of requiring the government to disclose all favorable information to the defense regardless of its assessment of its materiality, *id.* at 61 n.32, the Court holds that the government has a “broad” pretrial duty that obligates it to disclose “arguabl[y] material” favorable information, even if that information later proves not to be material:

In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for in camera inspection. Further, when the issue appears to be a close one, the trial court should insist upon reviewing such material, and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure may affect the outcome. All such rulings must be made in full recognition of the reality that “*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation,” and that “compliance with the prosecution’s responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system.”

Id. at 60-61 (internal quotations and citations omitted).

8. *Bennett v. United States*, 797 A.2d 1251 (D.C. 2002).

- a. The Court reversed defendant's conviction for first degree murder because the government failed to disclose information that would have impeached a prosecution witness.
- b. At trial, the government disclosed as Jencks material, a key witness' grand jury testimony but redacted portions of her testimony referring to a separate murder. Defense Counsel asked for the redacted portions to be disclosed. The prosecution conceded that the witness had been untruthful with respect to her testimony about the other murder, but asserted that this information was irrelevant to the charged crime. The trial court reviewed the full grand jury transcript in camera and declined to order disclosure to the defense.
- c. The Court of Appeals had a very different view. It determined that "the jury in this case was denied information which was of critical importance to its assessment of the evidence," *id.* at 1255, and concluded that the failure to disclose this impeachment information constituted a *Brady* violation:
 - 1) The Court concluded that "[t]here c[ould] be no doubt that the redacted evidence, which showed that Delores Smith lied either to the police or to the grand jury about a murder that she allegedly witnessed, was evidence favorable to the defense. *Id.* at 1256 (internal quotations and citation omitted).
 - 2) The Court concluded that this information was material:

The question of Bennett's innocence or guilt of a brutal murder turned entirely on the credibility of the witnesses. Delores Smith was perhaps the most important of these witnesses, and the jury was faced with the question whether this witness should be believed when she testified, under oath, regarding Bennett's involvement in a wanton and intentional killing.

Murder is, perhaps, the ultimate crime. To lie to the police or to a grand jury about a murder is to pervert the course of justice with respect to the willful taking of a human life. If a witness is willing to lie about a murder, a jury may well conclude that she is likely to be willing to lie about anything. More particularly, if she has lied about one murder, there may be little if any reason to credit her testimony about a different murder.

Id. at 1255 -1256; *see also id.* at 1256-57.
 - 3) Finally, the Court rejected the trial court's determination that this information could not have been used to impeach Ms. Smith because it was minimally relevant or cumulative.

- a) The Court found that the trial court’s discretion to limit the scope of cross-examination is not so broad as to “justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.” *Id.* at 1257 (internal quotations and citation omitted).
- b) The Court also determined that the information about Ms. Smith’s lie to the police or the grand jury about whether or not she witnessed another murder was not cumulative:

We have held that even where a prosecution witness has been “substantially impeached,” the trial court’s refusal to permit further and different impeachment may warrant reversal of the defendant’s conviction. . . . If the defense had been permitted to cross-examine Delores Smith about, and impeach her with, her two irreconcilable versions of the second murder, there is, at least, a reasonable probability that her credibility in Bennett’s case, already shaky as a result of other impeachment, would have been fatally undermined.

Id. at 1258.

9. *Gaither v. United States*, 759 A.2d 662 (D.C. 2000), mandate recalled and opinion amended by, 816 A.2d 791 (D.C. 2003).

- a. The Court remanded for an evidentiary hearing to determine whether there were suggestive procedures used in the identification process and, even if those procedures did not ultimately influence the witness, whether their use caused doubt on the thoroughness and good faith of the investigation such that they should have been disclosed under *Brady*. *Id.* at 663.
- b. The Court also directed the trial court on remand to determine whether the government had given the witness benefits of between \$400-800 in witness voucher payments, a \$100 loan, free lunches, and promises of help and friendship. *Id.* at 663-64.
- c. On remand, conviction was vacated and new trial ordered. *United States v. Reginald Gaither*, F-5286-88 (Feb. 5, 2004).

10. *Black v. United States*, 755 A.2d 1005 (D.C. 2000).

- a. A witness had given “possibly deceptive answers on a CVSA lie detector test that may have been inconsistent with her later statement to” police. *Id.* at 1010. Counsel tried to probe the nature of the statements at a pretrial hearing but trial court sustained prosecution’s objections to defense questions.
- b. The Court of Appeals remands to trial court to hold a hearing to determine if there was a *Brady* violation and observes that this is what the trial court should have done in the first instance:

Because we do not know the deceptive statements made by Marshall to Detective Young during the interview, we cannot make an informed determination of whether the information was material under *Brady*. It may be that Marshall's statements to Detective Young contradicted her inculpatory trial court testimony that identified Black as the shooter. Thus, the information could have served to impeach Marshall's testimony, and if timely disclosed by the government, may have produced a different result in this case. *The trial court should have conducted an inquiry*, either by requiring Detective Young to testify at the suppression hearing about the content of Marshall's statements during the CVSA test, or otherwise by requiring the government to produce more information about the substance of Marshall's interview.

Id. at 1010 (emphasis added).

11. *Farley v. United States*, 694 A.2d 887 (D.C. 1997).

- a. In this drug distribution case the Court remands to determine if government violated its *Brady* obligations when it failed to disclose statements that witness gave to police as well as the complaint witness filed with the Civilian Complaint Review Board.
- b. In so doing, the Court rejected the government arguments that (1) by disclosing to the defense, the witness' "name and address and the substance of his statement to the police," . . . it fulfilled its *Brady* obligations and (2) that the government had no obligation to disclose the CCRB complaint because it was unaware of its existence. *Id.* at 889.
- c. The Court specifically notes that the government is responsible for knowing about Civilian Complaint Review Board complaints against individual police officers, particularly because D.C. municipal regulations require notice of any complaints to be given to the officer accused, and if the individual officer was notified, his knowledge could be imputed to the government. *Id.* at 889-90.
- d. The Court remands for the trial court to conduct a materiality analysis of the suppressed information.

12. *Curry v. United States*, 658 A.2d 193 (D.C. 1995).

- a. Government withholds for over a year and fails to disclose until two days before trial the fact that on the night of the charged murder, an eyewitness gave a description of the shooter that did not match the defendant. By this time, the witness was gone, and no party could find him. The government conceded and the Court held that the Government had violated its duty of disclosure and that the information should have been disclosed. *Id.* at 197. Defense counsel moved for dismissal or in the alternative that the defense be permitted to introduce into evidence the witness' statements to police. The trial court denied the motion finding the witness had disappeared soon after the shooting and that the defense

would not have been able to locate him even if the information had been disclosed earlier. *Id.*

- b. The Court explains that *Brady* “is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. Effective compliance with the prosecution’s responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system.” *Id.* (internal quotation and citation omitted).
- c. Regarding timing:
 - 1) The Court holds that the identity of the witness should have been disclosed “soon after the return of Curry’s indictment,” particularly because the government was on notice of witness mobility and knew that the “the trail might quickly turn cold if it were not promptly and energetically pursued.” *Id.*
 - 2) The Court emphasizes the importance of timely disclosure: “[T]he practice of delayed production must be disapproved and discouraged. . . .” *Id.* The Court also stated: “Such delay may imperil a defendant’s right to a fair trial, and a conscientious prosecutor will not countenance it.” *Id.* at 198.
- d. The Court affirms because, under a deferential standard of review, the trial judge’s factual holding that the defense would not have been able to locate the witness even had the identity been disclosed at indictment, was not “clearly erroneous.” *Id.* at 198. Thus, while the Court might have been permitted to order other relief, such as the uncross-examined use of the witness’s statement, the trial judge did not abuse his discretion in not permitting that.

13. *Smith v. United States*, 666 A.2d 1216 (D.C. 1995).

- a. In *Smith*, the government did not disclose until trial that the victim/witness had misrepresented to police that the assailant had waved a gun in his face during the 911 call. He did this in order, he said, to have the police come more quickly. The Court held that the failure to disclose this information pretrial was a *Brady* violation. 666 A.2d at 1225.
- b. In so doing the Court rejected the government’s argument that this was mere impeachment information that could properly be disclosed as Jencks material. *Id.* at 1224-25.
- c. Although defense could have tried to use this information to seek reconsideration of the ruling, admitting the complainant’s initial report of the crime as an excited utterance, *id.* at 1225 (citing *James v. United States*, 580 A.2d 636 (D.C. 1990)), the Court ultimately affirmed because it determined that the defense had the opportunity to use this information to impeach the witness during cross-examination and in closing argument. *Id.* at 1225-1226.

14. *Jackson v. United States*, 650 A.2d 659 (D.C. 1994).

- a. In this murder case, defendant and co-defendants made a Rule 16 and *Brady* request for “any and all photo spreads shown to witnesses” and “non-identification by any witnesses of any defendant.” *Id.* at 661 n.4. The government responded that “all photo spreads have been shown to counsel. . . there is no *Brady* information concerning the identification of any defendant.” *Id.* But, “[t]his statement proved to be false.” *Id.*
- b. In fact “within two days of the murder, the police questioned Mr. Jose Garcia, a college-educated investment analyst, who witnessed the murder. When shown a photo array by the police that included a photo of appellant Kerry Jackson, Mr. Garcia was unable to identify anyone as the assailant. . . . [And] when queried whether the assailant was six feet, six inches tall and light-skinned (Kerry Jackson's description), Mr. Garcia responded that the assailant was only five feet, eight inches tall and dark-skinned. On November 2, 1990, Mr. Garcia died of a terminal illness.” *Id.*
- c. The government on appeal “wisely conceded in oral argument that, by failing to reveal the identity of a potentially important exculpatory witness, it violated both the letter and the spirit of *Brady*,” and the Court of Appeals accepted without discussion the trial court’s ruling that the government had violated its *Brady* obligations. *Id.*
- d. However, the Court affirmed the trial court’s denial of the defense motion to dismiss the indictment where the trial court determined that the *Brady* violation “could be ‘cured’ by requiring the parties to enter into a stipulation setting forth the testimony of Mr. Garcia, which was then read to the jury.” *Id.*

15. *Edelin v. United States*, 627 A.2d 968 (D.C. 1993).

- a. In this murder case, the government disclosed on the eve of trial just after opening statements that a witness had seen another man, Anthony Pate, wearing the distinctive green jacket that the shooter was believed to be wearing. Subsequently the government disclosed as Jencks a statement from this witness describing the defendant’s clothing that day and omitting any mention of a green jacket. The prosecutor disclosed during trial that a witness had given some inconsistent statements about the attire of the suspect and of the defendant (which was relevant to identification).
- b. Regarding timing the Court held that:
 - 1) It was now “well settled” that the prosecution must disclose *Brady* information “at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.” *Id.* at 970.
 - 2) That disclosure as Jencks does not satisfy *Brady*. *Id.*

- 3) And that if the prosecution belatedly discloses *Brady* information the burden “may [not] then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.” *Id.*
- c. Regarding materiality, the court noted that “we rightly expect prosecutors to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of prompt disclosure, especially in response to a pointed request.” *Id.* at 971.
- d. Court declined to reverse, finding that the trial judge did not abuse his discretion in determining that the defense was able to make adequate use of the belatedly disclosed information.

16. *James v. United States*, 580 A.2d 636 (D.C. 1990).

- a. In this murder case, the government withheld until the fifth day of a six-day trial a statement by an eyewitness which undercut a determination that a statement by another person present at the time of the crime but who did not testify at trial could be admitted as a spontaneous utterance. Specifically, the eyewitness, Essie Bowman, testified that Gary Augustine instructed her to remove the guns from the scene before he made the statement “Keith [James] shot at Ben.” The statement that was admitted as an excited utterance. *Id.* at 641-42.
- b. Noting the defense’s failure to request a mistrial or seek a continuance, the Court declined “to impose upon defense counsel the obligation, every time Jencks material is disclosed, . . . to evaluate—or to request a continuance in order to evaluate—the material’s relevance not only to the witness who is testifying, but also to every witness who has previously testified. . . . [T]he result would be that a prosecutor’s *Brady* obligations would extend no further than the requirements of the Jencks Act. That is to say, the prosecutor could withhold evidence material to various evidentiary rulings during the course of the trial and ultimately, perhaps, to the outcome of the trial as long as the evidence was eventually disclosed to the defense as Jencks material. At that point, the burden would be on the defense to evaluate the evidence’s relevance to every previous evidentiary ruling in the trial, or else waive the right to complain later. We do not read *Brady* or the due process clause so narrowly that they would allow such a result.

Id. at 643-44.

- c. The Court remanded to the trial court to determine if “(1) earlier disclosure of Bowman’s police statement have had any effect on the court’s spontaneous utterance ruling? If so, (2) is there a reasonable probability that the exclusion of Augustine’s statement to Baptiste would have changed the outcome of this apparently close trial?” *Id.* at 645.

17. *Lewis v. United States*, 408 A.2d 303 (D.C. 1979).

- a. In an initial opinion the Court held that the prosecution must disclose impeachable convictions for its witness to the defense upon request, and that the government would be imputed with knowledge of convictions in an FBI rap sheet.
- b. The Court granted rehearing to consider “the government’s arguments that (1) the impeachable convictions of government witnesses are not *Brady* material, automatically producible at trial upon request, and that (2) even if they are, this court’s order [imputing knowledge of the FBI rap sheet] is too broad.” *Id.* at 305. The Court reaffirms its opinion.
- c. Regarding the requirement that impeaching convictions be turned over upon request:
 - 1) The Court “begin[s] from the premise that ‘impeaching evidence’ is exculpatory and thus can be material to guilt or punishment, within the meaning of *Brady*.” *Id.* at 307.
 - 2) The Court then defends its requirement that all impeachable convictions be disclosed upon request regardless of materiality

because there can be no objective, ad hoc way to evaluate before trial whether an impeachable conviction of a particular government witness will be material to the outcome. No one has that gift of prophecy. To argue that the court can apply a material-to-outcome test before trial is to argue a contradiction. . . . It also raises the serious possibility that a defendant may be forced, unfairly, to disclose his or her case before trial, in an effort to carry a virtually impossible burden.

Id. at 307.

- 3) The Court further observes that

a defendant's actual use of convictions for impeachment at trial before the jury decides is a better test of materiality than a retrospective inquiry by an appellate court, limited to review of a less-than-vivid trial transcript, or an even later evaluation in a collateral proceeding under D.C. Code 1973, s 23-110 It follows, that a defendant is entitled to disclosure because “a substantial basis for claiming materiality exists”; a defendant should have no less a constitutional claim to at-trial disclosure of exculpatory information, when he or she has a chance to make use of it, than to post-trial appellate or collateral analysis of omitted evidence (which, absent a fortuity, the defendant will not even discover). In short, the defendant, not the post-trial reviewing court, should have control over materiality to outcome.

Id. at 308.

- 4) Given the alternative of having a blanket disclosure rule and leaving the disclosure of impeachable convictions to the discretion of the prosecution (“prosecutorial grace,” *id.* at 306), the Court chooses the former:

The government is not in a position to be a perfect arbiter of defense strategy, let alone a defendant's constitutional rights. It follows that the government's current policy of disclosing only those impeachable convictions about which a particular prosecutor happens to be aware makes the criminal trial process too fortuitous, and thus unfair, in a significant respect. We conclude, accordingly, that the integrity of the criminal trial process requires uniformity of access to impeachable convictions of government witnesses when requested.

Id. at 309; *see also id.* (“Although it may be somewhat strained to conclude that potentially all impeachable convictions can affect the outcome, we believe it is more strained to assume, as the government does, that failure to disclose such convictions is Not likely to affect the outcome.”).

- d. Regarding imputing knowledge of the FBI rap sheet to the prosecution, the Court determines that the government has easy access to these records, *id.* at 310, and that any cost of imputing this knowledge to the government “cannot be relevant here. If a defendant has a constitutional right to the disclosure of impeachable convictions or adjudications, the government must bear that cost, whatever it is.” *Id.* at 311.
- e. The Court sets up framework for ex parte review of witness’ juvenile records and notes that general request for impeachable convictions encompasses request for juvenile records. *Id.* at 312.