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The Effort to Establish a Level Playing Field

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The Effort to Establish a Level Playing Field
Presented by:
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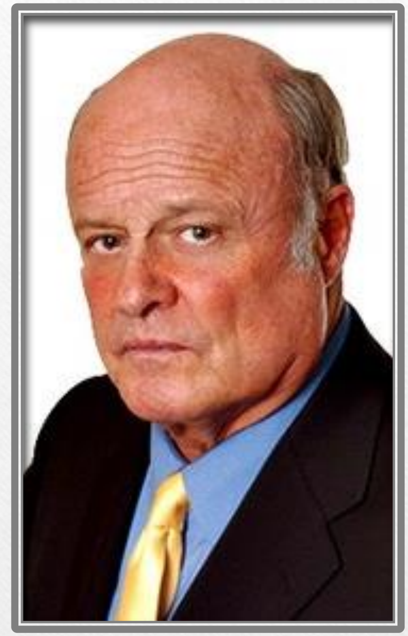
Goldberg began his career as an assistant district attorney in New York County right out of Harvard Law School working for district attorney Frank S. Hogan.

Jay Goldberg is a graduate of the Harvard Law School and was elected to Phi Beta Kappa, receiving his degree magna cum laude.

He was acting United States Attorney for the Northern District of Indiana, Special Attorney and Counselor to the United States Department of Justice, Washington D.C., an Assistant District Attorney, New York County and Special Assistant to James B. Donovan, an American hero, who effected the transfer of Russian spy Rudolph Abel for Francis Gary Powers (Bridge of Spies, with Tom Hanks).

He has been a past lecturer on trial advocacy at the Harvard Law School.

He is the author of four books: **Preparation and Trial of Criminal Cases within the Second Circuit** , (2009) (Amazon.com, 5 stars); Preparation and Trial of A Federal Criminal Case , (2010); Techniques in the Defense of a Federal Criminal Case , (2012); and, **The Courtroom is My Theater , (2018).**



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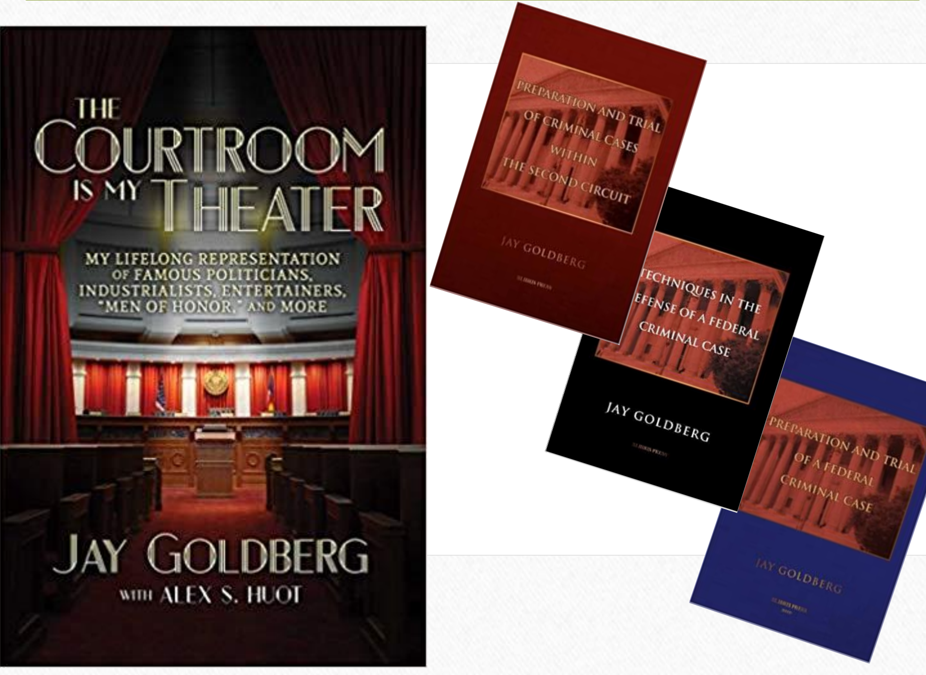
Books by Jay Goldberg

In The Courtroom Is My Theater, Jay Goldberg shows why he is one of the preeminent trial attorneys in America, as he shares stories of his high-profile courtroom drama as well as his adventures outside of the courtroom with some of the country's most prominent politicians, businessmen, entertainers, and "men of honor."



All Available on Amazon!

- **One man's journey through the practice of law with some of the world's most powerful and colorful characters, including Donald Trump, Robert F. Kennedy, Willie Nelson, Miles Davis and Armand Hammer.**
- **Former President of the Criminal Bar Association Richard Levitt called Goldberg "one of the foremost litigators of this or any generation."**
- **Former Chief of the Criminal Division of the United States Attorney's Office S.D.N.Y. Frederick Hafetz said: "I consider you to have the best killer trial skills I have ever seen in my 47 years of practice, and I have worked with the best, courtroom presence, capturing the jury's attention through devastating cross and summations that have jurors on the edge of their seats."**
- **New York Supreme Court Justice Arthur Lonschein said: "[Jay Goldberg] holds the distinction of being one of the most skilled, if not the most skilled trial lawyer in the United States."**

Alex Huot practices criminal law in the Southern District of New York and Eastern District of New York, as well as in the New York State courts. He began his career working with Jay Goldberg and is a co-author of ***The Courtroom is My Theater.*** In September 2019, Alex represented one of the defendants that Daniel Hernandez aka Tekashi 6ix9ine testified against. He cross-examined Tekashi 6ix9ine and is likely the first attorney to have a witness define the word "trolling" on the record.

The Courtroom is My Theater - https://www.amazon.com/Courtroom-Theater-Representation-Industrialists-Entertainers/dp/1642930717

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The Constitution Requires the Disclosure Sought by the Defense and Required to be Turned Over by the Prosecution

Brady Disclosure Defined and Explained

Brady disclosure consists of exculpatory or impeaching information and evidence that is material to the guilt or innocence or to the punishment of a defendant. The term comes from the 1963 U.S. Supreme Court case Brady v. Maryland,[1] in which the Supreme Court ruled that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process.

Following Brady, the prosecutor must disclose evidence or information that would prove the innocence of the defendant or would enable the defense to more effectively impeach the credibility of government witnesses. Evidence that would serve to reduce the defendant's sentence must also be disclosed by the prosecution. In practice this doctrine has often proved difficult to enforce. Some states have established their own laws to try to strengthen enforcement against prosecutorial misconduct in this area.

The Brady doctrine is a pretrial discovery rule that was established by the United States Supreme Court in Brady v. Maryland (1963).[2] The rule requires that the prosecution must turn over all exculpatory evidence to the defendant in a criminal case. Exculpatory evidence is evidence that might exonerate the defendant.

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

Brady v. Maryland, 373 U.S. 83 (1963), was a landmark United States Supreme Court case that established that the prosecution must turn over all evidence that might exonerate the defendant (exculpatory evidence) to the defense.[1]:4 The prosecution failed to do so for Brady, and he was convicted. Brady challenged his conviction, arguing it had been contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Background

On June 27, 1958, 25-year-old Maryland man John Leo Brady and 24-year-old companion Donald Boblit murdered 53-year-old acquaintance William Brooks. Both men were convicted and sentenced to death. Brady admitted to being involved in the murder, but he claimed that Boblit had done the actual killing and that they had stolen Brooks' car ahead of a planned bank robbery but had not planned to kill him.[2] The prosecution had withheld a written statement by Boblit (the men were tried separately), confessing that he had committed the act of killing by himself. The Maryland Court of Appeals had affirmed the conviction and remanded the case for a retrial only on the question of punishment. Brady's lawyer, E. Clinton Bamberger Jr., appealed the case to the Supreme Court, hoping for a new trial.[3]

Decision

The Supreme Court held that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment." The court determined that under Maryland law, the withheld evidence could not have exculpated the defendant but was material to his level of punishment. Thus, the Maryland Court of Appeals' ruling was affirmed – Brady would receive a new sentencing hearing but not a new trial.[3]

William O. Douglas wrote: "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... Society wins not only when the guilty are convicted, but when criminal trials are fair."[3]

A defendant's request for "Brady disclosure" refers to the holding of the Brady case, and the numerous state and federal cases that interpret its requirement that the prosecution disclose material exculpatory evidence to the defense. Exculpatory evidence is "material" if "there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."[4] Brady evidence includes statements of witnesses or physical evidence that conflicts with the prosecution's witnesses[5] and evidence that could allow the defense to impeach the credibility of a prosecution witness.[6]

Aftermath

Brady was given a new hearing, where his sentence was commuted to life imprisonment.[3] Brady was ultimately paroled. He moved to Florida, where he worked as a truck driver, started a family and did not re-offend.[3]

Police officers who have been dishonest are sometimes referred to as "Brady cops". Because of the Brady ruling, prosecutors are required to notify defendants and their attorneys whenever a law enforcement official involved in their case has a confirmed record of knowingly lying in an official capacity.[7]

Brady has become not only a matter of defendants' due process trial rights, but also of police officers' due process employment rights. Officers and their unions have used litigation, legislation, and informal political pressure to push back on Brady's application to their personnel files. This conflict over Brady's application has split the prosecution team, pitting prosecutors against police officers, and police management against police labor.[8] Brady evidence also includes evidence material to credibility of a civilian witness, such as evidence of false statements by the witness or evidence that a witness was paid to act as an informant.[9]

In United States v. Bagley (1985), the Court narrowed the reach of Brady by stating the suppressed evidence had to be "exculpatory" and "material" for a violation to result in the reversal of a conviction.[2] Harry Blackmun wrote in Bagley that "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."[2]

Federal Practice and Procedure (Wright & Miller) | April 2020 Update

- In passing on a defendant's request for discovery, there are constitutional imperatives that cannot be disregarded even though there is no constitutional right to discovery.1 In the well-known case of *Brady v. Maryland*, the prosecution withheld the confession of a co-defendant in which he admitted the homicide for which Brady was convicted. This was held to be error of a constitutional dimension because it would affect the defendant's punishment for the offense. According to Justice Douglas, writing for the Court:
- 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.
- Full article follows in Attachments

Some Additional ***Important*** Cases and Articles to Note:

Giglio v. United States, 405 U.S. 150 (1972)

- 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. 405 U. S. 153-155.
- **PDF of full case follows in attachments**

United States v. Agurs, 427 U.S. 97 (1976)

- 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 judge's firsthand appraisal of the entire record was thorough and entirely reasonable. Mooney v. Holohan, 294 U.S. 103 ; Brady v. Maryland, 373 U.S. 83 , distinguished. Pp. 103-114.
- **PDF of full case follows in attachments**

California v. Trombetta, 467 U.S. 479 (1984)

- When stopped in unrelated incidents on suspicion of drunken driving on California highways, each respondent submitted to a Intoxilyzer (breath analysis) test and registered a blood-alcohol concentration high enough to be presumed to be intoxicated under California law. Although it was technically feasible to preserve samples of respondents' breath, the arresting officers, as was their ordinary practice, did not do so. Respondents were then all charged with driving while intoxicated. Prior to trial, the Municipal Court denied each respondent's motion to suppress the Intoxilyzer test results on the ground that the arresting officers had failed to preserve samples of respondents' breath that the respondents claim would have enabled them to impeach the incriminating test results. Ultimately, in consolidated proceedings, the California Court of Appeal ruled in respondents' favor, concluding that due process demanded that the arresting officers preserve the breath samples.
- Held: The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath analysis tests at trial, and thus, here, the State's failure to preserve breath samples for respondents did not constitute a violation of the Federal Constitution. Pp. 467 U. S. 485-491.
- **PDF of full case follows in attachments**

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

- 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 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.
- **PDF of full case follows in attachments**

Kyles v. Whitley, 514 U.S. 419, 433 (1995)

- 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, 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.
- **PDF of full case follows in attachments**

United States v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450 (2002)

- The United States Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.
- Defendant refused a plea bargain that required she waive her right to evidence that could potentially impeach witnesses. The Government withdrew the offer. Defendant later pleaded guilty to a drug offense without a plea agreement. At sentencing, the Defendant asked for the same downward departure the Government would have recommended had she accepted the "fast track" agreement, but the United States District Court for the Southern District of California denied her request, imposing a standard Guideline sentence instead. Defendant contended that without disclosure of potential impeachment evidence her guilty plea under the proposed plea agreement would not be knowing and intelligent. The Government argued that providing such information to Defendant would result in the premature disclosure of its case, which was not constitutionally required. On appeal, the United States Court of Appeals for the Ninth Circuit, vacating the District Court's sentencing determination and remanding for determination of an appropriate remedy, held that Defendant was entitled to receive the same impeachment information before entering into a plea agreement that they are entitled to receive before trial. Moreover, the appellate court held that the Federal Constitution prohibited defendants from waiving their right to that information, and the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. The Government appealed the decision of the appellate court, contending that providing such information to Defendant would result in the premature disclosure of its case, which was not constitutionally required.U.S. v. Salmonese, 352 F.3d 608, 620 (2d Cir. 2003)
- **PDF of full case follows in attachments**

Litigating Brady v. Maryland: Games Prosecutors Play (2007) ~ Bennett L. Gershman

- *Pace University*, Pace Law Faculty Publications – School of Law – 2007
- By any measure, Brady v. Maryland' has not lived up to its expectations. Brady's announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory. Nevertheless, prosecutors over the years have not accorded Brady the respect it deserves. Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice. Moreover, as interpreted by the judiciary, Brady actually invites prosecutors to bend, if not break, the rules,' and many prosecutors have become adept at Brady gamesmanship to avoid compliance.'
- **Full Article Follows in Attachments**

Defendants' Informational Disadvantage Continues in Federal Criminal Cases (2012) ~ Goldberg

- *New York Law Journal*, August 20, 2012
- **This article is archived with the *New York Law Journal* and no longer appearing online**

Brady and the Unfulfilled Promise of an Even Playing Field (2013)~ Goldberg

- *New York Law Journal*, December 13, 2013.
- Jay Goldberg, a member of Jay Goldberg P.C., writes that almost a decade ago, the Second Circuit observed that there is an informational gap that exists between the defense and the prosecution, but what has been done to close the gap? Is there a way to assure that we will stop hearing that some innocence project has proven that a man was wrongly convicted? Action must be taken lest our criminal justice system be thought by the public to be fraught with miscarriages of justice.
- For some time, as long as a half century ago in May 1963, courts promised that the prosecution and defense would, as far as possible, engage on a level playing field. It was a "battle," a controversy between two fully armed gladiators that would best serve the ends of justice by enabling the jury to make an informed judgment, with both sides in a position to present material information going to the question of guilt or innocence.
- This article is archived at the *New York Law Journal* –you may see the entire article with a subscription to LexisNexis
- https://www.law.com/newyorklawjournal/almID/1202630217477/brady-and-the-unfulfilled-promise-of-an-even-playing-field/

Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining (2013) ~Michael Nasser Petegorsky

- *Fordham Law Review*, Volume 81, Issue 6 – 2013
- Ninety-seven percent of federal convictions are the result of guilty pleas. Despite the criminal justice system's reliance on plea bargaining, the law regarding the prosecution's duty to disclose certain evidence during this stage of the judicial process is unsettled. The Supreme Court's decision in Brady v. Maryland requires the prosecution to disclose evidence that establishes the defendant's factual innocence during a trial. Some courts apply this rule during plea bargaining and require the disclosure of material exculpatory evidence before the entry of a guilty plea. Other courts have held or suggested that the prosecution may suppress exculpatory evidence during plea bargaining, forcing the defendant to negotiate and determine whether to accept a plea offer or proceed to trial without it. Substantial disparities therefore exist in the bargaining power and decision-making ability of criminal defendants, depending on where they are charged.
- **Full Article Follows in Attachments**

United States v. Pizarro & Rivera, 17-cr-151 (AJN) - (2018)

- In response to the Defendants' motion to dismiss the Indictment, the Government writes that "[a]n adjournment is the appropriate remedy for the Government's error, as it will allow the defendants to engage in any necessary investigative steps with respect to the new information recently disclosed by the Government." Dkt. No. 125. Similarly, the Defendants argue that if the Court were to deny their motion to dismiss, "Defense counsel have no option but to seek an adjournment in order to provide effective assistance of counsel."
- **PDF of full case follows in attachments**

A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Disovery (Spring 2020) ~ Riley E. Clafton

- *Journal of Criminal Law and Criminology*, Volume 110, Issue 2 – Spring 2020
- How we think about the trial process, and the assumptions and beliefs we bring to bear on that process, shape how litigation is structured. This Comment demonstrates why materiality, and the theory of juridical proof informing that standard of materiality, must be redefined for Brady v. Maryland doctrine and criminal process. First, the Comment delineates the theory of explanationism—the revolutionary paradigm shift unfolding in the theory of legal proof. Explanationism conceptualizes juridical proof as a process in which the factfinder weighs the competing explanations offered by the parties against the evidence and the applicable burden of proof. Applying explanationism to criminal process demonstrates that explanationism not only is the more accurate account of juridical proof, but also better frames the criminal discovery process and ensures due process of law. The next section applies explanationism to Brady doctrine to show that the Supreme Court has tip-toed towards a more explanatory view of Brady v. Maryland but also faltered and lapsed back into a probabilistic inquiry at critical junctures. As a result, the efficacy of Brady is diminished where it is undermined by probabilistic theory or language. As a result, the doctrine should embrace explanationism more wholly. Under explanationism, materiality is determined by assessing whether the suppressed evidence could have been used by the defendant to influence the factfinder when presenting her case.
- **Full Article Follows in Attachments**

United States v. Ali Sadr Hashemi Nejad, 18-cr-224 (AJN), (June 9, 2020)

- Federal prosecutors have constitutional and statutory duties to disclose many types of evidence to defendants. This principle of disclosure is central to our criminal-justice system. "A prosecutor 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 v. Maryland, 373 U.S. 83, 87–88 (1963). And federal prosecutors, like all parties that appear before the Court, have ethical duties of candor. United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962) ("The prosecution has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth."). In the near decade the Undersigned has sat on the bench in the Southern District of New York, the vast majority of Assistant United States Attorneys before the Court have embraced their disclosure obligations, worked diligently to meet them, and forthrightly admitted when they did not.
- **PDF of full case follows in attachments**

United States v. Deutsch, 373 F. Supp. 289 (S.D.N.Y. 1974)

- We profess as a basic principle that the prosecutor's "duty * * * is to seek justice, not merely to convict."[1] He is "to guard the rights of the accused as well as to enforce the rights of the public."[2] The ruling in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), enforces this principle in an important respect. The prosecutor is required as a matter of constitutional law to disclose to defendant's evidentiary material that may help them to avoid conviction. As the Court has made clear:
  - *290 "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, 83 S. Ct. at 1196.[3]
- **PDF of full case follows in attachments**

The 'Brady' Obligation: A True Boost from District Judge Allison Nathan (July 31, 2020) ~ Goldberg and Huot

- ***New York Law Journal,*** July 31, 2020
- The author shares his views on District Judge Allison Nathan's opinions in 'U.S. v. Ali Sadr Hashemi Nejad,' and the earlier 'U.S. v. Pizarro,' where she makes it clear that there cannot be adherence to 'Brady' by merely allowing the government to state that it is "aware of its obligation."
- It is suggested that most lawyers and perhaps judges should subscribe to the Annual Review of Criminal Procedure contained in the Georgetown Law Journal. This includes every case decided by the Courts of Appeal each year. It details how said courts have handled the Brady obligation. As well, the Library of Congress prepares an extraordinary treatise, available from the Superintendent of Documents entitled "The Constitution of the United States of America: Analysis and Interpretation." This contains every case since the founding of our nation, including the Brady obligation and its progeny. The experience of this author with Brady issues is explained somewhat in the book The Courtroom is My Theater (Post Hill Press 2018). See also www.JayGoldberg.com.
- ***(United States vs Agone is cited in error, that citation should be to United States v. Deutsch, 373 F.Supp. 289 (S.D.N.Y. 1974)***
- **Full Article Follows in Attachments**

United States Attorney on Issues Related to Discovery, Trials and Other Proceedings

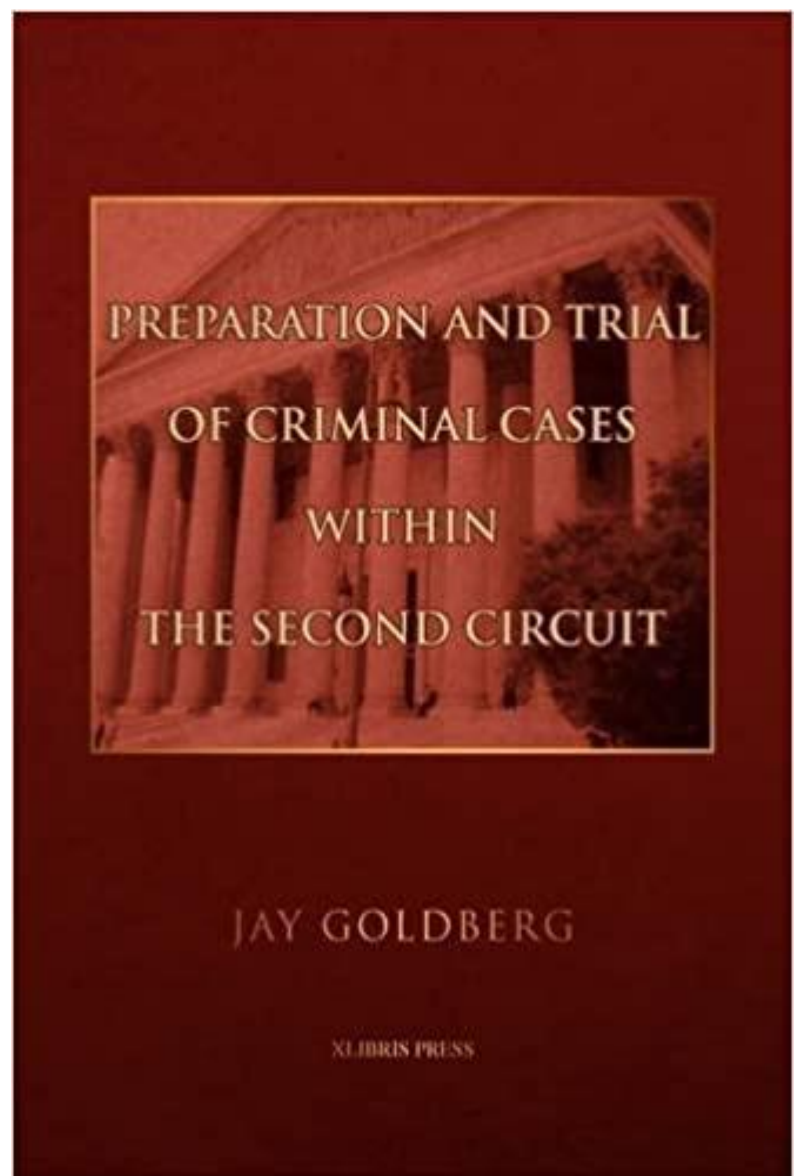
9-5.000	Issues Related to Discovery, Trials and Other Proceedings
9-5.001	Policy Regarding Disclosures of Exculpatory and Impeachment Information
9-5.002	Criminal Discovery
9-5.003	Criminal Discovery Involving Forensic Evidence and Experts
9-5.004	Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases
9-5.100	Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")
9-5.110	Testimony of FBI Laboratory Examiners
9-5.150	Authorization to Close Judicial Proceedings to Members of the Press and Public

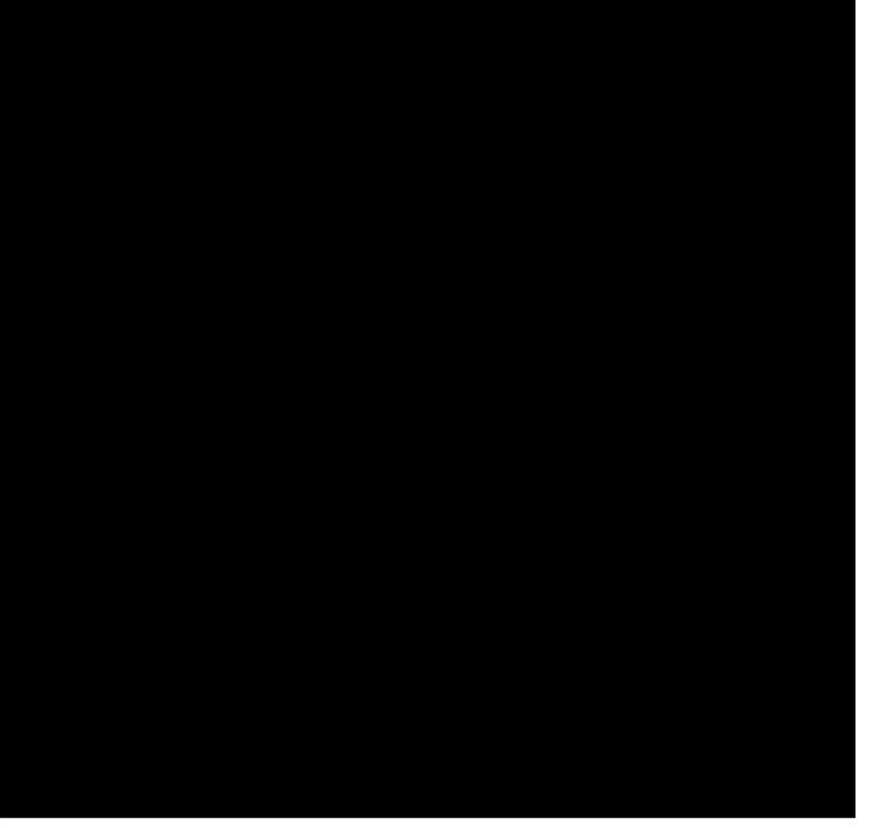
See the entire manual here at: https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings

Preparation and Trial of Criminal Cases Within the Second Circuit ~ Goldberg

Link to book on Amazon

Synopsis Follows





14. Demands for Turnover of Exculpatory Proof and Impeachment Materials

This deals with the subject of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). However skilled your private investigator may be, it is the government that is in possession of the most extensive exculpatory and impeachment

material. Seldom is there a government investigation that fails to produce a witness or a document contrary to the prosecutor's theory of the case. This may occur in a pre-trial interview or in the Grand Jury. At times, there are government witnesses who have a criminal record, and some have very extensive records. A way must be found to require the government to disgorge exculpatory proof. The Circuit has recognized the enormous advantage the government has in fact-gathering. *United States v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005); *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003).

The constitutional parameters in *Brady* and *Giglio* is expressed in *Kyles v. Whitley*, 514 U.S. 419 (1995). We use the term constitutional for that does not prevent a court from setting forth its own rule as to *Brady* and *Giglio*.

Post-conviction, a court will determine if the government's failure to disclose was "material" to the defense. Materiality is defined as a reasonable probability of a different result. *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).

With respect to a post-conviction analysis by a court, it is well to keep in mind the sage words in the dissent of the Circuit Judge Jerome Frank, in *United States v. Farina*, 184 F.2d 18 (2d Cir. 1950) (quoted with approval in *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997): "What influences juries, courts seldom know.")

The post-verdict analysis has the real effect of treating lawyers as fungible, for when the court engages in the post-verdict practice, it really treats all lawyers as having the same skill. This, contrary to

Gonzalez-Lopez, 548 U.S. 140 (2006) for what one lawyer may not be able to do with a piece of evidence, another lawyer may be able to utilize to enormous advantage, were he able to have had timely turnover. However, once again, it must be noted that the court, whether it be the trial court following conviction or the Circuit court on appeal, is that the court has the sole responsibility to determine whether or not in the absence of the suppressed information, the defendant "received a fair trial," which is understood to be a trial resulting in a verdict worthy of confidence. *United States v. Avellino,* 136 F.3d at 255 (2d Cir. 2008).

Defense counsel should bring to the court's attention the DOJ Memorandum, dated October 19, 2006, from the Deputy Attorney General, entitled *Principles of Federal Prosecution*. In this memo, under the heading "Holders of the United States Attorney's Manual, Title 9," the Justice Department directs prosecutors to go beyond their constitutional obligation, to provide *Brady* and *Giglio* material to defendants according to a timetable, so the defense can adequately prepare for trial. However, given the conduct and the actions of prosecutors in the Southern and Eastern Districts, one must seriously question their awareness of this mandate.

The authoritative decision in this Circuit is *Coppa*. Its core holding is as follows: "The nature of the prosecutor's constitutional duty to disclose has shifted to a result-affecting test that obliges a prosecutor to make a *prediction* as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made." [emphasis added]

Under this framework, it is the defendant's adversary who, exclusively, makes a pre-trial "prediction" as to what constitutes *Brady* and *Giglio* material, and he, with limits, determines when you will need to use it to prepare for trial.

Following *Coppa,* the Circuit, however, held that *Brady/Giglio* material should not be turned over on the eve of trial and material must be turned over even though not admissible, provided the prosecutor believes that it could lead to admissible proof. *United States v. Amato,* 540 F.3d 153 (2d Cir. 2008); *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007); *United States v. Paulino*, 445 F.3d 211 (2d Cir. 2006).

It is absolutely critical to note that the *Brady/Giglio* obligation applies as well to out-of-court declarants whose statements the government intends to use. *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003).

More than half of the judicial districts in the country have adopted local rules that provide set times for the turnover of specific materials falling within the *Brady* and *Giglio* obligations. A majority of district courts even within the Circuit have such rules. Despite a press for the Southern and Eastern Districts to adopt such local rules—in order to remove from prosecutors the power to utilize predictions as to the need for such materials—these courts have, without explanation, failed to do so.

While the *Coppa* court recognized the authority of district judges to enact their own *Brady* and *Giglio* rules "as part of sound case management," for the most part, this portion of the opinion has been

ignored, for judges in the Southern and Eastern Districts are content to rely on the bromide given by the prosecution: "We are aware of our *Brady* and *Giglio* obligations."[5] A worthwhile discussion of how faulty this can be, by simply accepting this representation, is contained in the opinion in *United States v. Deutsch*, 373 F. Supp. 289 (S.D.N.Y. 1974). As we have said, one need only read Professor Gershman's treatise to recognize the widespread violations of *Brady* and *Giglio* obligations by prosecutors who clearly were not aware of their *Brady* and *Giglio* obligations.

Judge Raggi, then a district court judge in the case of *United States v. Prince*, 1994 WL 99231 (E.D.N.Y.), fined the United States Attorney's office in the Eastern District of New York for its flagrant, continuous and what appeared to be endemic violations of its *Giglio* obligations.[6] While Judge Raggi's opinion dealt with the United States Attorney's office in the Eastern District, Judge Frankel's opinion in *Deutsch*, dealt with the United States Attorney's office in the Southern District.

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[5] State prosecutors have not suffered prejudice, despite the fact that C.P.L. § 240.20(h) requires *Brady* material be furnished on demand. Judges in the state courts do not delegate to prosecutors the decision making as to whether *Brady* / *Giglio* material will be helpful at trial. see, *People v. Vilardi*, 70 N.Y.2d 67 (1990).

[6] The fine was later vacated because the court found that it lacked the power to impose it.

After reviewing a detailed and scholarly report prepared by a number of judges, prosecutors, and defense practitioners, the district court judges in Massachusetts concluded that *Brady* and *Giglio* violations were so widespread that only a local rule setting forth the composition of *Brady/Giglio* material and the timing of turnover could ensure government compliance with its constitutional duty. (The Rule and Report can be found on the Boston Bar Association homepage.)

Nonetheless, given the DOJ memorandum referred to above, a letter should be sent to the prosecutor.

[Date]

[Re:]

Dear Mr. _____:
(United States Attorney)

We are the attorneys for (Defendant).

We ask that under the authority of the October 19, 2006 DOJ memorandum heading "Holders of the United States Attorneys Manual, Title 9", the following *Brady* and *Giglio* information should be disclosed by so as to give my client and myself a reasonable opportunity to use the information at trial or to exploit the information

to obtain other evidence for use in the trial. (*United States v. Amato,* 540 F.3d 153 (2d Cir. 2008); *United States v. Rodriguez*, 498 F.3d 221 (2d Cir. 2007); *United States v. Paulino*, 445 F.3d 211 (2d Cir. 2006); *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002); *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001); and *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974).

Nature of Material Sought

1. Any and all promises, understandings or agreements, formal or informal, between the prosecution, its agents and representatives and persons (including counsel for such persons) whom the prosecution intends to call as witnesses[7] at trial, together with copies of all documentation pertaining thereto. This request includes, but is not limited to, such promises, understandings or agreements as may have been made in connection with other cases or investigations. This request includes information concerning any payment of monies to any prospective witness.

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[7] This applies as well, to out-of-court declarants whose statements the government intends to use, so that a defendant may make use of Fed.R.Evid. 806.

2. Any and all actions, promises or efforts—formal or informal—on the part of the prosecution, its agents and representatives to aid, assist or obtain benefits of any kind for any person whom the prosecution considers a potential witness at trial, or a member of the immediate family of such witness.

   This request includes but is not limited to: (a) letters to anyone informing the recipient thereof of the witness' cooperation; (b) recommendations concerning licensing, certification or registration; (c) promises to take affirmative action to help the status of the witness in a profession, business or employment or promises not to jeopardize such status; (d) aid or efforts in securing or maintaining the business or employment of a witness; (e) aid or efforts concerning a new identity for the witness and his family; (f) listing payments of money and subsidies to the witness; or (g) any other activities, efforts, or promises similar in kind or related to the items listed in (a) through (f) above.

3. Any threat made to the witness or any member of his family by any law enforcement officer or prosecutor, which could arguably be developed on cross-examination.

4. A list of any and all requests, demands or complaints made to the government by the witness which arguably could be developed on cross-examination to demonstrate

any hope or expectation on the part of the witness for favorable governmental action in his behalf (regardless of whether or not the government has agreed to provide such favorable action).

5. Any material not otherwise listed that reflects or evidences the motivation of the witness either to cooperate with the government or any bias or hostility against the defendant.
6. Any and all evidence that any person who is a prosecution witness or prospective prosecution witness in this case is or was suffering from any physical or mental disability or emotional disturbance, drug addiction or alcohol addiction at any time during the period of the indictment to the present.
7. Any and all statements—formal and informal, oral or written—by the prosecution, its agents and representatives to any person (including counsel for such persons) whom the prosecution intends to call as a witness at trial pertaining in any way to the possibility, likelihood, course or outcome of any governmental action—state or federal, civil or criminal—or immigration matters against the witness, or anyone related by blood or marriage to the witness.
8. Any and all evidence of criminal conduct—state or federal—on the part of any person whom the prosecution intends to call as a witness at trial, of which the prosecution, its agents and representatives have become aware.

9. Information as to any judicial proceeding in any criminal case involving the witness as an unindicted co-conspirator, aidor and abettor, or defendant.
10. Any statements or documents including but not limited to, grand jury testimony and federal, state and local tax returns, made or executed by any potential prosecution witness at the trial in this action, which the prosecution knows, or through reasonable diligence, should have reason to know, is false.
11. The names and addresses of all persons whom the prosecution, its agents and representatives believe to have relevant knowledge and/or information with reference to the charges contained in the indictment but whom the prosecution does not propose to call as witnesses at trial.
12. *Any exculpatory information given before the grand jury.*
13. The witness' rap sheet.

AS REFLECTED IN THE FOOTNOTE, THESE REQUESTS APPLY NOT ONLY TO GOVERNMENT WITNESSES WHO WILL APPEAR AT TRIAL, BUT ALSO TO OUT-OF-COURT DECLARANTS.

Yours truly,

* * *

See, *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003).

It is suggested that if the prosecutor fails to agree to furnish the information, counsel should seek a conference under Fed. R. Crim. P. 16.1 and press for the material which we sought in the letter sent to the prosecutor for this will increase the likelihood that the court will involve itself on the *Brady/Giglio* issue and not simply rely on the blanket representation of the government.

Should a motion be necessary, we provide only a portion of one. Counsel must expand upon it by reference to the cases cited in the summary of position.

Memorandum of Law

THE GOVERNMENT PRE-TRIAL SHOULD BE REQUIRED TO TURN OVER *BRADY* AND *GIGLIO* MATERIAL AS PART OF SOUND CASE MANAGEMENT IN SUFFICIENT TIME TO ALLOW FOR FULL EXPLORATION AND EXPLOITATION BY THE DEFENSE

The parties have met and conferred and the government has failed to agree to furnish the material set forth in our letter to the court in a timely fashion.

A. Summary of Position

The Circuit wrote in *United States v. Coppa*, 267 F.3d 132 (2001) that district courts may establish their own rules with respect to turnover of *Brady* and *Giglio*

material. Reliance is made to the following: *United States v. Amato,* 540 F.3d 153 (2d Cir. 2008); *United States v. Rodriguez*, 498 F.3d 221 (2d Cir. 2007); *United States v. Paulino*, 445 F.3d 211 (2d Cir. 2006); *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002); *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001); and *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974); *California v. Trombetta*, 467 U.S. 479 (1984) (information concerning the motivation of the key government witnesses to testify favorably to the government); *United States v. Singh*, 628 F.2d 758 (2d Cir. 1980); *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974) (evidence concerning key government witness' eagerness to cooperate with the prosecution); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974) (criminal records of prosecution witnesses); *United States v. Feola*, 651 F. Supp. 1068 (S.D.N.Y. 1987); *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (facts concerning a key witness' mental and physical state).

A defendant's right to adequately prepare for trial would needlessly be imperiled if a prosecutor, having such impeachment information, chose to categorize such evidence as *Jencks* material and without justification, delayed turnover.

The government must apply the same principles urged herein to out-of-court declarants whose statements

the government intends to use, *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003), and, when we refer to "witness", we include out-of-court declarants.

The government should be required to examine the grand jury testimony to see if there is any *Brady/Giglio* material.

B. Specific Demands

Based upon the above, we seek all impeachment and exculpatory evidence actually or constructively available to the government, including evidence in the possession, custody or control of any law enforcement agencies participating in this investigation. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *United States v. Payne*, 63 F.3d 1200 (2d Cir. 1995). In particular, our request includes:

1. Any material showing a potential bias or prejudice of any witness the government anticipates calling in its case-in-chief including: (a) statements whether any promise, reward, or inducement has been given to any such witness, identifying by name each such witness and each promise, reward, or inducement; and (b) a copy of any promise, reward, or inducement reduced to writing.

   This request seeks material that bears directly on the witness' bias. Unlike criminal acts, which

may be inquired into simply for purposes of impeachment, the issues of bias, prejudice, hostility, and motive are so central to a witness' credibility that extrinsic proof may be offered. *United States v. Abel*, 469 U.S. 45 (1984); *United States v. James*, 609 F.2d 36 (2d Cir. 1979)(ordering disclosure of above-referenced materials).

It is well established that material regarding threats of the prosecution directed against any witness falls within *Brady* and *Giglio*, provided that there is a specific demand thereof. *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983).

2. Information known to the government regarding the following subjects: (a) complaints made by cooperating witnesses; (b) reports of cooperating witnesses during investigations; (c) adverse personal information of agent witnesses; and (d) any mental or physical impairment of any witnesses whom the government anticipates calling in its case-in-chief.

Our request for disclosure of material bearing adversely upon the witness' mental state merely applies the principle that extrinsic evidence of a witness' mental deficiency may be used to attack his credibility. *United States v. Pugliesi*, 153 F.2d 497 (2d Cir. 1945).

3. Any statements made by the government to the Pretrial Services Agency or the United States Department of Probation, favorable to a witness whom the government anticipates calling in its case-in-chief or anyone related to such witness.
4. Material showing any prior criminal or other bad acts of any witness whom the government anticipates calling in its case-in-chief, including: (a) a copy of any criminal record of any such witness; (b) a written description of any prosecutable offense known by the government to have been committed by any such witness; and (c) a written description of any conduct that may be admissible under Rule 608(b) of the Federal Rules of Evidence that is known by the government to have been committed by any such witness.

The defense has a right to inquire as to whether the witness' testimony is motivated by a desire to have the government intervene on his behalf either to see whether a prosecution can be aborted or otherwise resolved in a manner favorable to the witness. To the extent that the witness is exposed to the possibility of criminal penalties, his motive to carry favor with the government will be heightened. Disclosure would be required even if the government has not as yet promised the witness assistance. When

probing bias and motivation, defendants seek to inquire into the mental state of the witness rather than solely into the actions of the government alone.

A court should take judicial notice of the fact that "criminal rap sheets" often do not accurately reflect either the number of convictions or the full extent of the prior convictions. Thus, early turnover is warranted to permit the defense to determine the full extent of the witness' prior criminal record.

5. Any material not otherwise listed that reflects or evidences the motivation of any witness either to cooperate with the government or any bias or hostility against any defendant;
6. Any requests prepared by the prosecution for permission to grant immunity or leniency.

   These matters further relate to the bias of the witness, even if the government has not yet, and may never, agree to the witness' demand. See Napue v. Illinois, 360 U.S. 264 (1959); United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974); United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974).
7. The results of any lie detector tests given to any person in connection with the investigation of the charges contained in the indictment.

* * *

15. Demand for Bill of Particulars and Demand for Discovery: Federal Rules of Criminal Procedure 7(f) and 16

Defendants have no general constitutional right to discovery in criminal proceedings. Pre-trial disclosure, for the most part, comes from Rule 7(f), Rule 16, *Brady* and *Giglio*, as well as material turned over by the government, i.e., taped conversations, seized evidence, affidavits, orders in connection therewith. The court in *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003) wrote: "criminal defense counsel" in order to discover the government's proof have to resort to "the existing rules of discovery—limited as they are . . ." The Circuit recognized that the defendants are at an "informational disadvantage." *United States v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005). In the amendment to Fed.R.Crim.P. 7(f), the drafters made clear that it was designed to encourage a "more liberal attitude by the courts toward bills of particulars."

While counsel has a right then to expect that district courts would be liberal with respect to defense requests in an effort to "level the playing field," this is not the way 7(f), Rule 16, and *Brady/Giglio* are applied in the Southern and Eastern Districts.

In *United States v. Clemenza*, 04 CR 273 (S.D.N.Y. 2002), a defendant was charged with loan-sharking (extortionate credit transactions) committed against two unnamed individuals. Obviously, the defense for investigative purposes would want

to know pre-trial, the names of such individuals. Nevertheless, without any factual hearing or showing, the district court denied particulars as to the names of the "victims." Of course, the judge there should have considered *United States v. Agone*, 302 F.Supp. 1258 (S.D.N.Y., 1969), and the constitutional doctrine announced in *Russell v. United States*, 369 U.S. 749 (1962) which should have caused the court to require the government pre-trial to divulge the names so that the defense could "prepare for trial [and avoid surprise]." Arguments on behalf of the defendant were rejected.

The *Russell/Agone* analysis goes this way: suppose the government had offered proof to the grand jury that there were five "victims," but the indictment charged only two unnamed "victims." How would a court know which two persons that the grand jury found probable cause sufficient to consider "victims?" It is improper to allow the government to "roam at large" selecting the victims. This practice violates the defendant's Fifth Amendment right to be tried on charges brought by a grand jury.

Most often, a court denies particulars on the ground that the defendant is seeking "evidentiary detail" about the government's case. *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990). Defendants routinely seek and are denied particulars as to the time and place the alleged crimes were committed and the persons alleged to have been present and acting as participants in the crime. *United States v. Needham*, 2004 WL 1903061 (S.D.N.Y.).

If the defendant does not know the time and place that the charged crime was committed, how can the defendant prepare to

prove his alibi? How is the government harmed if it is required to furnish this information?

Defendants are also normally denied the names of unindicted co-conspirators. See *United States v. Nachamie*, 91 F. Supp. 2d 565 (S.D.N.Y. 2000). However, unindicted co-conspirators' statements will bind the defendant under Fed. R. Evid. 801(d)(2)(E). The prosecutor's refusal to provide the names of these co-conspirators will hamper the defense's pre-trial investigation and give rise to surprise.

The Supreme Court in *Hamling v. United States*, 718 U.S. 87 (1974) upheld indictments which track the language of a statute and do little more than state time and place in approximate terms. See also, *United States v. Needham*, 2004 WL 1903061 (citing *United States v. Salazar*, 485 F.2d 1272 (2d Cir. 1973)). These decisions clearly do not satisfy the intended purpose of a bill of particulars.

Courts have denied particulars when the government has made disclosures of documentary material under Fed.R.Crim. P. 16. However, such decisions fail to recognize that the bill of particulars alone augments the pleadings. Furthermore, a defendant is generally entitled to rely on the government's statements in the bills of particulars as contained in the response, as admissions against interest. *United States v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991) (with Altimari, J. concurring and Mahoney, J. dissenting); *cf. United States v. Flom*, 558 F.2d 1179 (5th Cir. 1977).

When the government produces documents, it will typically either provide a disk containing the documents, or make a room at its offices available and allow the defense, under the eye of an agent, to examine what could be thousands of pages of documents, arguing this satisfies the prosecution's obligation under Fed. R.Crim.P. 7(f). However, in *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988) and *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) the Circuit held that this practice does not satisfy the government's Rule 7(f) obligation. Nevertheless, the government continues to engage in this practice, but now claims it satisfies government's obligations under Fed.R.Crim.P. 16. The prosecution will then successfully argue that since it has met its obligations under Rule 16, a bill of particulars is no longer necessary.

According to *United States v. Nachamie*, 91 F. Supp. 2d 565 (S.D.N.Y. 2000), there is no duty to "identify" the documents that the government will use in its case-in-chief. On the other hand, other courts have found a duty to identify such documents as a reasonable interpretation of the language of Rule 16. *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978); *United States v. Poindexter*, 727 F. Supp. 1501 (D.C. 1989); *United States v. Weissman*, 1996 WL 751385 (S.D.N.Y.). Particularly the Third Circuit—for example the District Court of New Jersey—interprets the language as requiring this kind of turnover. One trying a case in the District Court of New Jersey can expect to receive this material pre-trial.

There are several cases that are particularly useful on the matter of discovery. *United States v. Nachamie, 91 F.Supp. 2d (2006)*

despite its ruling above, and *United States v. Lino*, 2001 WL 8356 (S.D.N.Y.) are particularly helpful on many pre-trial discovery issues. But, once again, (and this should not be so), counsel faces the "luck of the draw" with respect to the assigned judge.

In *United States v. Taylor*, 707 F. Supp. 696 (D.C. 1989), a drug conspiracy case, the court granted the bill of particulars, ruling that: "bills of particulars have been granted to require the disclosure of all persons the government will claim to have been co-conspirators, to the extent known, the locations of acts set forth in the indictment and the place where the offense charged occurred."

See also, *United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998); *United States v. Walsh*, 194 F.3d 37 (2d Cir. 1999); *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990); *United States v. Bin Laden*, 92 F. Supp. 2d 225 (S.D.N.Y. 2000); *United States v. Chen*, 378 F.3d 151 (2d Cir. 2004); and *United States v. Urso*, 369 F. Supp. 2d 254 (E.D.N.Y. 2005). Each of these cases is defense-friendly.

Fed.R.Crim.P. 16(a)(1)(c) is a special section that applies if the client is a corporation or other organizational defendant. Any statement, including grand jury testimony, by a person whom the government claims was or is able to bind the defendant because of that person's position in the organization is discoverable by the defense. No court or commentator has satisfactorily explained why there should not be a comparable rule as to individual defendants. Counsel should band together to push for this relief on behalf of their individual clients.

As to the matter of producing a witness list, this is fully discussed in *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1975). Securing the government's witness list is most often an unattainable goal.

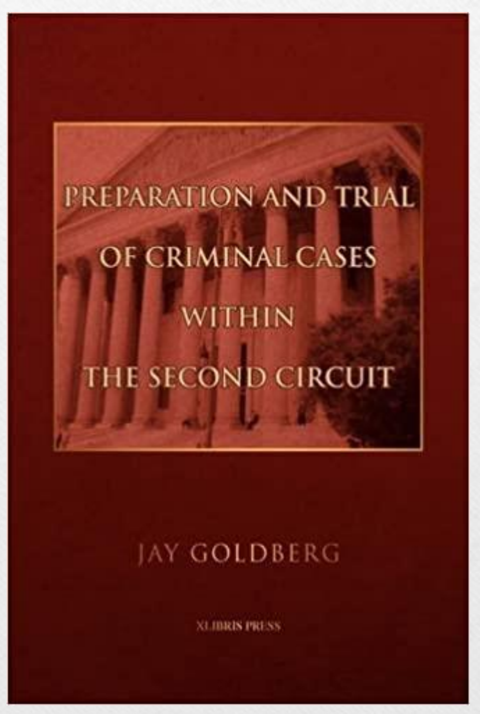
Available to the government to defeat discovery (more used than in past years following 9/11/2001) is the state secrets privilege. *United States v. Reynolds*, 345 U.S. 1 (1953); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950). This privilege can be overcome. It is not absolute, and will fall if the information is material and necessary to the defense and where the effect of withholding the proof would probably have an effect on the verdict.

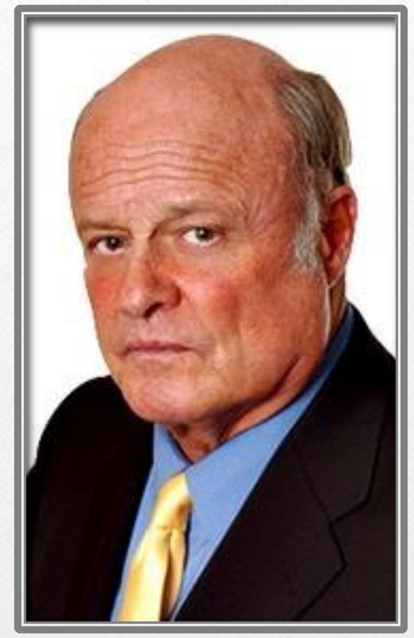
In general, the trial court has broad discretion to fashion a remedy for the government's failure to timely disclose Rule 16 materials. See, *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997); *United States v. Sanchez*, 912 F.3d 18 (2d Cir. 1990).

There is a danger to the defense in pressing for Fed.R.Crim.P. 16. Rule 16 triggers a reciprocal obligation on the part of defense. The defense, with exceptions, must disclose the same kinds of materials required to be disclosed by the prosecution.

Questions?

Please contact Jay Goldberg





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Attachments in the listed order as presented in slides previously

- Brady v. Maryland, 373 U.S. 83 (1963)
- Federal Practice and Procedure (Wright & Miller) | April 2020 Update

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- Giglio v. United States, 405 U.S. 150 (1972)
- United States v. Agurs, 427 U.S. 97 (1976)
- California v. Trombetta, 467 U.S. 479 (1984)
- United States v. Bagley, 473 U.S. 667, 682 (1985)
- Kyles v. Whitley, 514 U.S. 419, 433 (1995)
- United States v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450 (2002)
- Litigating Brady v. Maryland; Games Prosecutors Play (2007) ~ Bennett L. Gershman
- Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Please Bargaining (2013) ~ Michael Nasser Petegorsky
- United States v. Pizarro & Rivera, 17-cr-151 (AJN) - (2018)
- A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery (Spring 2020) ~ Riley E. Clafton
- United States v. Ali Sadr Hashemi Nejad, 18-cr-224 (AJN), decided June 9, 2020
- United States v. Deutsch, 373 F. Supp. 289 (S.D.N.Y. 1974)
- The 'Brady' Obligation: A True Boost from District Judge Allison Nathan (July 31, 2020) ~ Goldberg and Huot

BRADY v. MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 490. Argued March 18–19, 1963.—Decided May 13, 1963.

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked 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 the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing 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 by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held:* Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84–91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it 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. Pp. 86–88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88–91.

226 Md. 422, 174 A. 2d 167, affirmed.

E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was *John Martin Jones, Jr.*

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Thomas B. Finan,* Attorney General, and *Robert C. Murphy,* Deputy Attorney General.

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.

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

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.[1]

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, § 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, § 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.

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[1] Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 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) 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 Loan Corp.*, 337 U. S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson,* 326 U. S. 120, 126) 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. Cf. *Local No. 438* v. *Curry,* 371 U. S. 542, 549.

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, 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, 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, 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."

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, 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; *Wilde* v. *Wyoming,* 362 U. S. 607. Cf. *Durley* v. *Mayo,* 351 U. S. 277, 285 (dissenting opinion).

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.

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 avail-

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[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."

able, 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.)

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.

But Maryland's constitutional provision making the jury in criminal 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, 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 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; *Dick* v. *State,* 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel* v. *State,* 163 Md. 267, 162 A. 705.

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[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.

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 deprival of this defendant of that sporting chance through the use of a

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[4] For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 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,* at 120; *Vogel* v. *State,* 163 Md., at 272, 162 A., at 706–707.

bifurcated trial (cf. *Williams* v. *New York,* 337 U. S. 241) 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 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; *Minnesota* v. *National Tea Co.,* 309 U. S. 551. 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,

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*Md. Const., Art. 23; *Home Utilities Co., Inc.,* v. *Revere Copper & Brass, Inc.,* 209 Md. 610, 122 A. 2d 109; *Raymond* v. *State,* 192 Md. 602, 65 A. 2d 285; *County Comm'rs of Anne Arundel County* v. *English,* 182 Md. 514, 35 A. 2d 135; *Oursler* v. *Tawes,* 178 Md. 471, 13 A. 2d 763.

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

[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. 86–88 of its opinion.

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 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 § 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 disposi-

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[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 rearraignment, 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."

tive 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. 89) 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

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[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."

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.

2 Fed. Prac. & Proc. Crim. § 256 (4th ed.)

Federal Practice and Procedure (Wright & Miller) | April 2020 Update

Federal Rules of Criminal Procedure

Chapter 5. Arraignment and Preparation for Trial

Andrew D. Leipold[a0] and

Peter J. Henning[a1]

Rule 16. Discovery and Inspection

§ 256 Discovery by the Defendant—"Brady" Material

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Federal Procedure, L.Ed. § 22:1246

Rhodes, Orfield's Criminal Procedure Under the Federal Rules § 16:12 (2d ed.)

Forms

5A West's Federal Forms, District Courts—Criminal Rules § 87:34

In passing on a defendant's request for discovery, there are constitutional imperatives that cannot be disregarded even though there is no constitutional right to discovery.[1] In the well-known case of Brady v. Maryland,[2] the prosecution withheld the confession of a co-defendant in which he admitted the homicide for which Brady was convicted. This was held to be error of

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a constitutional dimension because it would affect the defendant's punishment for the offense. According to Justice Douglas, writing for the Court:

> 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.[3]

The Brady rule has been refined by the Supreme Court in a number of subsequent cases,[4] and there has been much learned debate concerning how far it reaches.[5] Issues related to the government's obligation to disclose Brady material are frequently litigated, at both the pre-trial stage and on appeal.

The purpose of the Brady rule was explained in 1985 in the case of United States v. Bagley:[6]

> 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. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.[7]

In Strickler v. Greene,[8] the Supreme Court summarized the steps in the Brady analysis:

There are three components of a true Brady violation:

> The evidence at issue must be favorable to the accused, 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.[9]

While Brady used the term “suppression,” it should not be understood to require active removal or hiding of evidence by the government—the issue is whether the prosecution revealed the evidence in a timely manner, regardless of intent or negligence.[9.50] Evidence is deemed “suppressed” if the prosecution failed to disclose it before it was too late for the defendant to make use of the evidence,[10] and it was not otherwise available to the defendant through the exercise of reasonable diligence.[11] The timing of the disclosure may be key to determining whether it was suppressed, and also whether the defendant suffered any prejudice from the late disclosure.[12]

Evidence equally available to the defendant by the exercise of due diligence means that the government is not obligated under Brady to produce it.[13] Similarly, if the defendant knows about the exculpatory information, then the government's failure to disclose it is not a Brady violation.[14]

If material is exculpatory[15] and subject to disclosure, but is not discoverable under Rule 16, then Brady only requires that it be disclosed in time to allow the defendant to use it effectively at trial.[16] Disclosure during trial may not be too late for defendant to make use of the evidence, and defense counsel may request a continuance or recess to review the materials.[17]

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Although disclosure at the time of trial may satisfy Brady, there are situations in which it has been thought desirable to require the government to produce Brady material earlier than this.[18]

The district court has authority to order Brady material disclosed prior to trial.[19] The burden to disclose exculpatory material is on the government in the first instance, and there is not a general requirement that courts seek out Brady material unless the prosecutor has sought such a judicial determination whether an item should be disclosed.[20]

The prosecutor is charged with knowledge of the significance of evidence in his file “even if he has actually overlooked it.”[21] Exculpatory evidence held by other investigative agencies that are part of the prosecution team is considered to be in the possession of the prosecutor and subject to Brady even if the information never came to the prosecutor's attention.[22] The government, however, is not required to seek out information from other sources, such as state police agencies or courts, that may be favorable to the defendant unless those agencies worked with the prosecutor.[23] Moreover, exculpatory evidence must exist at the time of the trial to qualify as Brady material.[24] But prosecutors cannot avoid knowledge that would lead to exculpatory material to avoid the Brady obligation.[25]

The Brady disclosure requirement applies to exculpatory evidence that goes to either the defendant's guilt or any potential punishment.[26] In Brady, the evidence that a confederate was the actual killer did not affect the defendant's guilt–which he admitted–but only the likely punishment.[27] In Cone v. Bell, the Court noted that "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as *Brady* itself demonstrates."[27.50] The evidence must be favorable to the defendant, so inculpatory material, or ambiguous information, falls outside Brady, although the government may be required to produce it under Rule 16.[28]

In Giglio v. U.S.,[29] the Supreme Court included within the category of exculpatory evidence subject to disclosure any witness impeachment information if the reliability of the witness may be determinative of the defendant's guilt or innocence.[30] The most common form of impeachment evidence is some type of cooperation agreement, which may be informal or contingent on subsequent performance, so long as it provides a witness with some benefit in exchange for testifying or giving information.[31] Providing a witness with a benefit, such as a reduced sentence or even a monetary payment, in exchange for testimony does not violate 18 U.S.C.A § 201(c)(2), which makes it a crime to give anything of value to a witness “for or because of” the person's testimony, so long as the government discloses the benefit provided and the defendant has an opportunity examine the witness on any possible bias as a result of the agreement.[32]

Even if evidence is exculpatory and not disclosed by the prosecutor, a Brady violation occurs only if the information was “material.” In United States v. Agurs,[33] the Supreme Court distinguished three different situations in deciding whether evidence is material and must be disclosed. First, if a prosecution witness has given perjured testimony and the prosecution knew or should have known of the perjury,[34] a conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[35] Second, if there has been a specific request for information and the prosecution has failed to respond, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[36] Finally, if there has been no request by defendant, or only a general request, information not revealed by the prosecutor will be deemed material only if the omitted evidence creates a reasonable doubt that did not otherwise exist.[37]

In United States v. Bagley, however, the Court abandoned the three-part materiality test for cases that distinguished between different types of requests, although the Agurs standard for perjury cases remains. Instead, the test of materiality under Brady is:

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> 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.[38]

The Court reiterated in Banks v. Dretke[39] the requirement that prosecutors have an independent duty to disclose Brady material that is not conditioned on a defendant's request for such material, stating that “[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.”[40]

In Strickler v. Greene, the Court explained that undisclosed evidence is material if there is a “reasonable probability” that the result of the trial would have been different, not just a reasonable possibility.[41] The test of materiality for the failure to disclose Giglio impeachment material showing the witness was not truthful is whether there is any reasonable likelihood that false testimony could have affected the judgment of the jury.[42] For impeachment evidence to be material, courts usually look at the witness's importance to the government's case, whether other types of impeachment material was available to attack credibility, and whether the withheld material was only cumulative of other impeaching evidence.[43] In Smith v. Cain, the Supreme Court reiterated that the importance of an eyewitness in proving the case is an important component in determining whether withheld impeachment evidence was material.[43.50] In Turner v. United States, the Court found that withheld exculpatory evidence from a murder prosecuted 30 years earlier was "too little, too weak, or too distant from the main evidentiary points to meet *Brady'*s standards.[43.70]

The materiality determination is not a sufficiency of the evidence test, so a defendant need not show that the jury would not have convicted even if the exculpatory evidence had been disclosed.[44] The analysis looks to the evidence collectively, and not on an item-by-item basis, to determine the potential prejudice on the trial from the withheld information.[45]

The focus is on prejudice to the defendant from the prosecutor's suppression of the evidence, and in Kyles v. Whitley[46] the Court explained that “[t]he 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.”[47] The defendant bears the burden of establishing prejudice from any suppression of evidence. Once a reviewing court finds that there was a due process violation from the suppression of material evidence, there is no need for further harmless-error review.[48]

Appellate review of the materiality and prejudice determinations is under the de novo standard.[49] While the usual remedy for a Brady violation is a new trial,[49.50] in rare circumstances, a court could find that the government's due process violation was so flagrant as to require dismissal of the case to avoid prejudice to the defendant from a retrial.[50]

Brady did not create a discovery rule, although the constitutional disclosure requirement operates much like one.[51] It was decided not to codify the Brady requirements in the discovery rules when they were amended in 1975.[52] Nevertheless, Brady has important implications for discovery, and defendants frequently couple a pre-trial discovery motion with a demand for production of Brady material.[53]

It is not uncommon for a court to grant a request under Rule 16 for disclosure of Brady material. Although a general request is less effective than a specific request, and the showing required for a new trial for nondisclosure is, therefore, more rigorous,[54] that there is no reason for not making the disclosure in the first instance. Further, if evidence is “material either to guilt or

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punishment" and "favorable to an accused," within the Brady formulations, it seems that a fortiori it must be "material to the preparation of his defense" under Rule 16(a)(1)(E) and (F).[55] If a prosecutor's office maintains an open file discovery system, then defense counsel can reasonably rely on the file containing all material Brady obligates the government to disclose and need not request such material.[56] However, it is not necessary to disclose Brady material prior to entering a plea agreement with a criminal defendant.[57]

When passing on requests for discovery under Rule 16, in doubtful cases courts should grant discovery sought under the rule and thereby avoid the constitutional questions posed by Brady.[58] This is consistent with the Supreme Court's admonition that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice,"[59] and with its statement that when there is a substantial basis for claiming that material is within Brady, the prosecutor should either furnish the information to the defendant or submit the problem to the trial judge.[60]

Because Brady is based on the Constitution, it overrides court-made rules of procedure. Thus, Rule 16(a)(2) prohibits discovery of work product but it does not alter the prosecutor's duty to disclose material that comes within Brady.[61] It is not yet settled whether Brady requires pre-trial disclosure of statements of witnesses other than under the Jencks Act—and now under Rule 26.2—that would ordinarily not have to be produced until the witness finished his direct testimony.[62] On the other hand, the Brady disclosure obligation applies regardless of whether the statement was committed to writing or otherwise recorded.[63]

The Brady rule does not apply to applications for a warrant. Law-enforcement officers are not obliged to include in the affidavit in support of a warrant exculpatory evidence they may have.[64] In District Attorney's Office for the Third Judicial District v. Osborne, the Supreme Court held that *Brady* does not apply to post-conviction proceedings, such as a suit to obtain evidence so that DNA testing could be conducted.[65]

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Footnotes

a0 Edwin M. Adams Professor of Law, University of Illinois. Professor Leipold revised §§ 160 to 240 for the publication of Chapter 5 in its Fourth Edition.

a1 Professor Of Law, Wayne State University. Professor Henning revised §§ 241 to 300 for the publication of Chapter 5 in its Fourth Edition.

1 **No constitutional right to discovery**
"There is no general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

2 **Brady case**
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3 **Due-process test**
373 U.S. at 104, 83 S.Ct. at 1196–1197. The Court further stated, "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." 83 S.Ct. at 1197.

4 **Rule refined**
Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); DeMarco v. U. S., 415 U.S. 449, 94 S. Ct. 1185, 39 L. Ed. 2d 501 (1974); Ring v. U. S., 419 U.S. 18, 95 S. Ct. 164, 42 L. Ed. 2d 29 (1974); U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Wood v. Bartholomew, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995); Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); U.S. v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002).

5 **Learned debate**

Gershman, Reflections on Brady v. Maryland, 47 S. Tex. L. Rev. 685 (2006); Douglass, Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining, 50 Emory L.J. 437 (2001); Cerruti, Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process, 94 Ky. L.J. 211 (2005); Sundby, Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland, 33 McGeorge L. Rev. 643 (2002); ABA Standards for Criminal Justice: Discovery, 3d ed. 1996, § 11-2.1(a)(viii), and Commentary thereto at pp. 32–33; Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U.Pa.L.Rev. 1365 (1987); Babcock, Fair Play: Evidence Favorable to An Accused and Effective Assistance of Counsel, 34 Stan.L.Rev. 1133 (1982); Cannon, Prosecutor's Duty to Disclose, 52 Marq.L.Rev. 516 (1969); Everett, Discovery in Criminal Cases—In Search of a Standard, Duke L.J. 477, 511–517 (1964); Carter, Suppression of Evidence Favorable to An Accused, 34 F.R.D. 87 (1964). Professor Western, in The Compulsory Process Clause, 73 Mich.L.Rev. 75, 121–132 (1974), made the interesting suggestion that the Brady rule is required by the Compulsory Process Clause of the Sixth Amendment.

6 **Bagley case**

U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

7 **Purpose of Brady**

473 U.S. at 675, 105 S.Ct. at 3380–3381.

See also

"The superior prosecutorial investigatory apparatus must turn over exculpatory information. The Brady rule imposes an independent duty to act on the government, like the duty to notify the defendant of the charges against him." U.S. v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013).

“This rule, derived from due process, helps to ensure fair criminal trials, protecting the presumption of innocence for the accused, while forcing the state to present proof beyond a reasonable doubt.” Mays v. City of Dayton, 134 F.3d 809, 815 (6th Cir. 1998), cert. denied, 524 U.S. 942, 118 S. Ct. 2352, 141 L. Ed. 2d 722 (1998).

8 **Strickler case**

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

9 **Three components of Brady**

527 U.S. 281–282, 119 S. Ct. at 1948.

9.50 **Not active removal or hiding**

"[T]he reason that a witness refuses to speak with the defendant thus appears irrelevant. Unless the witness's unavailability is somehow caused by or attributable to the government, Brady is not implicated because evidence has not been "suppressed." This rule seems quite ill-conceived, but it binds us nonetheless." U.S. v. Tavera, 719 F.3d 705, 718 (6th Cir. 2013).

"The term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within *Brady*'s scope. * * * There is no allegation that the trial prosecutor in this case acted willfully, maliciously, or in anything but good faith—but an 'innocent' failure to disclose favorable evidence constitutes a *Brady* violation nonetheless." U.S. v. Price, 566 F.3d 900, 907-908 (9th Cir. 2009).

"[I]n the *Brady* context, 'suppression' is not limited to circumstances where it was carried out by the Government intentionally or in bad faith; instead, negligence or inadvertence qualifies as 'suppression.'" United States v. Peake, 2016 WL 8234673, *3 (D.P.R. 2016), **citing Wright**, aff'd, 874 F.3d 65 (1st Cir. 2017).

10 **Disclosed too late**

"A new trial will rarely be warranted based on a *Brady* claim where the defendant obtains the information in time to use it at the trial. Where evidence is disclosed late but before trial, the defendant must show a reasonable probability that an earlier disclosure would have altered the trial's result. Here, Appellants have failed to demonstrate prejudice, which is the cornerstone of *Brady*." United States v. Borda, 848 F.3d 1044, 1067 (D.C. Cir. 2017), cert. denied, 137 S. Ct. 2315, 198 L. Ed. 2d 729 (2017).

“Delayed disclosure of evidence does not in and of itself constitute a Brady violation.” U.S. v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002), cert. denied, 537 U.S. 1049, 123 S. Ct. 611, 154 L. Ed. 2d 524 (2002).

Not applicable to post-trial proceedings

“Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. Brady is the wrong framework.” District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

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“[E]ven if the evidence Jones seeks were assumed to be material, the Brady right of pretrial disclosure available to defendants at trial does not extend to habeas corpus petitioners seeking post-conviction relief.” Jones v. Ryan, 733 F.3d 825, 837 (9th Cir. 2013), cert. denied, 571 U.S. 984, 134 S. Ct. 503, 187 L. Ed. 2d 340 (2013).

11 **Otherwise available**

"That Wogenstahl did not obtain the evidence he now presents until that final request is hardly attributable to a lack of reasonable due diligence on his part. The prosecution has a constitutional obligation under *Brady* to provide material exculpatory and impeachment evidence, and the defendant is not required to request continuously *Brady* information in order to show due diligence." In re Wogenstahl, 902 F.3d 621, 629 (6th Cir. 2018).

"[T]he government's claim about Ross's probation eligibility did not describe a term of their agreement that could be modified. It was simply a description of the relevant law, complete with citation. The government might have misunderstood or misstated the law, but could not have suppressed it, as required for a *Brady* violation." United States v. Betts–Gaston, 860 F.3d 525, 530 (7th Cir. 2017).

“[T]he government did not engage in any conduct indicating that it performed its Brady obligations in bad faith. First, there is no proof that the government larded its production with entirely irrelevant documents. Furthermore, it cannot be said that the government made access to the documents unduly onerous. While access to the documents may have been somewhat hampered due to the format in which they were transferred, the district court noted that the defendants' motion practice ‘demonstrate[d] they [were] capably navigating the discovery, which primarily all came from [the] [d]efendants in the first place.’ Finally, there is no indication that the government deliberately concealed any exculpatory evidence in the information it turned over to the defense. Consequently, the government has not ‘abdicated’ its duties under Brady.” U.S. v. Warshak, 631 F.3d 266, 297-298 (6th Cir. 2010).

“[E]vidence for Brady purposes is deemed ‘suppressed’ if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.” U.S. v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002), cert. denied, 537 U.S. 1049, 123 S. Ct. 611, 154 L. Ed. 2d 524 (2002).

“We regard as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for Brady purposes. To begin with, it is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses. Sometimes, a defense witness may be uncooperative or reluctant. Or, the defense witness may have forgotten or inadvertently omitted some important piece of evidence previously related to the prosecution or law enforcement. Or, as may have been the case here, the defense witness learned of certain evidence in the time between when she spoke with defense counsel and the prosecution.” Boss v. Pierce, 263 F.3d 734, 740 (7th Cir. 2001), cert. denied, 535 U.S. 1078, 122 S. Ct. 1961, 152 L. Ed. 2d 1022 (2002).

12 **Timing of disclosure**

“To the extent that this evidence was exculpatory, its relevance to Mr. Rijo's case was straightforward: it undermined the thoroughness and good faith of the Government's investigation. This defense is neither complicated nor inconsistent with the defense strategy pursued by Mr. Rijo. Seven days afforded ample time for its preparation. On these facts, we cannot conclude that the Government's belated disclosure of this evidence prevented defense counsel from using it in preparing and presenting Mr. Rijo's case.” U.S. v. Cruz-Feliciano, 786 F.3d 78, 88 (1st Cir. 2015), cert. denied, 136 S. Ct. 274 (2015).

“The United States presented substantial evidence of guilt, and Appellants struggle to explain with the required specificity how these statements, if disclosed earlier, would have changed any aspect of the trial. Although the United States committed a serious blunder that we do not easily countenance, we cannot conclude that the delayed disclosure here resulted in a trial unworthy of confidence.” U.S. v. Fields, 763 F.3d 443, 461 (6th Cir. 2014).

“Here, while we do not doubt that the defense would have been better prepared to impeach the government's witnesses if there had been more time to digest the *Brady/Giglio* materials, Rivera has failed to show a reasonable probability that the outcome of his case would have been any different if the trial court had granted the one-week continuance.” U.S. v. Delgado-Marrero, 744 F.3d 167, 199, 93 Fed. R. Evid. Serv. 938 (1st Cir. 2014).

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Government's disclosure of Brady material on the Friday before trial started the following Monday did not violate Brady because “the documents given to Douglas on the Friday before trial totaled only some 290 pages. They were grouped according to the witness to which they pertained and were easily recognizable as such, with the documents relating to a given witness fastened with a clip.” U.S. v. Douglas, 525 F.3d 225, 245–246 (2d Cir. 2008), cert. denied, 129 S. Ct. 619, 172 L. Ed. 2d 458 (2008).

Government suppressed an exculpatory memorandum when it was delivered to the defense less than one full business day before trial, it was among more than 2,700 pages of material in two file boxes, it was listed on page twelve of a 41-page index designating over 600 exhibits, none of the individual items were Bates stamped, and the exhibits were not placed in separate file folders that corresponded with the “3500 numbers” listed on the exhibit list. U.S. v. Gil, 297 F.3d 93, 96 (2d Cir. 2002).

“[W]e have never interpreted due process of law as requiring more than that Brady material must be disclosed in time for its effective use at trial,” U.S. v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001).

“No due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial.” U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985).

“We recognize that *Brady v. Maryland* and *United States v. Agurs* do not require the pre-trial disclosure of material evidence as long as the ultimate disclosure is made before it is too late for the defendant to make use of the evidence.” U.S. v. Olson, 697 F.2d 273, 275 (8th Cir. 1983).

13

Due diligence

"Mr. Stein conceded that Exhibit X was a publicly available document filed with a public agency. Although in some cases a publicly available document practically may be unobtainable with reasonable diligence, Mr. Stein made no effort to establish that this is such a case. In fact, Mr. Stein represented that he located the document on the 'SEC website.'" United States v. Stein, 846 F.3d 1135, 1146–1147 (11th Cir. 2017), cert. denied, 138 S. Ct. 556 (2017).

“[I]t is apparent that with just minimal due diligence on the part of Georgiou, he could have obtained a copy of [Waltzer's] guilty plea transcript because he certainly was aware that the main witness against him had pled guilty before Judge Dalzell. Likewise, the existence of the Bail Report was not hidden from Appellant, and it could have been accessed through his exercise of reasonable diligence. Accordingly, the Minutes and the Bail Report cannot be deemed to have been suppressed.” U.S. v. Georgiou, 777 F.3d 125, 140-141 (3d Cir. 2015), cert. denied, 136 S. Ct. 401.

“[T]he CA–7 form is a publicly available document and could have been uncovered by a diligent investigation. As a senior claims examiner at the Department of Labor testified, Catone could have obtained a copy of his entire claims file by simply submitting a written request to the Department of Labor.” U.S. v. Catone, 769 F.3d 866, 872 (4th Cir. 2014).

There was no Brady violation from the government's failure to produce the transcript of its witness's state court testimony in an unrelated matter where the defendant cross-examined the witness about the results of that trial, and because he "could have obtained a copy of the transcript himself, he cannot show that the Government suppressed evidence." U.S. v. Ladoucer, 573 F.3d 628, 636 (8th Cir. 2009).

"Bond essentially argues that Johnson's testimony would have been favorable to him and that the government 'suppressed' such evidence in violation of *Brady* by failing to call Johnson as a witness after indicating that it would. However, it is elementary that litigants are not required to call every witness identified on their witness lists. * * * Whether a litigant actually calls all, or any, of the witnesses on its witness list is purely a matter of trial strategy. *Brady* does not, as a general matter, supplant the prosecutor's ability to make strategic choices during litigation." U.S. v. Bond, 552 F.3d 1092, 1097 (9th Cir. 2009).

“Since Harris knew where he was (and was not) at the time, counsel surely would have done so had Harris been charged in the Mexico City Café incident. But Harris was not charged with that crime, so there was no reason for the government to disclose (what Harris already knew) that he was at his workplace at the time.” Harris v. Kuba, 486 F.3d 1010, 1015 (7th Cir. 2007).

Defendant's Brady claim is without merit when the file at issue was a matter of public record and could have been obtained upon request, “especially when the file pertains to an alleged co-conspirator and the charges against the co-conspirator are so closely related to the conspiracy with which the defendant is charged.” U.S. v. Infante, 404 F.3d 376, 387 (5th Cir. 2005).

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“[B]ecause the evidence was available to Spirko from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence, the Brady rule does not apply.” Spirko v. Mitchell, 368 F.3d 603, 611, (6th Cir. 2004), cert. denied, 544 U.S. 948, 125 S. Ct. 1699, 161 L. Ed. 2d 525 (2005).
The prosecution is not required to furnish a defendant with exculpatory evidence that is fully available to him through the exercise of due diligence. Wright v. Hopper, 169 F.3d 695, 702 (11th Cir. 1999), cert. denied, 528 U.S. 934, 120 S. Ct. 336, 145 L. Ed. 2d 262 (1999).
“Brady rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence.” U.S. v. Dean, 722 F.2d 92, 95 (5th Cir. 1983).
United States v. Peake, 2016 WL 8234673, *3 (D.P.R. 2016), **quoting Wright**, aff'd, 874 F.3d 65 (1st Cir. 2017).

14 **Known by defendant**
"There can be no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information." United States v. Castano, 906 F.3d 458, 466 (6th Cir. 2018).
"Pendleton's knowledge of the inconsistent statements suggests that he had access to the information from other sources, and *Brady* does not require disclosure in this circumstance, id. particularly when the movant offers nothing more than speculation to support his belief that a PSR contains the relevant information." United States of America v. Pendleton, 832 F.3d 934, 941 (8th Cir. 2016).
“Based upon the record before us, it appears that Mark's counsel, but not the government, possessed the Isaac letters. This severely undercuts Mark's contention that the government suppressed or withheld evidence in violation of *Brady*.” U.S. v. Freeman, 61 V.I. 679, 763 F.3d 322, 347 (3d Cir. 2014), cert. denied, 135 S. Ct. 1467, 191 L. Ed. 2d 412 (2015).
“[A]ll that was unknown to the defendant and his attorney was the *fact* of Lopez's statement, not the *content* of that statement. Further, the fact that prosecutors interviewed Lopez could have easily been discovered with a simple phone call to Lopez's attorney.” The court admonished prosecutors that “when the government obtains an exculpatory statement and fails to disclose that statement, the government proceeds at its own risk and places any resulting conviction in jeopardy.” U.S. v. Barraza Cazares, 465 F.3d 327, 335 (8th Cir. 2006), cert. denied, 128 S. Ct. 41, 169 L. Ed. 2d 40 (2007).
“[E]vidence is not ‘suppressed’ if the defendant knows about it and has it in her possession.” Lambert v. Blackwell, 387 F.3d 210, 265 (3d Cir. 2004), cert. denied, 544 U.S. 1063, 125 S. Ct. 2516, 161 L. Ed. 2d 1114 (2005).
“[I]nformation actually known by the defendant falls outside the ambit of the *Brady* rule.” U.S. v. Roane, 378 F.3d 382, 402 (4th Cir. 2004), cert. denied, 546 U.S. 810, 126 S. Ct. 330, 163 L. Ed. 2d 43 (2005).
“Evidence is not ‘suppressed’ if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence. As a result, the Government is not required to disclose grand jury testimony to a defendant who is ‘on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish.’” (quoting U.S. v. Stewart, 513 F.2d 957, 600 (2d Cir. 1975). U.S. v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, 459 U.S. 1174, 103 S. Ct. 823, 74 L. Ed. 2d 1019 (1983).
“[T]he government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.” U.S. v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977).
U.S. v. Lebeau, 2015 WL 3755925, *2 (D.S.D. 2015), **quoting Wright**.

15 **Exculpatory**
"Lynch asserts that he has subsequently discovered about the United States' prosecution priorities should have been disclosed to him pursuant to *Brady v. Maryland*. This claim is without merit, because the evidence was not exculpatory of Lynch or otherwise relevant to his case." United States v. Lynch, 903 F.3d 1061, 1073 (9th Cir. 2018), cert. denied, 139 S. Ct. 2717, 204 L. Ed. 2d 1114 (2019).
"Likewise, the fingerprint-comparison results excluding Floyd from the fingerprints lifted from the whiskey bottle would obviously have helped [Floyd] and would have had some value in countering the detective's testimony and the State's theory that Floyd shared a drink with Hines. Id. Because, in the context of the detective's testimony, this evidence is favorable for impeaching the prosecution's witness, it would be

unreasonable to conclude that it is anything other than favorable under *Brady*." Floyd v. Vannoy, 894 F.3d 143, 163 (5th Cir. 2018), cert. denied, 139 S. Ct. 573 (2018).

"In short, Sitzmann has not shown that Jones' testimony was "favorable to the accused" within the meaning of *Brady* and *Giglio*. Accordingly, the District Court did not err in rejecting Sitzmann's claims." United States v. Sitzmann, 893 F.3d 811, 828 (D.C. Cir. 2018).

"Evidence concerning the agents' corruption is *not* Brady information because it is not exculpatory or impeaching of the government's trial evidence." United States v. Ulbricht, 858 F.3d 71, 113 (2d Cir. 2017).

“The defendants raise one last perplexing *Brady* theory: that the government failed to disclose statements by defendants that it intended to use at trial involving threats to witnesses. But *Brady* material must be exculpatory. These statements are about as far from exculpatory as one can imagine. They are not covered by *Brady*.” U.S. v. Brown, 822 F.3d 966, 975 (7th Cir. 2016), cert. denied, 137 S. Ct. 248 (2016).

“Ruiz—the State's key witness at trial—repeatedly denied to the police that he was at the murder site and that he knew anything about the murders. His statement changed only after Raucci provided critical details about the case, told Ruiz ‘that it was in his best interest to tell what happened [and] give a detailed statement as to his participation and also the other two,’ and promised to ‘let [Ruiz] go’ if he did so. That evidence was of a kind that would suggest to any prosecutor that the defense would want to know about it. If defense counsel had known this information at trial, he could have cross-examined Ruiz regarding his prior inconsistent statements and the extent to which Raucci coached him and induced him to testify falsely. As the district court concluded, Sweeney's testimony was clearly exculpatory under *Brady* or impeachment material under *Giglio*, if not both.” Lewis v. Connecticut Com'r of Correction, 790 F.3d 109, 124 (2d Cir. 2015)

“On its face, the nondisclosure of the identities of the other suspects—two of whom were reported to have confessed to the murder—was an egregious breach of the State's *Brady* obligations.” Bies v. Sheldon, 775 F.3d 386, 400 (6th Cir. 2014).

"The transcripts contained substantial *Brady* material, much of which was easily identified as such. The fact that the government is able to argue that portions of the transcripts were consistent with the prosecution's theory fails to lessen the exculpatory force of sworn SEC testimony. . . ." U.S. v. Mahaffy, 693 F.3d 113, 130 (2d Cir. 2012).

“In the absence of a particularized and focused request, the district court is not required to troll through voluminous recordings in search of potentially exculpatory evidence.” U.S. v. Caro–Muniz, 406 F.3d 22, 30 (1st Cir. 2005).

“While there may have been differences between the witnesses' testimony and their disclosed statements, that was an issue Vieth's counsel pursued by impeaching the witnesses with their prior inconsistent statements. As a result, there is no *Brady* violation.” U.S. v. Vieth, 397 F.3d 615, 619 (8th Cir. 2005), cert. denied, 545 U.S. 1110, 125 S. Ct. 2560, 162 L. Ed. 2d 286 (2005).

16 **Timing of disclosure**

Prosecution need not disclose in advance of trial the names of witnesses who will testify unfavorably to the defendant. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

"Accordingly, to establish a *Brady* violation, Szczerba must show that the government's delay in disclosing the evidence deprived him of its usefulness and that this deprivation materially affected the outcome of his trial. Szczerba cannot meet this burden." United States v. Szczerba, 897 F.3d 929, 941 (8th Cir. 2018), petition for certiorari filed (U.S. Nov. 29, 2018).

“Claxton's *Brady* argument with respect to the Turnbull and Springette Letters is necessarily limited, of course, by the fact that the government provided the letters to the defense. The District Court permitted additional cross examination of both witnesses, giving counsel ‘plenty of leeway’ to impeach the witnesses and as much time as counsel needed to prepare. To the extent that the jury heard the additional cross examination made with the benefit of the letters, therefore, Claxton cannot argue that the evidence was suppressed or that it was material to the issue of guilt because he ultimately used those materials at trial.” U.S. v. Claxton, 61 V.I. 715, 766 F.3d 280, 304 (3d Cir. 2014).

“[T]here is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value.” U.S. v. Houston, 648 F.3d 806, 813 (9th Cir. 2011).

"It would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial. * * * If a defendant could never make out a *Brady* violation on the basis of the effect of delay on his trial preparation and strategy, this would

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create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information. It is not hard to imagine the many circumstances in which the belated revelation of *Brady* material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. To force the defendant to bear these costs without recourse would offend the notion of fair trial that underlies the *Brady* principle." U.S. v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009), cert. denied, 558 U.S. 1016, 130 S. Ct. 565, 175 L. Ed. 2d 391.

"[I]f the defendant had the evidence at trial, he has no *Brady* claim." U.S. v. Erickson, 561 F.3d 1150, 1165 (10th Cir. 2009), cert. denied, 558 U.S. 1150, 130 S. Ct. 173, 175 L. Ed. 2d 109.

“Because Todd was intimately familiar with the information contained in the documents in question, he should have been able to utilize that information in his defense when the documents were delivered two days before trial.” U.S. v. Todd, 424 F.3d 525, 534 (7th Cir. 2005), cert. denied, 547 U.S. 1178, 126 S. Ct. 2352, 165 L. Ed. 2d 278 (2006).

A motion to dismiss the charges is not the proper vehicle for redressing a late Brady disclosure; a request for a continuance is the best method of preventing harm to the defendant. U.S. v. Collins, 415 F.3d 304, 311 (4th Cir. 2005).

“*Brady* does not require pre-trial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial.” U.S. v. Almendares, 397 F.3d 653, 664 (8th Cir. 2005).

“Evidence is not suppressed within the meaning of Brady if it is made known and available to the defense before trial.” U.S. v. Wooten, 377 F.3d 1134, 1142 (10th Cir. 2004), cert. denied, 543 U.S. 993, 125 S. Ct. 510, 160 L. Ed. 2d 381 (2004).

“No denial of due process occurs if Brady material is disclosed to appellees in time for its effective use at trial.” U.S. v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983), cert. denied, 464 U.S. 1048, 104 S. Ct. 725, 79 L. Ed. 2d 185 (1984).

Impeaching evidence

Information concerning “favor or deals” made to key government witness merely goes to credibility of witness and need not be disclosed prior to witness testifying. U.S. v. Rinn, 586 F.2d 113, 119 (9th Cir. 1978), cert. denied, 441 U.S. 931, 99 S. Ct. 2051, 60 L. Ed. 2d 659 (1979).

Government ordered to produce all impeachment evidence three days before the trial. U.S. v. Marquez, 686 F. Supp. 1354, 1358 (N.D. Ill. 1988).

Delaying disclosure of Brady materials useful for impeachment until night preceding testimony would be insufficient to protect constitutional rights of defendants. U.S. v. Thevis, 84 F.R.D. 47, 52–54 (N.D. Ga. 1979).

17 **Disclosure during trial**

Late disclosure of evidence that the government provided financial assistance to a witness did not violate *Brady* because “[w]hile the timing of the disclosure did not afford Al–Dabbi's attorney the benefit of the information in formulating his case, it did provide him with the opportunity to request a continuance or recess of the trial to prepare to cross-examine [the witness] effectively or otherwise make use of the information.” U.S. v. Gasim Al-Dabbi, 388 F.3d 1145, 1149 (8th Cir. 2004).

18 **Produce earlier**

“The district court also found that because the prosecution did not get the records until just before trial they could not have been turned over earlier. Although the prosecution may not have received the phone records until shortly before the start of trial, the records were in the possession of law enforcement investigators since the previous Wednesday, five days before the start of trial. This possession is imputed to the prosecution regardless of whether it had actual possession of the records. The government used those five days to check the phone numbers to try to make connections to Garner and concedes that it took “an extensive amount of time” to check the phone numbers in the records. The defense should have been afforded at least the same amount of time to conduct its own investigation …” U.S. v. Garner, 507 F.3d 399, 406–407 (6th Cir. 2007).

When the claim is one of delayed disclosure rather than complete suppression, defendant must show that, given timely disclosure, a more effective trial strategy would likely have resulted. U.S. v. Lemmerer, 277 F.3d 579, 579–588 (1st Cir. 2002), cert. denied, 537 U.S. 901, 123 S. Ct. 217, 154 L. Ed. 2d 173 (2002).

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Mandamus granted as district court exceeded its authority in ordering immediate disclosure of all exculpatory and impeachment evidence far in advance of trial, rather Brady material must be disclosed in time for its effective use at trial or at a plea proceeding. U.S. v. Coppa, 267 F.3d 132, 140–144 (2d Cir. 2001).

Where there was specific corroborated evidence of threats to the safety of witnesses, district court abused its discretion in requiring disclosure of names of witnesses to whom the government had offered immunity or leniency prior to trial. U.S. v. Higgs, 713 F.2d 39, 45 (3d Cir. 1983), cert. denied, 464 U.S. 1048, 104 S. Ct. 725, 79 L. Ed. 2d 185 (1984).

"Thus, in a case such as this where, as Defendants correctly argue, the success of the Government's case will undoubtedly turn on the jury's assessment of the credibility of its four major witnesses, it is particularly important that the Defendants be given access to any inconsistent statements of those witnesses which constitute potential impeachment," and government was required to produce materials 10 days before the start of trial. U.S. v. Daum, 847 F. Supp. 2d 18, 20-21 (D.D.C. 2012).

Defendant was entitled to disclosure of impeachment material regarding all witnesses and nonwitness declarants whose statements would be offered into evidence in the case but, insofar as he sought information which may have led to exculpatory evidence or information which may have been beneficial, his request was far too broad and was denied; under circumstances of the case and in absence of strong showing by government why pre-trial disclosure should not have been had, pre-trial disclosure of such information was preferable to disclosure during trial. U.S. v. Penix, 516 F. Supp. 248, 251 (W.D. Okla. 1981).

Defendant against whom grand jury returned indictment would be entitled to discover any and all reports of statements or transcripts of testimony which he had given to government agents, and would also be entitled to view scientific reports and examine stone “stelae” involved and, in addition, in view of fact that events at issue were alleged to have taken place up to more than five years ago, he would be entitled to inspect and copy all information and material in possession of prosecutors which tended to exculpate defendant either through indication of his innocence, through showing of mitigation of punishment if he should be convicted, or for use in impeachment of key government witnesses. U.S. v. Kosovsky, 513 F. Supp. 1, 3–4 (W.D. Okla. 1980).

19 **District court authority**

“We flatly reject the notion, espoused by the prosecution, that ‘it is the government, not the district court, that in the first instance is to decide when to turn over Brady material.’ … 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.” U.S. v. Starusko, 729 F.2d 256 (3d Cir. 1984).

20 **Burden on government**

“The district court is under no general independent duty to review government files for potential *Brady* material.” U.S. v. Bland, 517 F.3d 930, 935 (7th Cir. 2008).

“[U]nder *Brady*, the government need only disclose during pre-trial 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.” U.S. v. Jordan, 316 F.3d 1215, 1252 (11th Cir. 2003).

“The prosecuting attorney, however, informed the court that he had reviewed the sealed document and that it did not contain any Brady material. The prosecuting attorney is an officer of the court and, absent some indication of misconduct, the court is entitled to accept his representations on this issue.” U.S. v. Hernandez, 31 F.3d 354, 361 (6th Cir. 1994).

21 **Evidence overlooked**

U.S. v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392, 2400, 49 L. Ed. 2d 342 (1976).

"The proponent of a *Brady* claim—i.e., the defendant—bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it. Once the defendant produces such evidence, the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from others acting on the government's behalf." U.S. v. Price, 566 F.3d 900, 910 (9th Cir. 2009).

The government has not discharged its obligations if the prosecutor has asked the investigative agents for exculpatory material and the agents have refused to provide it; “To repeat, *Brady* and *Giglio* impose

obligations not only on the prosecutor, but on the government as a whole.” U.S. v. Blanco, 392 F.3d 382, 394 (9th Cir. 2004).

Although the prosecutor “may have been so busy preparing to wrap up his case that he failed” to see the value of evidence that would have been exculpatory, or failed to grasp its significance, “*Brady* has no good faith or inadvertence defense.” Gantt v. Roe, 389 F.3d 908, 912 (9th Cir. 2004).

A prosecutor's lack of knowledge that exculpatory material exists does not excuse a Brady violation, and “the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it.” U.S. v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991).

For purposes of disclosure requirements, government had knowledge of criminal record of its key witness even though, because of shortness of time, prosecutor chose not to run a Federal Bureau of Investigation or a National Crime Information Center check on the witness to obtain such information, and thus, such available information was withheld or suppressed. U.S. v. Auten, 632 F.2d 478, 481 (5th Cir. 1980).

Brady rule applied even though the prosecutor was personally unaware of the existence of the evidence that had been requested where it was available in the medical examiner's office. Martinez v. Wainwright, 621 F.2d 184, 187–188 (5th Cir. 1980).

But see

Government obligation only extends to information in its possession, custody, or control, and information concerning details of witness's state court marijuana conviction was maintained by the Rhode Island state courts, and “there is no evidence that the federal prosecutor or any agent working on her behalf had this information prior to or during trial.” U.S. v. Hall, 434 F.3d 42, 55 (1st Cir. 2006).

22 **Possession of prosecutor**

“[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.” Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995).

"Police officers generally discharge their *Brady* obligations by turning over such evidence to the prosecutors, who in turn have a duty to disclose the evidence to the defense." Goudy v. Cummings, 922 F.3d 834, 837 (7th Cir. 2019).

"Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense. Any other rule presents too slippery a slope." Dennis v. Secretary, Pennsylvania Department of Corrections, 834 F.3d 263, 292 (3d Cir. 2016)

“Ridling examined M.K. ‘at the behest of’ law enforcement as part of a criminal investigation into M.K.'s allegation that McCormick sexually abused her. Moreover, Ridling explicitly testified that she kept a record of the exam to prepare herself to testify later. Under these circumstances, we agree that Ridling was part of the prosecution team for *Brady* purposes. Accordingly, we must impute her knowledge of her own lack of certification to the prosecutor. And because the prosecutor didn't disclose Ridling's lack of certification to the defense, we conclude the prosecution suppressed evidence.” McCormick v. Parker, 821 F.3d 1240, 1247 (10th Cir. 2016).

"But even if the trial attorney did not himself possess the exculpatory evidence, knowledge of that evidence is imputed to him under *Brady*." Aguilar v. Woodford, 725 F.3d 970, 982 (9th Cir. 2013).

"The state is charged with the knowledge that there was impeachment material in Saldate's personnel file. After all, the state eventually produced some of this evidence in federal habeas proceedings and has never claimed that it could not have disclosed it in time for Milke's trial. There can be no doubt that the state failed in its constitutional obligation of producing this material without any request by the defense." Milke v. Ryan, 711 F.3d 998, 1016 (9th Cir. 2013).

Witness's “sentencing-related testimony was maintained by the probation officer preparing the PSR, and there is no evidence that the federal prosecutor or any agent working on the U.S. Attorney's behalf had this information prior to or during trial. Accordingly, the government committed no *Brady* violation.” U.S. v. Rivera-Rodriguez, 617 F.3d 581, 595 (1st Cir. 2010).

"Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime." Moldowan v. City of Warren, 578 F.3d 351, 378 (6th Cir. 2009).

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"[I]f Detective Anderson did in fact know of [the key witness'] 'arrests' and 'violation convictions' as the trial prosecutor initially stated, and if the prosecutor either failed to disclose the information or failed to discover that his agent knew of or possessed it, a *Brady* violation occurred." U.S. v. Price, 566 F.3d 900, 909 (9th Cir. 2009).

“Although the prosecution may not have received the phone records until shortly before the start of trial, the records were in the possession of law enforcement investigators since the previous Wednesday, five days before the start of trial. This possession is imputed to the prosecution regardless of whether it had actual possession of the records.” U.S. v. Garner, 507 F.3d 399, 406–407 (6th Cir. 2007).

When addressing cross-jurisdiction constructive knowledge, the following issues are addressed: “(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.” U.S. v. Risha, 445 F.3d 298, 304 (3d Cir. 2006).

“There is nothing in the record which suggests that, at the time of trial, any federal officer or any member of the Sandy City Police Department involved in the case knew of the confidential informant's alleged pending state charges. Nor has Defendant met his burden by directing this court to any record evidence supporting his proposition that the government suppressed information. Thus, we do not impute knowledge by the prosecution of these January acts during or before the February 2004 trial, given that no charges were filed until June 2004, months after the trial's conclusion. We therefore determine that the government did not suppress evidence of these felonies and misdemeanors.” U.S. v. Geames, 427 F.3d 1333, 1337 (10th Cir. 2005).

“The prosecution contended on appeal that it received the Bradford memo from OTB ‘only days before’ the government produced it to the defense. But in a Rule 28J letter submitted to this Court approximately three weeks after oral argument, the government concedes that an OTB investigator saw the Bradford memo at some point during the grand jury investigation of Gil. The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the ‘prosecution team.’ The government thus constructively possessed the Bradford memo long before it was turned over to the defense.” U.S. v. Gil, 297 F.3d 93, 106–107 (2d Cir. 2002).

Witness Security Program operated by the United States Marshals Service was imputed to be part of the prosecution team when members installed a video-teleconferencing system to further the government's investigation so that videotapes of witness interviews were within the prosecution's knowledge and control. U.S. v. Bin Laden, 397 F. Supp. 2d 465, 484–485 (S.D. N.Y. 2005), aff'd, 552 F.3d 93 (2d Cir. 2008).

23 **Not required to seek out information**

"Michigan *state* prison records do not fall within *Brady*'s coverage of materials that the *federal* prosecutor would have in its possession." United States v. Pembrook, 876 F.3d 812, 826 (6th Cir. 2017) (italics in original), cert. granted, judgment vacated on other grounds, 139 S. Ct. 65, 202 L. Ed. 2d 1 (2018) and cert. granted, judgment vacated on other grounds, 139 S. Ct. 68, 202 L. Ed. 2d 1 (2018) and cert. granted, judgment vacated, 139 S. Ct. 137, 202 L. Ed. 2d 1 (2018) and cert. granted, judgment vacated on other grounds, 138 S. Ct. 2676, 201 L. Ed. 2d 1068 (2018).

“[W]here the government does not have evidence in its possession, the prosecution cannot have suppressed it, either willfully or inadvertently. In response to the motion for a new trial, a member of the prosecution team swore, under oath, that the government only learned of the declaration after Messrs. Rodriguez and Esquenazi were convicted. Neither defendant points to any contrary evidence.” U.S. v. Esquenazi, 752 F.3d 912, 933, Fed. Sec. L. Rep. (CCH) P 97966 (11th Cir. 2014).

“To charge prosecutors with knowledge of exculpatory evidence buried in the computer databases of institutions that collect and store vast amounts of digitized data would be an unreasonable extension of the Brady rule. The courts, rightly in our view, have refused to make it. The government is not ‘obliged to sift fastidiously’ through millions of pages (whether paper or electronic).” U.S. v. Gray, 648 F.3d 562, 567 (7th Cir. 2011).

“Knowledge of information that state investigators obtain is not imputed for Brady purposes to federal investigators who conduct a separate investigation when the separate investigative teams do not collaborate extensively.” U.S. v. Naranjo, 634 F.3d 1198, 1212 (11th Cir. 2011).

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“Courts have routinely refused to extend Brady's constructive knowledge doctrine where doing so would cut against the agency principles underlying imputed knowledge and would require prosecutors to do full interviews and background checks on everyone who touched the case. And with good reason: it is one thing to require prosecutors to inquire about whether police have turned up exculpatory or impeachment evidence during their investigation. It is quite another to require them, on pain of a possible retrial, to conduct disciplinary inquiries into the general conduct of every officer working the case.” U.S. v. Robinson, 627 F.3d 941, 952 (4th Cir. 2010).

"There is nothing of record to indicate that the nation of Colombia was somehow under American control in the investigation of this case, or that any Colombian authorities were members of a United States 'prosecution team' * * * while Colombian officials naturally participated in the Colombian judicial proceeding that resulted in Uribe's extradition, those authorities did not function as agents of the United States government or act under its control. Instead, they acted on behalf of their own government in responding to a request from the United States. The level of cooperation extended by the Colombian government, while admirable, appears to have been nothing more than the comity called for by treaty and custom. We decline to adopt the defendants' suggestion that a determination of constructive possession is appropriate whenever a foreign government responds to a request from the United States for investigative or judicial assistance." U.S. v. Reyeros, 537 F.3d 270, 283 (3d Cir. 2008).

“We find nothing in the cases to show that federal prosecutors may be held responsible for the omissions of a state regulatory agency—an arm of a different government altogether—and nothing in the record of this case to indicate that the U.S. Attorney's Office and the [Oklahoma Insurance Department] had a working relationship close enough to trigger such a rule if it existed.” U.S. v. Redcorn, 528 F.3d 727, 744 (10th Cir. 2008).

Defendants “allege that the government breached its *Brady* obligations by ignoring and failing to collect information about the religious beliefs of investors, but *Brady* does not require the government to discover information not in its possession or of which it was not aware.” U.S. v. Heppner, 519 F.3d 744, 750 (8th Cir. 2008), cert. denied, 129 S. Ct. 250, 172 L. Ed. 2d 188 (2008).

“There 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.” U.S. v. Earnest, 129 F.3d 906, 910 (7th Cir. 1997).

U.S. v. Hart, 2013 WL 4041861, *2 (E.D. Mich. 2013), **quoting Wright**.

24 **Exist at time of trial**

"The government did not have this evidence until after Wolf's trial ended. Therefore there was no *Brady* violation." United States v. Wolf, 860 F.3d 175, 193 (4th Cir. 2017).

“The failure to create exculpatory evidence does not constitute a Brady violation.” U.S. v. Alverio-Melendez, 640 F.3d 412, 424 (1st Cir. 2011), cert. denied, 565 U.S. 925, 132 S. Ct. 356 (2011).

“[O]nly admissible evidence can be material, for only admissible evidence could possibly lead to a different verdict.” U.S. v. Salem, 578 F.3d 682, 686 (7th Cir. 2009).

“Here, the district court correctly concluded that the vast majority of the evidence of departmental misconduct was discovered by the City after this case was remanded to the district court for discovery relating to selective prosecution. As such evidence did not exist at the time of trial, it was not *Brady* material.” U.S. v. Jones, 399 F.3d 640, 647 (6th Cir. 2005), cert. denied, 546 U.S. 863, 126 S. Ct. 148, 163 L. Ed. 2d 146 (2005).

25 **Cannot avoid knowledge**

“Of course the prosecutor's own interest in avoiding surprise at trial gives him a very considerable incentive to search accessible files for possibly exculpatory evidence, quite independent of *Brady*. Accordingly there is less need for a judicially constructed incentive than in the classic *Brady* situation, where prosecutors already possess the information but may have little incentive to divulge it apart from the *Brady* rule itself. We suspect the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that 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.” U.S. v. Brooks, 966 F.2d 1500, 1502 (D.C. Cir. 1992).

“[A] prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.” Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984).

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“The 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. The government did not act before trial to pinpoint with accuracy the time and date of Tatum's contradictory statements, and the government cannot shield itself from its Brady obligations by willful ignorance or failure to investigate." U.S. v. Quinn, 537 F. Supp. 2d 99, 110 (D.D.C. 2008).

26 **Exculpatory evidence**

"But a review of the record—particularly the very FBI communications at issue—indicates that a recording of the meeting, unlike recordings of most of Mo's other meetings with Young, was never made and that any information purportedly within the recordings was not material.10 There is no record evidence to the contrary. Given this, Young has offered nothing but rank speculation as to the nature of the allegedly suppressed materials, which cannot establish a Brady violation." United States v. Young, 916 F.3d 368, 383 (4th Cir. 2019), cert. denied, 140 S. Ct. 113, 205 L. Ed. 2d 33 (2019).

“[W]hether evidence is favorable is a question of substance, not degree, and evidence that has any affirmative, evidentiary support for the defendant's case or any impeachment value is, by definition, favorable. Although the weight of the evidence bears on whether its suppression was prejudicial, evidence is favorable to a defendant even if its value is only minimal. Accordingly, Street's recollections were favorable to Comstock—they impeached Street's credibility in terms of how he handled his ring, and more importantly, affirmatively cast serious doubt on whether there was a crime in the first place.” Comstock v. Humphries, 786 F.3d 701, 708-709 (9th Cir. 2015).

“Where, as here, however, the government maintains that it has turned over all material impeachment evidence, speculation is insufficient to permit even an in camera review of the requested materials.” U.S. v. Prochilo, 629 F.3d 264, 269 (1st Cir. 2011).

“Because Caro can only speculate as to what the requested information might reveal, he cannot satisfy *Brady*'s requirement of showing that the requested evidence would be ‘favorable to [the] accused.’” U.S. v. Caro, 597 F.3d 608, 619 (4th Cir. 2010).

District court did not abuse its discretion in granting a new trial based on the government's failure to disclose that its expert witness was under investigation for possible fraud, even though the fraud was unrelated to the witness's testimony that the substance involved was cocaine. U.S. v. Banks, 546 F.3d 507, 512-513 (7th Cir. 2008).

“By its own terms, Brady only applies to evidence ‘favorable to an accused.’ A prosecutor has no duty under Brady to inform the defendant that a witness who had earlier failed to pick the defendant out of a line-up later identified the defendant as the perpetrator because that evidence is not ‘favorable to an accused.’” U.S. v. Barker, 988 F.2d 77, 78 (9th Cir. 1993)

27 **Punishment**

“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.” 373 U.S. 83, 87–88, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963)

"[T]here can be no confidence that all three judges would have determined that the aggravating factors listed in Ohio Rev. Code § 2929.04(B) outweighed the mitigating factors had they been presented with the withheld information, and therefore there can be no confidence that the sentence would have been the same." Jells v. Mitchell, 538 F.3d 478, 507 (6th Cir. 2008).

27.50 **Converse not always true**

Cone v. Bell, 556 U.S. 449, 473, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009).

28 **Not inculpatory evidence**

"[T]he recusal information of the Mississippi division of the US Attorney's Office is immaterial to Charles's ability to "prepare a proper defense against the indictment" for his own crimes of tax evasion and filing false tax returns. Accordingly, the memorandum does not qualify as Brady material." United States v. Bolton, 908 F.3d 75, 91 (5th Cir. 2018), cert. denied, 140 S. Ct. 47, 205 L. Ed. 2d 128 (2019).

"Brady covers the suppression of evidence, not the use of evidence at trial that is packaged differently than it was during pretrial disclosures, which is essentially what happened here." United States v. Hassan, 844 F.3d 723, 727 (8th Cir. 2016).

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“The Appellants note that the Government did not produce the requested print comparisons at trial. According to the Appellants, the Government's decision to exclude the print comparisons at trial must mean that the comparisons were favorable to them. The Appellants' argument, which is solely based on conjecture and speculation, cannot support a *Brady* violation.” U.S. v. Horton, 756 F.3d 569, 575, 93 Fed. R. Evid. Serv. 1300 (8th Cir. 2014), cert. denied, 574 U.S. 850, 135 S. Ct. 122, 190 L. Ed. 2d 93 (2014).

Defendant's argument “betrays a misunderstanding of the *Brady* rule. The government admits that if it had possessed any evidence tending to show that someone at the banks was behind the forgeries, it would have been required to turn that evidence over. But there was no such evidence. The evidence that the government did have showed only that the documents Grintjes swore were collected from several banks using standard procedures were really forgeries. This was inculpatory evidence, not exculpatory.” U.S. v. Grintjes, 237 F.3d 876, 880 (7th Cir. 2001).

“Under Brady, before we look at the effect at trial of the nondisclosure, we determine the nature of the evidence itself: is the evidence inculpatory or exculpatory? If the evidence is inculpatory, then Brady is not violated, regardless of the effect at trial of the nondisclosure.” U.S. v. Gonzales, 90 F.3d 1363, 1369 (8th Cir. 1996).

Failure to disclose information that agents tried to buy drugs from the defendant a few years earlier was not a Brady violation where the “evidence is not favorable to Polland. If anything, it reflects the fact that the D.E.A. harbored suspicions about Polland's conduct, which is more inculpatory than exculpatory.” U.S. v. Polland, 994 F.2d 1262, 1267 (7th Cir. 1993), cert. denied, 510 U.S. 1136, 114 S. Ct. 1115, 127 L. Ed. 2d 425 (1994).

Rule 16

“Rule 16 requires the production of inculpatory as well as exculpatory evidence, which might assist in preparation of a defense.” U.S. v. Baker, 453 F.3d 419, 424 (7th Cir. 2006).

29 **Giglio case**

Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

30 **Impeachment evidence**

The Court held, “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.” 405 U.S. at 154, 92 S. Ct. at 766.

"We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence. We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to 'undermine confidence' in the jury's verdict." Turner v. U.S., 137 S. Ct. 1885, 1895, 198 L. Ed. 2d 443 (2017) (citations omitted).

“This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence.” Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S. Ct. 2188, 2190, 165 L. Ed. 2d 269 (2006) (per curiam).

“Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. Such evidence is ‘evidence favorable to an accused,’ *Brady*, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” U.S. v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985).

"Beerman's testimony that Bradford was drunk, and evidence of the amount of alcohol that Bradford had consumed, were introduced at trial. The statements from these three other individuals in the apartment complex who saw Bradford looking ‘drunk’ or ‘weird’ were thus cumulative. We cannot say that there is a ‘reasonable probability’ the trial result would have differed had the interview notes been disclosed." Bradford v. Davis, 923 F.3d 599, 614 (9th Cir. 2019).

"Thus, the Supreme Court has long recognized that suppression of strong and non-cumulative evidence related to the credibility of an important witness is material under *Brady*, at least when the witness's testimony is critical to the prosecution's case." Sims v. Hyatte, 914 F.3d 1078, 1088 (7th Cir. 2019).

"Defendant's confession contributed to each count for which the jury convicted Defendant. It was critical for Defendant's ‘entire defense’ to establish that he unambiguously invoked the right to remain silent and to impeach the officers’ credibility on the nature and timing of the Miranda warnings." United States v. Abdallah, 911 F.3d 201, 219 (4th Cir. 2018).

"The fact that Forrest is an admitted lifelong drug dealer with at least two controlled-substance convictions (to say nothing of his firearm convictions) does not undermine the incremental value of this impeachment

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evidence. (As we said earlier, most of the witnesses in this trial had similar flaws.) It answered the important question whether Forrest sold heroin *while* he was a cooperating witness. Nothing else in the record directly spoke to that crucial point." United States v. Walter, 870 F.3d 622, 630 (7th Cir. 2017).

"Interview notes may be discoverable under *Brady* if they are inconsistent with the content of the corresponding 302s." United States v. Cessa, 861 F.3d 121, 133 (5th Cir. 2017).

"Because of the importance of Jackson's testimony to the State's case against Thomas and because the jury was not presented with any other evidence of Jackson's pecuniary bias, we find the FBI's $750 payment to Jackson was material to the jury's determination of Thomas's guilt." Thomas v. Westbrooks, 849 F.3d 659, 666 (6th Cir. 2017), cert. denied, 138 S. Ct. 390 (2017).

“We think it beyond doubt that the Supreme Court recognizes the application of *Brady* principles to a witness's psychiatric records, possessed by the prosecution, that may be used to impeach his credibility, particularly where, as here, the witness's testimony is the only evidence that there was in fact a crime and the State's other evidence is not strong enough to sustain confidence in the verdict.” Fuentes v. T. Griffin, 829 F.3d 233, 248 (2d Cir. 2016).

“If the defendants had been able to ask Staples about whether his testimony was influenced by a desire to receive favorable treatment from the government in the fraud investigation, and about his alleged involvement in the major fraud scheme, the defendants could have undermined further the limited evidence presented by the government that Tammy was the fifth participant in the gambling business. For these reasons, we conclude that the prosecutors violated their obligations under *Brady* when they failed to disclose impeachment evidence of the SEC investigation to defense counsel, and that this impeachment evidence was material to the outcome of the trial.” U.S. v. Parker, 790 F.3d 550, 561(4th Cir. 2015).

“[T]he testimony of the three cooperating witnesses—especially Delgado—was both essential to the convictions and uncorroborated by any significant independent evidence. Indeed, the absence of such evidence is so marked and surprising in view of the resources devoted to the investigation and the availability of three turned conspirators that it could reasonably cause the factfinder to be dubious about the witnesses' claims. This is therefore a case in which the *Brady* material that was not produced need not be ‘highly impeaching’ in order to require that the verdict be reversed.” U.S. v. Flores-Rivera, 787 F.3d 1, 18 (1st Cir. 2015).

“We believe that the evidence here would have done more than simply raise general questions about Henson's character. It would have addressed whether Henson was telling the truth in this specific instance.” Barton v. Warden, Southern Ohio Correctional Facility, 786 F.3d 450, 469 (6th Cir. 2015).

Failure to disclose that key government witness was a confidential informant was material impeachment evidence “[g]iven juries' negative predisposition regarding informants, the trial jury would likely have been suspicious of Sims and cautious about her testimony. Such suspicion could have very likely redounded to Defendant's benefit.” Robinson v. Mills, 592 F.3d 730, 737 (6th Cir. 2010).

“We agree with Wilson that Jackson's record of convictions is material because he would have been able to impeach Jackson's testimony with evidence of his *crimen falsi* convictions, pro-prosecution bias, and mental impairments, all of which undermine his reliability.” Wilson v. Beard, 589 F.3d 651, 665 (3d Cir. 2009).

Government's failure to turn over agent's notes of initial proffer session with a cooperating witness violated Brady because the defense could have used the statements in them to impeach the witness; "We must conclude that there is a reasonable probability that if the government had not inexplicably withheld Agent Urso's proffer notes, the jury would have harbored a reasonable doubt about Spadoni's guilt." U.S. v. Triumph Capital Group, Inc., 544 F.3d 149, 165 (2d Cir. 2008).

Failure to disclose reports describing ongoing hostility between defendant and other member of drug conspiracy "undermine the testimony of the key witnesses in the government's case against Carrin. Under these circumstances, the DEA reports establish a reasonable probability that the results of Carrin's trial would have been different if the DEA reports had been disclosed to the defense in a timely manner." U.S. v. Aviles-Colon, 536 F.3d 1, 21 (1st Cir. 2008).

Defendant was unaware that the government's key witness said he should be hypnotized to “truly recall” the events, and so defendant was unable to impeach the witness's ability to recall, thus depriving the jury of critical information. Conley v. U.S., 415 F.3d 183, 191 (1st Cir. 2005).

State court unreasonably applied Supreme Court precedent in finding that the prosecution's suppression of an agreement to seek leniency for a key witness was immaterial because “where the prosecution fails to

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disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial.” Horton v. Mayle, 408 F.3d 570, 581 (9th Cir. 2005).

Special parole visa provided by Immigration and Naturalization Service to cooperating witness that allowed him to stay in the country rather than being deported was “highly relevant impeachment material” that “any competent lawyer would have known” had to be disclosed under Brady. U.S. v. Blanco, 392 F.3d 382, 392 (9th Cir. 2004).

“*Giglio* does not require disclosure of rejected plea offers; the duty to disclose is dependent upon the existence of an agreement between the witness and the government.” U.S. v. Rushing, 388 F.3d 1153, 1158 (8th Cir. 2004).

Failure to disclose impeachment evidence of a critical prosecution witness, such as his persistent criminal misconduct while acting as an informant, his avoidance of prosecution, drug use at the trial, and previous lies about the defendant to police undermined confidence in the outcome of the trial. Benn v. Lambert, 283 F.3d 1040, 1054–1059 (9th Cir. 2002), cert. denied, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002).

State's failure to disclose to capital murder defendant that the deputy sheriff who allegedly induced the defendant's confession had participated in sale of guns to fund a murder with which the defendant was charged in a separate prosecution constituted a Brady violation warranting habeas relief, where deputy's credibility was important in establishing admissibility of confession, confession was the only evidence linking the defendant to the murder, and as a result, the defendant suffered prejudice. Nuckols v. Gibson, 233 F.3d 1261, 1266 (10th Cir. 2000).

Although it is usually the case that impeachment material for a defense witness would not be exculpatory, there may be cases in which it is, and “the fact that Jones was originally proffered as a defense witness has no consequence for the scope of the government's Brady obligations here.” In re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 894 (D.C. Cir. 1999).

A prosecutor's threatening remark to a key prosecution witness constituted material impeachment evidence that could have substantially undermined the critical value of a witness's testimony; therefore the government's failure to disclose this incident to the defendant sufficiently undermined the appellate court's confidence in the integrity of the verdict to warrant a reversal. U.S. v. Scheer, 168 F.3d 445, 452–453 (11th Cir. 1999).

“The purpose of the *Giglio* line of cases is to make clear that the duty imposed on the prosecution in *Brady* extends not only to exculpatory information about the defendant but also to information about witnesses which would undermine the government's case. *Giglio* does not give the defendant the right to know about information which would help solidify the government's case.” U.S. v. Barker, 988 F.2d 77, 78 (9th Cir. 1993).

“[B]ecause impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence under *Brady*.” U.S. v. Buchanan, 891 F.2d 1436, 1443 (10th Cir. 1989), cert. denied, 494 U.S. 1088, 110 S. Ct. 1829, 108 L. Ed. 2d 958 (1990).

In antitrust prosecution involving independent petroleum marketers, trial court committed prejudicial error in denying one corporate defendant access to hospital records of major witness, which indicated that witness had been under treatment for mental illness that rendered him at the time of the alleged conspiracy delusional and hallucinatory with poor judgment and insight, for its use in cross-examination of the witness. U.S. v. Soc. of Independent Gasoline Marketers of America, 624 F.2d 461, 466–467 (4th Cir. 1979), cert. denied, 449 U.S. 1078, 101 S. Ct. 859, 66 L. Ed. 2d 801 (1981).

Not impeaching

“The impact of withholding evidence is more severe when it is highly impeaching or when the impeached testimony is essential to the defendant's conviction.,, *,, *,, * The impeachment value of the evidence is marginal (necessarily so, given the vagueness of the defendant's allegations), and that value could effectively have been realized by recalling [the witness] for further cross-examination.” U.S. v. Mathur, 624 F.3d 498, 505 (1st Cir. 2010).

The fact that a witness was planning to write a book about one of the defendants, a former Governor of Louisiana, which the government did not disclose, “would have had at best only a marginal impact on the government's case against the Edwardses.” U.S. v. Edwards, 442 F.3d 258, 267–268 (5th Cir. 2006), cert. denied, 548 U.S. 908, 126 S. Ct. 2948, 165 L. Ed. 2d 957 (2006).

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Government's failure to disclose deposition of government witness in which he recounted his participation in several drug-related murders and results of polygraph test in which he admitted committing two murders but allegedly gave several deceptive responses when asked about involvement of others did not violate Brady disclosure requirements; polygraph results would not have significantly aided impeachment in that witness had already admitted on direct examination to deceptions in other contexts and to participating in three murders. U.S. v. Graham, 83 F.3d 1466, 1473–1474 (D.C. Cir. 1996), cert. denied, 519 U.S. 1132, 117 S. Ct. 993, 136 L. Ed. 2d 874 (1997).

Witnesses hopeful expectation that they could avoid criminal or civil proceedings by disclosing to government attorneys what they knew about certain transactions relating to the sale of certain real estate, even when supplemented by evidence that government attorney used language concerning the possibility of granting informal immunity did not amount to a promise of leniency such that the government was required to disclose it. U.S. v. Baskes, 649 F.2d 471, 476–477 (7th Cir. 1980).

31 **Cooperation agreement**

“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.” U.S. v. Bagley, 473 U.S. 667, 683, 105 S. Ct. 3375, 3384, 87 L. Ed. 2d 481 (1985).

“We find no abuse of discretion in the district court's conclusion that this evidence was material. Derrington was a key witness and the only other alleged conspirator with Dvorin. During trial, Derrington testified that he was ‘cooperating with the … Government’ and ‘hope[d] to obtain some leniency’ at sentencing, but represented that he did not ‘get any promises from the Government in exchange for [his] testimony.’ During cross-examination, Dvorin's counsel elicited testimony that Derrington was hoping to get favorable treatment from the court and the government based on his cooperation. But this testimony does not make clear, nor does the plea agreement itself indicate, that the government agreed to ‘file a motion urging sentencing consideration for Derrington's cooperation if, in its sole discretion, it determine[d] that he ha[d] provided substantial assistance in the investigation or prosecution of others.’ It is reasonable to conclude that evidence of such consideration would be more powerful than Derrington's testimony that he merely hoped he would receive leniency, but had not received any promise from the government that he would.” U.S. v. Dvorin, 817 F.3d 438, 451 (5th Cir. 2016), cert. denied, 137 S. Ct. 140 (2016).

“The records of the FBI's payments provide significant impeachment evidence that would have shaded the jurors' perceptions of Cabral's credibility. Although Cabral testified about Seda's motive, Cabral's motive for testifying was left untouched. Payments to a government witness are no small thing.” U.S. v. Sedaghaty, 728 F.3d 885, 900-901, 2013-2 U.S. Tax Cas. (CCH) P 50492, 112 A.F.T.R.2d 2013-5864 (9th Cir. 2013).

"That the police officers investigating the Phillips case interceded on Colman's behalf multiple times with respect to an unrelated felony offense was a tangible benefit to Colman in consideration for her testimony against Phillips. The receipt of such a benefit could have been used to impeach Colman's credibility. The state was thus not only obligated under *Brady* to disclose to Phillips that such an intervention had occurred, but also obligated under *Napue* to correct Colman's claim that she had been promised no benefits, along with Minier's assertion that any intimation that she had received such treatment was 'sheer fabrication': contrary to these statements, Colman had already received substantial benefits for her testimony in the form of direct assistance that enabled her to escape prosecution for a serious drug-trafficking offense." Phillips v. Ornoski, 673 F.3d 1168, 1186 (9th Cir. 2012).

“[T]he Supreme Court has never limited a Brady violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal.” LaCaze v. Warden Louisiana Correctional Institute for Women, 645 F.3d 728, 735 (5th Cir. 2011).

“[T]he evidence the government withheld would not simply have been cumulative of the impeachment evidence brought out during cross-examination of Storch at trial. Rather, it would have created substantial doubt as to Storch's credibility, particularly with respect to his professed naivete. The details of Storch's own agreement with the prosecution, and the fact that Storch had negotiated the subsequent deal independent of his public defender, would have allowed defense counsel to discredit Storch on a novel basis. The prosecution's failure to correct Storch's false testimony about his prior deals was prejudicial.” Maxwell v. Roe, 628 F.3d 486, 511 (9th Cir. 2010).

“The government should have revealed in advance of trial that it had a fee agreement with Labhart. Such could have been used to impeach Labhart's motive to tell the truth. However, we conclude that if such failure constituted a *Brady* violation, it was immaterial and harmless. The jury heard that Labhart was receiving tens of thousands of dollars from the government and Dynegy in exchange for over 350 hours of analysis in this case. He also stated that he was subpoenaed to complete work he had not completed while he was employed by Dynegy. Labhart was not testifying as an accomplice to a crime seeking a reduced sentence or a ‘hired gun’ in search of a bounty. Rather, Labhart was the most qualified person to perform the true-false, long-short, and penny-up penny-down analyses. There is no indication that Labhart anticipated receiving a bonus in the event of a guilty verdict. The facts and circumstances of Labhart's unique role in this case do not implicate the policy concerns we have expressed about undisclosed payments to informants testifying in criminal cases.” U.S. v. Valencia, 600 F.3d 389, 418-419 (5th Cir. 2010), cert. denied, 562 U.S. 893, 131 S. Ct. 285, 178 L. Ed. 2d 141 (2010).

State court's determination that communications by police officers with a cooperating witness regarding a tacit agreement for a reduction in the charges against him need not be disclosed unless approved by the prosecutor's office "flies in the face" of the prosecutor's duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. Akrawi v. Booker, 572 F.3d 252, 263 (6th Cir. 2009).

“It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under Brady. The existence of a less formal, unwritten or tacit agreement is also subject to Brady 's disclosure mandate.” Bell v. Bell, 512 F.3d 223, 233 (6th Cir. 2008), cert. denied, 129 S. Ct. 114, 172 L. Ed. 2d 35 (2008).

32 **No Violation of § 201**

18 U.S.C.A. § 201(c)(2) provides that whoever “directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom …”

“Nor can Schneider establish that the payment of fees was favorable to the defense (the second *Brady* element) because the victim, an alleged crime victim, was paid via statutorily-mandated vouchers, unlike the witness in *United States v. Bagley*, who was paid in cash as a cooperating informant in exchange for information.” U.S. v. Schneider, 801 F.3d 186, 202 (3d Cir. 2015), cert. denied, 136 S. Ct. 1217.

“We today join our sister circuits and hold that 18 U.S.C. § 201(c)(2) does not prohibit the government from paying fees, housing, expenses, and cash rewards to any cooperating witness, so long as the payment does not recompense any corruption of the truth of testimony.” U.S. v. Ihnatenko, 482 F.3d 1097, 1100 (9th Cir. 2007).

“[T]he government can pay informants to gather information and can have those informants testify at trial. In reaching this conclusion we stress, as the Fourth Circuit did, that ‘a defendant's right to be apprised of the government's compensation arrangement with the witness, and to inquire about it on cross-examination, must be vigorously protected.’ And of course perjury and the use of perjured testimony remain illegal.” U.S. v. Harris, 210 F.3d 165, 167 (3d Cir. 2000) (quoting U.S. v. Anty, 203 F.3d 305, 312 (4th Cir. 2000)).

“Legitimizing the payment of money to witnesses can be a risky business, particularly when the payment greatly outstrips any anticipated expense. The payment becomes a reward, and as with any reward, the danger is that the recipient, out of gratitude or greed, might be inclined to alter or bend the truth. Accordingly, the government must act with great care when engaging in the practice of paying for more than expenses. Moreover, a defendant's right to be apprised of the government's compensation arrangement with the witness, and to inquire about it on cross-examination, must be vigorously protected. The adversary process must be allowed to probe for possible corruption of testimony, because it is this corruption at which 18 U.S.C. § 201(c)(2) aims.” U.S. v. Anty, 203 F.3d 305, 311–312 (4th Cir. 2000), cert. denied, 531 U.S. 853, 121 S. Ct. 131, 148 L. Ed. 2d 84 (2000).

33 **Agurs case**

U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

34 **Knew or should have known**

427 U.S. at 103, 96 S. Ct. at 2397.

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“In the instant case, the government knew that some portion of the records was fictitious, that their author had stated that they were false in their entirety, and that no adequate further inquiry had been made into their veracity. It should have known that introduction of the records with Stirling's unqualified testimony concerning their significance conveyed a message to misleading as to amount to falsity.” U.S. v. Vozzella, 124 F.3d 389, 393 (2d Cir. 1997).

35 **Known perjury**

427 U.S. at 103, 96 S. Ct. at 2397.

When the violation involves a claim that false testimony was offered "the materiality assessment is less stringent than that for more general *Brady* withholding of evidence claims." Rosencrantz v. Lafler, 568 F.3d 577, 584 (6th Cir. 2009).

“[W]e believe that where undisclosed Brady material undermines the credibility of specific evidence that the government otherwise knew or should have known to be false, the standard of materiality applicable to the first Brady category applies. In such circumstances, the failure to disclose is part and parcel of the presentation of false evidence to the jury … and is a far more serious act than a failure to disclose generally exculpatory material.” U.S. v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997).

“The standard of materiality is less stringent, however, when the prosecutor knowingly uses perjured testimony or fails to correct testimony he or she learns to be false. In that instance, the falsehood is deemed material if a ‘reasonable likelihood’ exists that the false testimony could have affected the jury's verdict.” U.S. v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997).

“The standard of materiality is less stringent, however, if the Government knowingly used perjured testimony or failed to correct testimony it learned was false. In that case, the test is whether it is reasonably likely that the falsehood could have affected the jury's verdict.” U.S. v. Lyons, 352 F. Supp. 2d 1231, 1244 (M.D. Fla. 2004).

36 **Specific request**

427 U.S. at 104, 96 S. Ct. at 2398.

Since there had been a specific request for the deceased's rap sheet, and it tended to confirm the testimony of the defendant and refute that of the only other witness to the killing, the sheet might have proved critical to the jury and its suppression violated the Brady rule. Martinez v. Wainwright, 621 F.2d 184, 188–189 (5th Cir. 1980).

It was error to fail to conduct an in camera review of Brady material where there had been a request for specific documents sought as potentially exculpatory evidence in a case in which the uncontroverted evidence did not so conclusively establish defendant's guilt as to permit a conclusion that the undisclosed material could not have affected the outcome. U.S. v. Gaston, 608 F.2d 607, 613–614 (5th Cir. 1979).

Even assuming a specific request was made, failure to disclose did not require reversal where some of the evidence would have been merely cumulative as to credibility and the remaining undisclosed evidence impunging credibility would not have affected the outcome. U. S. ex rel. Marzeno v. Gengler, 574 F.2d 730, 736–737 (3d Cir. 1978).

Government's insistence that suppression of its friendly relationship with government witness was inadvertent and that witness's relationship with prosecution was, in fact, partially disclosed did not eliminate need for reversal of conviction where balance of evidence suppressed, including fact that witness was in protective custody and being paid substantial monthly allowances, might reasonably have affected jury's judgment on some material point. U.S. v. Librach, 520 F.2d 550, 559 (8th Cir. 1975).

37 **General request**

427 U.S. at 107–113, 96 S. Ct. at 2399–2402.

In the Agurs case itself, there had been no request for the arrest record of the deceased and it was held not error to have failed to tender it. 427 U.S. at 114, 96 S. Ct. at 2402.

Failure of the government to produce the report of an FBI interview with a material witness did not require a new trial, where defendant made only a general request, and use of the report would have been merely cumulative and would not have created a reasonable doubt that did not otherwise exist. U.S. v. Robinson, 585 F.2d 274, 281 (7th Cir. 1978), cert. denied, 441 U.S. 947, 99 S. Ct. 2171, 60 L. Ed. 2d 1051 (1979).

Since only a general request had been made, failure of government to disclose that it had paid $300 to a key government witness did not require a new trial. U.S. v. Jackson, 579 F.2d 553, 560 (10th Cir. 1978), cert. denied, 439 U.S. 981, 99 S. Ct. 569, 58 L. Ed. 2d 652 (1978).

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Trial court, in securities-fraud prosecution, did not err by denying one defendant's oral motion during trial for order requiring government to lodge all Securities and Exchange Commission transcripts and statements and interviews with witnesses by Federal Bureau of Investigation, postal service, or anyone else that were in possession of United States attorney for court's examination to ferret out possible exculpatory material. U.S. v. Weiner, 578 F.2d 757, 765 (9th Cir. 1978), cert. denied, 439 U.S. 981, 99 S. Ct. 568, 58 L. Ed. 2d 651 (1978).

Defense discovery requests seeking all evidence of any kind favorable to defendants was a general request, rather than a specific request, and thus, government's failure to disclose two letters written by United States attorney to prospective customers of contractor, from which defendants allegedly had extorted sum, did not violate defendant's right to fair trial under Brady v. Maryland, in absence of showing that the letters would have created reasonable doubt as to guilt of defendants. U.S. v. DiCarlo, 575 F.2d 952, 960 (1st Cir. 1978), cert. denied, 439 U.S. 834, 99 S. Ct. 115, 58 L. Ed. 2d 129 (1978).

Evidence that a prosecution witness who testified he had made two trips to import cocaine had also made two other trips to purchase marijuana was not sufficient to create a reasonable doubt and the government's failure to disclose that evidence in response to a general request for all exculpatory information did not require reversal. U.S. v. Lasky, 548 F.2d 835, 840 (9th Cir. 1977), cert. denied, 434 U.S. 821, 98 S. Ct. 63, 54 L. Ed. 2d 77 (1977).

Assuming that defense request for exculpatory material was not specific, nevertheless, case was one where verdict had only slight support and additional evidence of relatively minor importance might have been sufficient to create reasonable doubt, and thus, government should have produced letters written by United States attorney for witness that could have been used to impeach witness whose testimony was essential to government's case on two counts of indictment. U.S. v. McCrane, 547 F.2d 204, 207 (3d Cir. 1976).

Even if statement made by witness at time of line-up did constitute exculpatory evidence and was material where defendant was given the statement as soon as he specifically requested line-up statement, failure of prosecution to produce the statement in response to generalized request or exculpatory material did not violate requirements of United States Supreme Court decision relating to prosecution's production of exculpatory evidence. U.S. v. Burke, 506 F.2d 1165, 1169 (9th Cir. 1974), cert. denied, 421 U.S. 915, 95 S. Ct. 1576, 43 L. Ed. 2d 781 (1975).

38 **“Reasonable probability” test**

473 U.S. at 682, 105 S. Ct. at 3383. This part of Justice Blackmun's opinion in Bagley was joined only by Justice O'Connor. But Justice White, in an opinion joined by Chief Justice Burger and by Justice Rehnquist, said: “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.” 473 U.S. at 685, 105 S. Ct. at 3385.

Test applied

“Semantics aside, here is where the rubber meets the road: This was a case that surprisingly pivoted entirely on the credibility of Delgado and his two cohorts. The unproduced *Brady* materials were the only evidence that would have eliminated the claim that the testimony was entirely uncoordinated, and the Delgado letter would have provided a uniquely colorful tool for both attacking Delgado's motivation and raising the prospect that Delgado and the prosecutor were hiding something from the jury. Many members of the public would pause when told that a jury accepted Delgado's testimony—and convicted Ramos and Omar—without being shown any of these documents.” U.S. v. Flores-Rivera, 787 F.3d 1, 20 (1st Cir. 2015).

Had the full extent of the prosecution's deal with a critical witness been revealed, it would have put the testimony in a different light regarding whether the witness was competent or insane, which creates a reasonable probability of a different result had the exculpatory evidence been disclosed. Silva v. Brown, 416 F.3d 980, 986–987 (9th Cir. 2005).

The government's failure to disclose that its key witness suggested that he be hypnotized to “truly recall” the events was material, and the government's acknowledgment that one witness had memory problems and another lacked credibility meant that the suppression of an FBI memorandum regarding the key witness's suggestion “may have made the difference between a conviction or acquittal.” Conley v. U.S., 415 F.3d 183, 191 (1st Cir. 2005).

“We are particularly troubled by the prosecution's affirmative misrepresentation concerning the scope of benefits provided to the testifying aliens and its failure to divulge evidence that its star witness, Agent Cruce,

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personally disliked Sipe,” and therefore the grant of a new trial for Brady violations was not erroneous. U.S. v. Sipe, 388 F.3d 471, 477 (5th Cir. 2004).

Disclosure of government report on the history of the gun before it entered defendant's apartment was immaterial because the “report adds nothing to the issue in dispute-that Gillaum had possession of the handgun. Evidence that corroborates a portion of a defendant's story that is not directly relevant to the crime charged does not justify a finding of materiality under Brady.” U.S. v. Gillaum, 372 F.3d 848, 858–859 (7th Cir. 2004), cert. denied, 543 U.S. 969, 125 S. Ct. 427, 160 L. Ed. 2d 339 (2004).

The Antiterrorism and Effective Death Penalty Act requirement that a federal habeas court defer to the state court's adjudication of a claim on its merit does not apply when the claim is based on Brady material that has surfaced for the first time during federal proceedings. Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003).

Failure to disclose that an employee, who initially was to testify, claimed memory loss with regard to handing defendant envelopes of cash in exchange for checks did not violate the government's Brady disclosure duty. The defendant testified that she knew of no illegal activity at the business, the employee had not withdrawn his statements that he laundered money through the business through a fake job, and documentary evidence supported his story. U.S. v. Cunan, 152 F.3d 29, 35 (1st Cir. 1998).

Prosecution's suppression of evidence of its agreement to provide benefits to a witness in exchange for his testimony undermined the court's confidence in the outcome of the trial and due process required that that evidence be disclosed. Singh v. Prunty, 142 F.3d 1157, 1161–1162 (9th Cir. 1998), cert. denied, 525 U.S. 956, 119 S. Ct. 388, 142 L. Ed. 2d 321 (1998).

Prosecution violated Brady by failing to turn over to a prison inmate, who was accused of capital murder while in prison, an interoffice communication in which a prison official stated that a second inmate told him that a third inmate, not the defendant committed the murder. Three other inmates testified to the same effect at trial, but the prosecution was able to impeach their testimony by pointing out that the third inmate was “conveniently dead” when they accused him of murder. The prosecution could not have made that argument to impeach the second inmate's statement as it was made on the day of the killing, before the third inmate died. Clemmons v. Delo, 124 F.3d 944, 950–951 (8th Cir. 1997), cert. denied, 523 U.S. 1088, 118 S. Ct. 1548, 140 L. Ed. 2d 695 (1998).

Prosecution witness's testimony in the penalty phase of a capital-murder case that defendant had raped her and confessed to killing other women was material to the issue of defendant's future dangerousness. Therefore the prosecution's failure to disclose the witness's criminal record, which would have led defendant to discover the witness's history of mental illness, violated Brady v. Maryland. The investigating officer's testimony did not corroborate the witness's testimony as to rape or confession, and that testimony was a critical part of the state's case on future dangerousness. East v. Johnson, 123 F.3d 235, 237–238 (5th Cir. 1997).

Co-defendant's testimony at his separate trial was sufficiently material and favorable to the defendant that the trial court's denial of defendant's motion to be tried after the co-defendant undermined confidence in the guilty verdict and required a new trial. Taylor v. Singletary, 122 F.3d 1390, 1394–1396 (11th Cir. 1997).

Government's nondisclosure of potential impeachment evidence, which was both favorable to the defense and material, required reversal of conviction, each piece of the withheld evidence could have been used by the defense to undermine the credibility of government witnesses, the testimony of the government witnesses was the linchpin of the government's case, and the jury very well could have reached a different verdict had the defendant been armed with the impeachment evidence. U.S. v. Pelullo, 105 F.3d 117, 123–124 (3d Cir. 1997).

Failure of the prosecution to disclose to defendant that another individual had been arrested for the same crime and that there were witnesses and physical evidence linking that other person to the crime suggested a reasonable probability that the result of the proceeding would have been different. Banks v. Reynolds, 54 F.3d 1508, 1519–1521 (10th Cir. 1995).

Trial court properly denied defendant's motion where there was no reasonable probability that documents would have led to acquittal. U.S. v. Vue, 13 F.3d 1206, 1209 (8th Cir. 1994), **citing Wright.**

39 **Banks case**

Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004).

40 **Prosecutor's duty**

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540 U.S. 668, 696, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). Prior to trial, the state prosecutor informed Banks' counsel, “[W]e will, without the necessity of motions [,] provide you with all discovery to which you are entitled.” The prosecutor failed to disclose that it withheld information about “two essential prosecution witnesses,” that one was a paid police informant and a transcript of the other showing the prosecutor and police officers “intensively coached” the witness. The Court expressed incredulity with the state's argument that, on habeas corpus, the defendant had not been appropriately diligent in pursuing the Brady material: “The State here nevertheless urges, in effect, that ‘the prosecution can lie and conceal and the prisoner still has the burden to … discover the evidence,’ Tr. of Oral Arg. 35, so long as the ‘potential existence’ of a prosecutorial misconduct claim might have been detected, id. at 36. A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process. ‘Ordinarily, we presume that public officials have properly discharged their official duties.’ [quoting Bracy v. Gramley, 1997, 117 S.Ct. 1793, 520 U.S. 899, 138 L.Ed.2d 97].” 540 U.S. at 696, 124 S. Ct. at 1275.

"According to the prosecution here, as the government argued in *Banks*, it was the lawyer's responsibility to 'discover this evidence.' If the prosecution and the dissent are right, we must punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had. The *Banks* case makes it clear that the client does not lose the benefit of *Brady* when the lawyer fails to 'detect' the favorable information." U.S. v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013).

“In this case, the Government deprived King of any access to the grand jury testimony and so prevented him from specifically proving its materiality.” U.S. v. King, 628 F.3d 693, 703 (4th Cir. 2011).

41 **Reasonable Probability**

“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. As the District Court recognized, however, petitioner's burden is to establish a reasonable probability of a different result.” Strickler v. Greene, 527 U.S. 263, 291, 119 S. Ct. 1936, 1953, 144 L. Ed. 2d 286 (1999).

See also

"The suppressed evidence need not be admissible to be material under *Brady*; but it must, somehow, create a reasonable probability that the result of the proceeding would be different." U.S. v. Brown, 650 F.3d 581, 588 (5th Cir. 2011), cert. denied, 566 U.S. 970, 132 S. Ct. 1969, 182 L. Ed. 2d 833 (2012).

Although the state court identified the correct legal standard for evaluating a Brady claim, it improperly rejected the claim by finding that each piece of evidence did not conclusively establish the defendant's innocence and failing to look at the evidence cumulatively as required by Kyles V. Whitley. Goudy v. Basinger, 604 F.3d 394, 400 (7th Cir. 2010).

42 **Materiality under Giglio**

In Giglio, the Court quoted the standard applied Napue v. People of Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), a case involving the prosecution's use of perjured testimony, that a new trial is required “the false testimony could … in any reasonable likelihood have affected the judgment of the jury.” 360 U.S. at 271, 79 S. Ct. at 1178.

"Thus, even if the false testimony ‘may not have affected the jury's verdict,’ it is material if the evidence reasonably *could* have affected the verdict." United States v. Ausby, 916 F.3d 1089, 1093 (D.C. Cir. 2019) (italics in original).

"It cannot be that Junior's omission of criminal convictions and gang membership information on some, but not all, of his immigration forms tips the balance of the evidence sufficiently to throw the jury's entire verdict into question. The purportedly suppressed evidence, then, was not material under *Brady*." United States v. Chavez, 894 F.3d 593, 601 (4th Cir. 2018), cert. denied, 139 S. Ct. 278 (2018).

"[I]t is only those new avenues of impeachment that sufficiently undermine confidence in the verdict that will make out a successful *Brady* claim." U.S. v. Walker, 657 F.3d 160, 188 (3d Cir. 2011), cert. denied, 566 U.S. 1170, 132 S. Ct. 1122, 181 L. Ed. 2d 1001 (2012).

"The cases in which this court has found that a new basis for impeachment existed generally involved a much starker contrast between the available and suppressed impeachment evidence." U.S. v. Cooper, 654 F.3d 1104, 1121 (10th Cir. 2011).

“[T]the materiality standard under Giglio is less stringent than under a garden variety Brady claim.” U.S. v. Svete, 521 F.3d 1302, 1313 (11th Cir. 2008), on reh'g en banc, 556 F.3d 1157 (11th Cir. 2009).

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“The materiality prong is easier to establish with Giglio claims than with Brady claims.” Brown v. Head, 272 F.3d 1308, 1317 (11th Cir. 2001), cert. denied, 537 U.S. 978, 123 S. Ct. 476, 154 L. Ed. 2d 338 (2002).

43 **Impeaching evidence**

"Thus, the Supreme Court has long recognized that suppression of strong and non-cumulative evidence related to the credibility of an important witness is material under *Brady*, at least when the witness's testimony is critical to the prosecution's case." Sims v. Hyatte, 914 F.3d 1078, 1088 (7th Cir. 2019).

"Had the defense been able to impeach Forrest with Nesbitt's information, Forrest's reaction could have done wonders for the defense. Nesbitt's statements, if believed, showed that Forrest was actively disregarding his cooperation agreement, his bond, and the law. Had this been raised with him on cross-examination, Forrest might have invoked the Fifth Amendment and refused to testify in order to avoid either perjuring himself or opening himself up to yet another drug conviction. At the least, Nesbitt's statement would have dented Forrest's assertion that he had been on the straight and narrow since he began cooperating with the government. That matters. Such a claim would enhance the witness's credibility with the jury, if one thinks that jurors are more likely to trust a reformed criminal than an active one. Yet the implication is flipped if the redemption story turns out to be a lie." United States v. Walter, 870 F.3d 622, 630-631 (7th Cir. 2017).

"The impeachment value of the evidence that LaDonna had knowingly filed five false individual tax returns was cumulative to LaDonna's admission at trial that she had prepared and filed years of false income tax returns on behalf of 2FT clients." United States v. Davis, 863 F.3d 894, 908 (D.C. Cir. 2017).

"If the Government had the ability or obligation to disclose to Thomas the eventual compensation, it is plausible that the withholding of evidence might have affected the outcome of the case. But during the federal trial the Government had no obligation to disclose to the defendant whether it was considering the eventual payment to Jackson." Thomas v. United States, 849 F.3d 669, 680 (6th Cir. 2017), cert. denied, 138 S. Ct. 261, 199 L. Ed. 2d 124 (2017).

"The record confirms that Wright effectively impeached Blaksley at trial. Any additional impeachment evidence would have been cumulative and insufficient to support a *Brady* violation." United States v. Wright, 848 F.3d 1274, 1283 (10th Cir. 2017), petition for certiorari filed, 138 S. Ct. 115, 199 L. Ed. 2d 187 (2017).

“We conclude that had Thomas's testimony against Shelton been excluded as a result of the prosecution's secret efforts to preclude an inquiry into his competency, there is a reasonable probability that the jury would not have found Shelton guilty of deliberate and premeditated first-degree murder—that the outcome of the proceeding would have been different. Certainly, viewing the record as a whole we cannot be confident that the verdict would have been the same. We do not rely on the possibility that Thomas's testimony was excludable, however, as we also hold that there was a reasonable probability of a different outcome had Thomas's testimony been admitted and then impeached by evidence of the prosecution's undisclosed deal with him.” Shelton v. Marshall, 796 F.3d 1075, 1085 (9th Cir. 2015), for additional opinion, see, 621 Fed. Appx. 873 (9th Cir. 2015) and amended on reh'g, 806 F.3d 1011 (9th Cir. 2015).

“Lapan's cross-examination was short, focusing on Hardy's weak vision and his arguable inability to identify people running across his field of vision. The suppressed information would have added to the force of the cross-examination and defense counsel's closing argument. There is a reasonable probability that the suppressed information would have made a difference, causing the jury to view Hardy's implication of Amado with a great deal more suspicion.” Amado v. Gonzalez, 758 F.3d 1119, 1139 (9th Cir. 2014).

“A prejudicial *Brady* violation has not been effected, however, where the defendant already had available to him evidence that would have allowed for impeachment on the same or similar topics … While the Andino proffer had the potential to lead to a line of questioning regarding Vega's truthfulness with law enforcement and with the jury, Paladin already had available—and used—the same kind of evidence to undermine Vega's credibility.” U.S. v. Paladin, 748 F.3d 438, 447 (1st Cir. 2014), cert. denied, 574 U.S. 1019, 135 S. Ct. 694 (2014).

"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." Browning v. Trammell, 717 F.3d 1092, 1106 (10th Cir. 2013).

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"The District Court was correct that admissibility is a consideration that bears on *Brady* materiality. The materiality standard, however, is not reducible to a simple determination of admissibility. Rather, we believe, as do the majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence." Johnson v. Folino, 705 F.3d 117, 129 (3d Cir. 2013), cert. denied, 571 U.S. 939, 134 S. Ct. 61, 187 L. Ed. 2d 253 (2013).

"The government is correct that Lauricella and Ledwith's testimony contains what appears to be inadmissible hearsay. Even so, items may still be material and favorable under *Brady* if not admissible themselves so long as they could lead to admissible evidence." U.S. v. Mahaffy, 693 F.3d 113, 131 (2d Cir. 2012).

"The Newsome report is indubitably impeaching, in that it establishes a motive not only for Barber to implicate someone else, but to point the finger specifically at Wolfe. Indeed, it cannot be trivialized that-as Detective Newsome's own report demonstrates-Newsome fed Barber the crux of his testimony, i.e., that he was hired by Wolfe to murder Petrole. Put simply, the Newsome report is crucial, impeaching evidence that was unquestionably subject to disclosure under *Brady*." Wolfe v. Clarke, 691 F.3d 410, 423 (4th Cir. 2012).

“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.” LaCaze v. Warden Louisiana Correctional Institute for Women, 645 F.3d 728, 736 (5th Cir. 2011).

“The district court did not abuse its discretion in concluding that evidence of additional possible sources of pro-government bias would have been largely cumulative of Salem's impeachment efforts and therefore was immaterial for the purposes of Brady.” U.S. v. Salem, 643 F.3d 221, 229 (7th Cir. 2011).

“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.” Lambert v. Beard, 633 F.3d 126, 135 (3d Cir. 2011).

"The evidence demonstrating the CI's breach of a prior agreement with the DEA in 2004, along with the allegations of criminal conduct occurring in 2005, raises a reasonable probability that the outcome in this case might have been different. The government's failure to disclose these other agreements, in connection with the district court's decision to preclude cross-examination on the CI's alleged criminal activities during these previous engagements, made the presentation of this additional impeachment testimony impossible. While we cannot speculate on whether the district court's decision to exclude this testimony would have been different had it been aware of the additional DEA agreements, the failure to disclose this evidence sufficiently undermines our confidence in the outcome of this case." U.S. v. Torres, 569 F.3d 1277, 1283 (10th Cir. 2009).

"Where the prosecution possesses or knows of material favorable to the defendant that would be admissible subject to the court's discretion *Brady* requires that such material be turned over to the defense." U.S. v. Price, 566 F.3d 900, 912 (9th Cir. 2009).

To be considered cumulative, undisclosed impeachment evidence must be the same kind of evidence as that introduced at trial; “Harper's admission that she prepared loan applications containing false statements for Brodie is similar to her previous admissions that she had prepared hundreds of appraisals containing false statements. The withheld evidence was simply another illustration of Harper's untruthfulness rather than evidence ‘almost unique in its detrimental effect’ on Harper's credibility.” U.S. v. Brodie, 524 F.3d 259, 269 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1396 (2009).

“When assessing the materiality of Giglio information, we must consider the significance of the suppressed evidence in relation to the entire record.” U.S. v. Gonzalez-Montoya, 161 F.3d 643, 650 (10th Cir. 1998), cert. denied, 526 U.S. 1033, 119 S. Ct. 1284, 143 L. Ed. 2d 377 (1999).

“Evidence of impeachment is material if the witness whose testimony is attacked supplied the only evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.” U.S. v. Wong, 78 F.3d 73, 79 (2d Cir. 1996).

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“Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the Brady requirement.” U.S. v. Dweck, 913 F.2d 365, 371 (7th Cir. 1990).

“Knowing that Lopez lied ‘about everything’ permitted Rodriguez to take advantage of Lopez's prior lies to law enforcement and to establish that she changed her story to obtain a cooperation agreement with the Government in the hope of getting a reduced sentence. Knowing that Lopez had lied specifically about not knowing what was going on at the time of her arrest would not have materially aided Rodriguez's cross-examination of her or advanced his defense. At most, knowing the specific lies might have caused Rodriguez to ask Lopez a few more impeaching questions, but cumulative impeachment information is not material or prejudicial in the Brady context.” U.S. v. Rodriguez, 538 F. Supp. 2d 674, 678 (S.D. N.Y. 2008).

“Impeachment evidence is material where the witness whose credibility is at issue supplied the primary evidence linking the defendant to the crime,” Orena v. U.S., 956 F. Supp. 1071, 1106 (E.D. N.Y. 1997).

But see

“However, the failure to disclose impeachment evidence does not require automatic reversal, even where, as here, the prosecution's case depends largely on the credibility of a particular witness.” U.S. v. Trujillo, 136 F.3d 1388, 1393 (10th Cir. 1998), cert. denied, 525 U.S. 833, 119 S. Ct. 87, 142 L. Ed. 2d 69 (1998).

43.50 **Importance of eyewitness**

"We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. That is not the case here. Boatner's testimony was the *only* evidence linking Smith to the crime." 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012) (italics in original).

43.70 **Too little**

137 S. Ct. 1885, 1894 (2017). The Court explained, "The witnesses may have differed on minor details, but virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators. The evidence at trial was such that, even though petitioners knew that Freeman saw two men enter the alley after he discovered Fuller's body, that one appeared to have a bulky object hidden under his coat, and that both ran when the police arrived, none of the petitioners attempted to mount a defense that implicated those men as alternative perpetrators acting alone." 137 S. Ct. at 1894.

44 **Not sufficiency-of-evidence test**

Kyles v. Whitley, 514 U.S. 419, 434–435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995).

“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.” Strickler v. Greene, 527 U.S. 263, 290, 119 S. Ct. 1936, 1952, 144 L. Ed. 2d 286 (1999).

“One observation on materiality: The test generally doesn't fluctuate with the government's culpability. Defendants believe that it does and suggest there's an inverse relationship between the two: the greater the government's culpability, the lesser the defendant's burden on materiality. That suggestion, however, runs afoul of our caselaw.” U.S. v. Reese, 745 F.3d 1075, 1084 (10th Cir. 2014), cert. denied, 574 U.S. 894, 135 S. Ct. 235 (2014).

"After the first trial ended with thirty-eight counts of acquittal and a hung jury on the securities fraud conspiracy count, and the jury in the second trial was deadlocked after deliberating for two days on the retried securities fraud conspiracy count, we have little confidence that the result would have been the same had the government complied with its *Brady* obligations and disclosed the SEC transcripts." U.S. v. Mahaffy, 693 F.3d 113, 133 (2d Cir. 2012).

“The government's failure to disclose evidence establishing Blakney's ownership of the heroin therefore undermines our confidence in Johnson's conviction for possessing the heroin with intent to distribute it. Johnson was entitled to assert the stronger defense and we are not confident every juror would have rejected it.” U.S. v. Johnson, 592 F.3d 164, 172 (D.C. Cir. 2010).

"Considering the undisclosed evidence cumulatively means adding up the force of it all and weighing it against the totality of the evidence that was introduced at the trial. That is the way a court decides if its confidence in the guilty verdict is undermined where a suppressed-evidence type of *Brady* claim is involved, or if the suppression was harmless beyond a reasonable doubt where a *Giglio* type of *Brady* claim is involved." Smith v. Secretary, Dept. of Corrections, 572 F.3d 1327, 1334 (11th Cir. 2009).

In a close case, gas station receipts that could have linked another person to the crime were material under Brady and should have been disclosed, and the evidentiary suppression undermines confidence in the verdict

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even though timely disclosure might not have affected the outcome. Trammell v. McKune, 485 F.3d 546, 552 (10th Cir. 2007).

Prosecutor's threatening remark to a key prosecution witness constituted material impeachment evidence that could have substantially undermined the critical value of the witness's testimony, and thus, the Government's failure to disclose this incident to defendant sufficiently undermined the appellate court's confidence in the integrity of the verdict to warrant reversal, even though the witness testified that he was not influenced by the prosecutor's threat, and there was other evidence against the defendant, whether other witnesses gave less conclusive and noncumulative testimony, the threatened witness was central to the government's case, and his credibility was the focal point of the case. U.S. v. Scheer, 168 F.3d 445, 452–453 (11th Cir. 1999).

A defendant does not have to show by a preponderance of the evidence that disclosure of the evidence would have resulted in an acquittal. U.S. v. Ellis, 121 F.3d 908, 915 (4th Cir. 1997), cert. denied, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 674 (1998).

Undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence will still convict. Hays v. Alabama, 85 F.3d 1492, 1498 (11th Cir. 1996), cert. denied, 520 U.S. 1123, 117 S. Ct. 1262, 137 L. Ed. 2d 341 (1997).

Dismissal of Superior Court charges against a key government witness was material and should have been disclosed to the defendant under Brady, and the trial court should have reviewed the medical records of the witness before ruling that they were immaterial. U.S. v. Smith, 77 F.3d 511, 514–515 (D.C. Cir. 1996).

But cf.

Although the government's illegal procurement of a green card for one of its main witnesses should have been disclosed, this newly discovered evidence was not material under Brady because the “materiality of omitted evidence is assessed in light of other evidence, not merely in terms of its probative value standing alone.” U.S. v. Ross, 372 F.3d 1097, 1107–1108 (9th Cir. 2004).

Although the test for materiality is not a sufficiency-of-evidence test, the strength of the independent evidence of defendants' guilt increases the degree of significance that would need to be ascribed to the withheld impeachment evidence in order for it reasonably to undermine confidence in the verdict. U.S. v. Orena, 145 F.3d 551, 559 (2d Cir. 1998), cert. denied, 525 U.S. 1072, 119 S. Ct. 805, 142 L. Ed. 2d 665 (1999).

45 **Evidence considered collectively**

“[T]he state post conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, and failed even to mention the statements of the two inmates impeaching Scott.” Wearry v. Cain, 136 S. Ct. 1002, 1007, 194 L. Ed. 2d 78 (2016) (citations omitted).

Kyles v. Whitley, 514 U.S. 419, 437–438, 115 S. Ct. 1555, 1567–1568, 131 L. Ed. 2d 490 (1995).

“But prosecutorial misbehavior alone does not a Brady violation make. A reasonable possibility of concrete prejudice from the false testimony or the delayed disclosure must be shown.” U.S. v. Straker, 800 F.3d 570, 604 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 170.

“When the prosecution fails to turn over numerous pieces of favorable evidence, the proper focus of Brady's materiality inquiry is on the cumulative effect of the unsuppressed evidence on the jury's verdict.” Gumm v. Mitchell, 775 F.3d 345, 370 (6th Cir. 2014).

“We find the cumulative effect of the suppressed evidence denied Valdovinos a fair trial. The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence.” Valdovinos v. McGrath, 598 F.3d 568, 580 (9th Cir. 2010).

“Overall, the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened. The two key witnesses presented by the state would have been substantially less credible, thus undermining the main evidence implicating Simmons in Knaze's death and Cobaugh's assault. Therefore, we agree with the District Court and hold that, cumulatively, the Commonwealth's *Brady* violations leave us without confidence in Simmons's conviction.” Simmons v. Beard, 590 F.3d 223, 238-239 (3d Cir. 2009).

"Given that the suppressed statements directly undermine the prosecution witnesses' testimony that the struggle had ended and that Zimmer had turned toward his truck before David Mahler shot him, the jury was entitled to know of the withheld evidence in making its credibility determinations." Mahler v. Kaylo, 537 F.3d 494, 504 (5th Cir. 2008).

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The two suppressed statements that were contradictory were material because the government's case rested almost entirely on the testimony of the witness who made the statements and the testimony was inconsistent with them. Graves v. Dretke, 442 F.3d 334, 344 (5th Cir. 2006), cert. denied, 549 U.S. 943, 127 S. Ct. 374, 166 L. Ed. 2d 253 (2006).

“Because the Washington Supreme Court failed to complete the second half of the equation, which requires evaluation of the cumulative effect of all the withheld evidence ‘separately and at the end of the discussion,’ its decision was contrary to clearly established Federal law as set forth in *Kyles*.” Barker v. Fleming, 423 F.3d 1085, 1094 (9th Cir. 2005), cert. denied, 547 U.S. 1138, 126 S. Ct. 2041, 164 L. Ed. 2d 796 (2006).

“Even if none of the nondisclosures standing alone could have affected the outcome, when viewed cumulatively in the context of the full array of the facts, we cannot disagree with the conclusion of the district judge that the government's non-disclosures undermined confidence in the jury's verdict.” U.S. v. Sipe, 388 F.3d 471, 477 (5th Cir. 2004).

“Because the state court applied only an item-by-item determination of materiality, the decision is contrary to the Supreme Court's decision in Kyles.” Castleberry v. Brigano, 349 F.3d 286, 291 (6th Cir. 2003).

The Antiterrorism and Effective Death Penalty Act does not affect the requirement that Brady materials must be weighed collectively when a court is considering whether the materials made a material difference to the outcome of the petitioner's trial. Monroe v. Angelone, 323 F.3d 286, 299 (4th Cir. 2003).

Even if interviewee's statement to the police that he and the murder victim had engaged in anal sex at the victim's behest were relevant to whether the victim consented to vaginal sex and anal sex with the defendant on the night of the victim's murder, the prosecution's failure to disclose that statement did not violate Brady, in light of overwhelming evidence that the defendant raped the victim. The victim's wrists were bound with electrical cord, her mouth was tightly gagged with a pair of panties, and the victim was actually found murdered, bound, and gagged in the position in which she was sodomized. Hoke v. Netherland, 92 F.3d 1350, 1357–1358 (4th Cir. 1996), cert. denied, 519 U.S. 1048, 117 S. Ct. 630, 136 L. Ed. 2d 548 (1996).

Information that the state had not disclosed concern to a witness who had accepted a plea bargain to avoid facing the death penalty was not material, where the witness's testimony was supported by other evidence, the undisclosed evidence was cumulative of other evidence impeaching the witness, and the state presented other evidence of the defendant's guilt. Spence v. Johnson, 80 F.3d 989, 994 (5th Cir. 1996), cert. denied, 519 U.S. 1012, 117 S. Ct. 519, 136 L. Ed. 2d 407 (1996).

46 **Kyles case**

514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Justice Souter wrote the opinion of the Court. Justice Stevens joined the opinion of the Court and also wrote a brief concurring opinion, in which Justices Ginsburg and Breyer joined. Justice Scalia dissented, in an opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas.

47 **Verdict worthy of confidence**

514 U.S. at 434, 115 S. Ct. at 1566. The Court explained how Bagley's test of materiality should be understood:

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, 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.

“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.” Wearry v. Cain, 136 S. Ct. 1002, 1006, 194 L. Ed. 2d 78 (2016).

"The video and Delisma's testimony established that his initial, exculpatory denials were false. And although the interview report may have had some minimal impeachment value, there is no reasonable probability that it would have changed the outcome of the trial." United States v. Elbeblawy, 899 F.3d 925, 937 (11th Cir. 2018), cert. denied, 139 S. Ct. 1322, 203 L. Ed. 2d 573 (2019).

"Instead of engaging in a holistic materiality inquiry per *Kyles*, the Pennsylvania Supreme Court proceeded down an analytical path that hinged the activity sheet's *Brady* materiality on the sufficiency of the evidence,

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namely, the strength of Bertha and Cameron's eyewitness testimony, in direct contravention of how the Supreme Court has defined materiality." Dennis v. Secretary, Pennsylvania Department of Corrections, 834 F.3d 263, 303 (3d Cir. 2016).

"Sweeney provided credible evidence that Ruiz simply parroted information supplied by an unscrupulous police officer. Sweeney's testimony thoroughly undermines Ruiz's credibility and thus any reasonable confidence in the outcome of the trial." Lewis v. Connecticut Com'r of Correction, 790 F.3d 109, 124 (2d Cir. 2015).

"Even assuming Valderama's counsel might have made more effective use of tardily disclosed information and evidence had the government timely fulfilled its disclosure obligations in all respects, the government's evidence against appellants was overwhelming." U.S. v. Celis, 608 F.3d 818, 837 (D.C. Cir. 2010), cert. denied, 562 U.S. 1052, 131 S. Ct. 620, 178 L. Ed. 2d 450.

Use of jail house informant's false notes was material to jury's verdict and federal court, on habeas review, had "no confidence in the verdict under these circumstances … [i]n light of the already scant evidence on which the conviction was based[] and the emphasis the notes thus took on at the original trial." Hall v. Director of Corrections, 343 F.3d 976, 984 (9th Cir. 2003).

"What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." U.S. v. Robinson, 39 F.3d 1115, 1119 (10th Cir. 1994).

48 **No harmless-error review**

514 U.S. at 435, 115 S. Ct. at 1566.

"Because the standard applied to new trial motions based on *Brady* violations—what we shall call the 'modified standard' or the 'Brady error rule'—is less onerous and, thus, easier for defendants to satisfy, defendants have an incentive to try to shoehorn as much of the new evidence into the *Brady* category as possible." U.S. v. Maldonado-Rivera, 489 F.3d 60, 66 (1st Cir. 2007).

"[O]nce a court finds a *Brady* violation, a new trial follows as the prescribed remedy, not as a matter of discretion." U.S. v. Oruche, 484 F.3d 590, 595 (D.C. Cir. 2007).

"Once the materiality of the suppressed evidence is established, no further harmless error analysis is necessary, even in the context of habeas review: when the government has suppressed material evidence favorable to the defendant, the conviction must be set aside." Silva v. Brown, 416 F.3d 980, 986 (9th Cir. 2005).

U.S. v. Ryan, 153 F.3d 708, 712 (8th Cir. 1998), cert. denied, 526 U.S. 1064, 119 S. Ct. 1454, 143 L. Ed. 2d 541 (1999); Singh v. Prunty, 142 F.3d 1157, 1159 n. 5 (9th Cir. 1998), cert. denied, 525 U.S. 956, 119 S. Ct. 388, 142 L. Ed. 2d 321 (1998); U.S. v. Frost, 125 F.3d 346, 383 (6th Cir. 1997), cert. denied, 525 U.S. 810, 119 S. Ct. 40, 142 L. Ed. 2d 32 (1998); Taylor v. Singletary, 122 F.3d 1390, 1394 (11th Cir. 1997); U.S. v. Smith, 77 F.3d 511, 517 (D.C. Cir. 1996); U.S. v. Lloyd, 71 F.3d 408, 411 (D.C. Cir. 1995).

49 **De novo review**

"Whether information was material is a question for de novo review." U.S. v. Hemphill, 514 F.3d 1350, 1360 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 590 (2008).

"This court reviews de novo a claim of failure to disclose evidence in violation of *Brady*." U.S. v. Mendez, 514 F.3d 1035, 1046 (10th Cir. 2008), cert. denied, 128 S. Ct. 2455, 171 L. Ed. 2d 250 (2008).

"We review de novo claims of *Brady* violations." U.S. v. Moore, 452 F.3d 382, 387 (5th Cir. 2006).

"We review alleged violations of Brady de novo." U.S. v. Ross, 372 F.3d 1097, 1107 (9th Cir. 2004).

"Allegations of violations of *Brady v. Maryland* present mixed questions of law and fact which this Court reviews *de novo*." Carter v. Bell, 218 F.3d 581, 591 (6th Cir. 2000).

"The district court's conclusion that no Brady violation occurred is subject to de novo review." U.S. v. Mejia, 82 F.3d 1032, 1036 (11th Cir. 1996), cert. denied, 519 U.S. 872, 117 S. Ct. 188, 136 L. Ed. 2d 126 (1996).

49.50 **Usual remedy**

"But even if Swenson could show a Brady violation, the usual remedy is a new trial, not dismissal with prejudice. The district court's remedy cannot be supported on these grounds." United States v. Swenson, 894 F.3d 677, 684 (5th Cir. 2018), cert. denied, 139 S. Ct. 469, 202 L. Ed. 2d 357 (2018).

"It is important to our conclusion that Daaiyah's counsel engaged in a good faith effort to craft a sanction that would fit the Government's violation. Almost invariably, it will not do for a defendant to tell a district court that the only cure is dismissal of the indictment, and then to settle for something less on appeal that would be a basis for a second trial. Here, we think the defense gave the District Court some reasonable options. And the motivation concern works the other way, too, in that a prosecutor who learns of a Brady failure must

have incentive to work with the court to remedy the violation rather than, as was done here, to ask only that the failure be forgiven and forgotten.” U.S. v. Pasha, 797 F.3d 1122, 1141 (D.C. Cir. 2015).

"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 is in the sound discretion of the district court." U.S. v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009), cert. denied, 558 U.S. 1016, 130 S. Ct. 565, 175 L. Ed. 2d 391.

50 **Dismissal of indictment**

"Because dismissing an indictment is a ‘drastic step,’ it is ‘disfavored.’ But, where a defendant was prejudiced by the late disclosure and there was flagrant prosecutorial misconduct, dismissal with prejudice may be an appropriate remedy." United States v. Garrison, 888 F.3d 1057, 1065 (9th Cir. 2018).

“In this case, the failure to produce documents and to record what had or had not been disclosed, along with the affirmative misrepresentations to the court of full compliance, support the district court's finding of ‘flagrant’ prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense. We note as particularly relevant the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and yet it did nothing to ensure it had provided full disclosure until the trial court insisted it produce verification of such after numerous complaints from the defense … Although the appropriate remedy will usually be a new trial, a district court may dismiss the indictment when the prosecution's actions rise, as they did here, to the level of flagrant prosecutorial misconduct.” U.S. v. Chapman, 524 F.3d 1073, 1085–1086 (9th Cir. 2008).

"[T]he Government appears unwilling to own up to its conduct. Indeed, even now the Government continues to argue that the tapes were not *Brady* material. * * * Therefore, the Court finds the *Brady* violation justifies dismissal of the indictment." U.S. v. Fitzgerald, 615 F. Supp. 2d 1156, 1160 (S.D. Cal. 2009).

When the need to disclose Brady materials should have been clear, and the government required the court to endure repeated failures to produce records for *in camera*, ex parte review, the “protracted course of misconduct caused extraordinary prejudice to Lyons, exhibited disregard of the Government's duties, and demonstrated contempt for the court. Accordingly, the Court finds it appropriate to dismiss the remaining counts, as a new trial would be an insufficient remedy.” U.S. v. Lyons, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004).

No dismissal

Segment of tape not disclosed to the defendants "was ambiguous, and the district court found there was no bad faith in failing to deliver the tape to the defense in a timely manner. The record supports that determination. Dismissal of the indictment therefore is not warranted." U.S. v. Williams, 547 F.3d 1187, 1202 (9th Cir. 2008).

51 **Not a discovery rule**

“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.’” U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985). The internal quotation is from the dissenting opinion in Giles v. Maryland, 386 U.S. 66, 117, 87 S. Ct. 793, 818, 17 L. Ed. 2d 737 (1967).

“It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and Brady did not create one ….” Weatherford v. Bursey, 429 U.S. 545, 560, 97 S. Ct. 837, 845–846, 51 L. Ed. 2d 30 (1977).

“Brady did not create a broad rule of discovery in criminal cases.” U.S. v. Prochilo, 629 F.3d 264, 269 (1st Cir. 2011).

“The requirements of Brady are not based on any general constitutional right to discovery in criminal cases, but rather on a defendant's due process right to a fair trial.” U.S. v. Higgs, 713 F.2d 39, 42 (3d Cir. 1983), cert. denied, 464 U.S. 1048, 104 S. Ct. 725, 79 L. Ed. 2d 185 (1984).

“Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.” U.S. v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978).

“It is not a rule of discovery.” U.S. v. Kaplan, 554 F.2d 577, 579 (3d Cir. 1977).

“Brady was never intended to create pre-trial remedies.” U.S. v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971).

"The Government's discovery obligations and *Brady* obligations are not coterminous." U.S. v. Meregildo, 920 F. Supp. 2d 434, 443 (S.D. N.Y. 2013).

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U.S. v. Walker, 922 F. Supp. 732, 741 (N.D. N.Y. 1996), **citing Wright.**

52 **Not codified**

See Advisory Committee Notes for the 1975 amendment.

53 **Important implications**

“[I]n most criminal prosecutions, the *Brady* rule, Rule 16 and the Jencks Act, exhaust the universe of discovery to which the defendant is entitled.” U.S. v. Presser, 844 F.2d 1275, 1285 n. 12 (6th Cir. 1988).

“It is conceivable that some documents which are not covered by Rule 16, e.g., a Jencks Act statement, may be Brady material because of their content. Thus, on occasion there will be an overlap between the two means a federal defendant uses to obtain information in the possession of the prosecution.” U.S. v. Kaplan, 554 F.2d 577, 580 (3d Cir. 1977).

U.S. v. Marenghi, 893 F. Supp. 85, 97 (D. Me. 1995), **citing Wright.**

“Not only the scope of disclosure, but the timing of the allowed discovery turns on the interplay of Brady's constitutional command upon the statutory mandates of Rule 16 and the Jencks Act.” U.S. v. Thevis, 84 F.R.D. 47, 50 (N.D. Ga. 1979).

54 **Less effective**

This is still true even after the Bagley case. As one court summarized it: “Viewing the [Bagley] opinions as a whole, it is fair to say that all the participating Justices agreed on one thing at least: that reversal for suppression of evidence by the government is most likely where the request for it was specific.” Lindsey v. King, 769 F.2d 1034, 1041 (5th Cir. 1985).

See also

"To grant Doe a new trial on the discovery violations, the district court must find a likelihood 'that the verdict would have been different' had the documents been disclosed. To grant Doe a new trial on a Brady violation, however, the district court must merely determine that the documents, if favorable to Doe, undermine its confidence in the outcome and that there is a 'reasonable probability' of a different result. This is a much relaxed standard, and thus it is possible that Doe could be granted a new trial on *Brady* but not discovery grounds." U.S. v. Doe, 705 F.3d 1134, 1152-1153 (9th Cir. 2013).

55 **Material to defense**

The court did not abuse its discretion by not disclosing the presentence report, as the court decided during an *in camera* inspection that the material contained within the report had nothing that the court deemed necessary to disclose, and that absent a compelling need to provide defense counsel with exculpatory and impeachment information, the presentence information does not need to be provided to the defendant. U.S. v. Pena, 227 F.3d 23, 28 (2d Cir. 2000).

District court abused its discretion in ordering disclosure of entire personnel files of three Federal Bureau of Investigation agents without first conducting in camera inspection to determine whether those files contained any evidence material to the preparation of the defense or exculpatory under Brady. U.S. v. Cadet, 727 F.2d 1453, 1467–1468 (9th Cir. 1984).

"[J]ust because information is discoverable pre-trial does not mean its non-production constitutes a *Brady* violation after trial" because the disclosure required under Rule 16 is much broader than that required by Brady. U.S. v. Poulsen, 568 F. Supp. 2d 885, 924 (S.D. Ohio 2008).

U.S. v. Garcia, 2001 WL 173784, *2 n. 8 (D. Del. 2001), **quoting Wright.**

“In essence, this holding as to Rule 16(a)(1)(C) or (D) is that Brady evidence identified by specific request is, by definition, material. On a spectrum, the showing of materiality would vary inversely with the degree to which the specifically requested material were actually Brady. Thus, if Brady material would [were?] specifically requested under Rule 16(a)(1)(C) or (D), no showing of materiality to the defense would be required. However, were the material requested ‘arguably Brady’ some showing of materiality would be required though not the showing required if no Brady information were requested. This requirement also has the exemplary virtue of encouraging the prosecution to seek an in camera determination by the Court if the disclosure of materials specifically requested is in doubt.” U.S. v. Thevis, 84 F.R.D. 47, 52 (N.D. Ga. 1979).

56 **Open file discovery**

“[I]f 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*.” Strickler v. Greene, 527 U.S. 263, 283 n. 23, 119 S. Ct. 1936, 1949 n. 23, 144 L. Ed. 2d 286 (1999).

"Rule 16 does not address the form discovery must take, and the 'open discovery file' provided by the government in this case allowed Graves access to material that was not required by rule, statute, or the

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Constitution. Counsel signed a stipulated discovery and protective order early in the case that permitted the government to produce discovery in digital format and denied Graves paper copies while detained. Graves cites no authority requiring the government to produce electronic discovery in a particular fashion." United States v. Graves, 856 F.3d 567, 570 (8th Cir. 2017).

"We do not hold that the use of a voluminous open file can never violate *Brady*. For instance, evidence that the government 'padded' an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*. But considering the additional steps the government took beyond merely providing Skilling with the open file, the equal access that Skilling and the government had to the open file, the complexity of Skilling's case, and the absence of evidence that the government used the open file to hide potentially exculpatory evidence or otherwise acted in bad faith, we hold that the government's use of the open file did not violate *Brady*." U.S. v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009), rev'd on other grounds, 561 U.S. 338, 130 S. Ct. 2896, 177 L. Ed. 2d 619.

“Assuming that the evidence in question is exculpatory, we find no *Brady* violation because the government did not suppress it. The government allowed the defense to conduct open-file discovery of all documents in its possession.” U.S. v. Morales–Rodriguez, 467 F.3d 1, 15 (1st Cir. 2006), cert. denied, 549 U.S. 1068, 127 S. Ct. 696, 166 L. Ed. 2d 542 (2006).

“Brady and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.” U.S. v. Pelullo, 399 F.3d 197, 212 (3d Cir. 2005), cert. denied, 546 U.S. 1137, 126 S. Ct. 1141, 163 L. Ed. 2d 999 (2006).

“[T]he Government cannot hide *Brady* material as an exculpatory needle in a haystack of discovery materials.” U.S. v. Thomas, 981 F. Supp. 2d 229, 239 (S.D. N.Y. 2013).

57

Plea agreement

The Constitution does not require the pre-guilty plea disclosure of impeachment information because “impeachment information is special in relation to the *fairness of a trial,* not in respect to whether a plea is *voluntary,*” prior Court decisions allow guilty pleas “despite various forms of misapprehension under which a defendant might labor,” and due process considerations argue against such a requirement. U.S. v. Ruiz, 536 U.S. 622, 629, 122 S. Ct. 2450, 2455, 153 L. Ed. 2d 586 (2002) (emphasis in the original).

“[W]e hold that appellees were under no clearly established obligation to disclose exculpatory *Brady* material to the prosecutors in time to be put to effective use in plea bargaining. We do not decide whether appellants have a constitutional right to receive exculpatory *Brady* material from law enforcement prior to entering into a plea agreement.” Robertson v. Lucas, 753 F.3d 606, 621-622 (6th Cir. 2014).

"Conroy argues that the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea. *Ruiz* never makes such a distinction nor can this proposition be implied from its discussion. Accordingly, we conclude that Conroy's guilty plea precludes her from claiming that the government's failure to disclose the FBI report was a *Brady* violation." U.S. v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009).

Alleged impeachment evidence was not material, and therefore, failure to disclose it did not violate Brady and render involuntary defendant's guilty plea where defendant failed to show that he would have insisted on going to trial had the government provided the evidence. U.S. v. Walters, 269 F.3d 1207, 1214–1215 (10th Cir. 2001).

But see

Failure to turn over evidence that the government manipulated a key witness into reverting back to his original version of events from one that exonerated the defendant was an “egregious circumstance” that makes “this one of the rare instances in which the government's failure to turn over evidence constitutes sufficiently parlous behavior to satisfy the misconduct prong” to show the defendant's guilty plea was involuntary. Ferrara v. U.S., 456 F.3d 278, 291 (1st Cir. 2006).

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“The Court declines the Government's invitation to hold that *Ruiz* applies to exculpatory as well as impeachment material.” U.S. v. Danzi, 726 F. Supp. 2d 120, 128 (D. Conn. 2010), opinion clarified, 2010 WL 3463272 (D. Conn. 2010).

58 **Doubtful cases**

"As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." Cone v. Bell, 556 U.S. 449, 469 n.15, 129 S. Ct. 1769, 1783 n. 15, 173 L. Ed. 2d 701 (2009).

“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.” Kyles v. Whitley, 514 U.S. 419, 439, 115 S. Ct. 1555, 1568, 131 L. Ed. 2d 490 (1995).

“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.” U.S. v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399–2400, 49 L. Ed. 2d 342 (1976).

Brady's materiality standard is not the limit of the government's duty of disclosure because the constitutional analysis is post-trial and “should not be used to sanction any and all conduct that does not rise to a constitutional violation of defendant's due process rights because the United States Attorney is held to a higher standard.” U.S. v. Acosta, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005).

“Because the exculpatory nature of any material is, at least prior to trial, a duty imposed upon the prosecutor, many problems and disputes are likely to arise if, during or after trial, the prosecutor's decisions in that regard are found to be inadequate. The Court directs that such disputes are to be resolved on the side of disclosure, so that problems and disputes may be avoided.” U.S. v. Allen, 513 F. Supp. 547, 550–551 (W.D. Okla. 1981).

“As a prophylactic measure against reversible error, and to save court time arguing about discovery omissions, prosecuting attorneys should generally disclose all material that is possibly exculpatory of the defendant. If the prosecution becomes aware, after trial, of exculpatory materials not previously produced, that information, too, should be promptly produced to the defendant.” ABA Standards for Criminal Justice: Discovery, 3d ed. 1996, p. 33.

Singh v. Prunty, 142 F.3d 1157, 1163 (9th Cir. 1998), cert. denied, 525 U.S. 956, 119 S. Ct. 388, 142 L. Ed. 2d 321 (1998); Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995); U.S. v. Conder, 423 F.2d 904, 911, (6th Cir. 1970), **citing Wright**, cert. denied, 400 U.S. 958, 91 S. Ct. 357, 27 L. Ed. 2d 267 (1970); U.S. v. Smith, 65 F.R.D. 464, 473 (N.D. Ga. 1974), **citing Wright.**

59 **Disclosure promotes**

Dennis v. U.S., 384 U.S. 855, 871, 86 S. Ct. 1840, 1849, 16 L. Ed. 2d 973 (1966).

“The government should err on the side of disclosure when interpreting its Brady/Giglio obligations given the need for the utmost reliability in capital proceedings.” U.S. v. Karake, 281 F. Supp. 2d 302, 306 (D.D.C. 2003).

“The conclusion that the Supreme Court today favors broader disclosure in criminal cases approaching, though not quite reaching, the civil practice cannot be doubted in light of the language of the Court when it states: ‘In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.’ 384 U.S. at 873, 86 S.Ct. at 1851.” U.S. v. Westmoreland, 41 F.R.D. 419, 424 (S.D. Ind. 1967).

U.S. v. Baum, 482 F.2d 1325, 1332 (2d Cir. 1973), **citing Wright**; U.S. v. White, 450 F.2d 264, 268–269 (5th Cir. 1971), cert. denied, 405 U.S. 1072, 92 S. Ct. 1523, 31 L. Ed. 2d 805 (1972); U.S. v. Williams, 65 F.R.D. 422, 426 (W.D. Mo. 1974), **quoting Wright.**

60 **Submit problem to judge**

“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.” U.S. v. Agurs, 427 U.S. 97, 106, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976).

“[I]n the pre-trial context, the court should require disclosure of favorable evidence under Brady and Giglio without attempting to analyze its ‘materiality’ at trial. The judge cannot know what possible effect certain evidence will have on a trial not yet held.” U.S. v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004).

In determining what evidence is favorable to an accused and material to either guilt or punishment, the only course to be followed by a prudent prosecutor is to supply any evidence that is even arguably favorable

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to defendant on question of guilt or on question of punishment; that it may be burdensome to supply such evidence is no excuse, and it is unimportant if government fails in good faith to supply exculpatory evidence. U.S. v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977).

61 **Duty to disclose**

Dickson v. Quarterman, 462 F.3d 470, 480 (5th Cir. 2006), **quoting Wright.**

Brady supersedes Rule 16(a)(2), and Assistant U.S. Attorney's notes of an interview with two witnesses who operated a gift shop owned by defendant that allegedly sold counterfeit goods must be produced because the information is material to defendant's guilt and summaries of the interview “are not the equivalent of actual notes” because summaries involve interpretation, context, and emphasis may not be precisely captured, and “seemingly innocuous or immaterial statements by a witness may not be included” may be material to the defendant for impeachment. U.S. v. Park, 319 F. Supp. 2d 1177, 1178 (D. Guam 2004).

Fact that government memoranda are not discoverable under these rules cannot qualify the government's responsibilities under the Brady decision, which, in effect, requires the government to produce, on request, evidence favorable to the accused. U.S. v. DeMarco, 407 F. Supp. 107, 110–112 (C.D. Cal. 1975).

Internal government documents are immune from discovery under Rule 16 but may under some circumstances have to be produced under Brady doctrine. U.S. v. Westmoreland, 41 F.R.D. 419, 427 (S.D. Ind. 1967).

62 **Relation to Jencks Act**

“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.” U.S. v. Rittweger, 524 F.3d 171, 181 n. 4 (2d Cir. 2008), cert. denied, 129 S. Ct. 1391 (2009).

“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.” U.S. v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984).

“Brady does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and Brady material, the Jencks Act standards control.” U.S. v. Jones, 612 F.2d 453, 455 (9th Cir. 1979), cert. denied, 445 U.S. 966, 100 S. Ct. 1656, 64 L. Ed. 2d 242 (1980).

“On several occasions, this Court has addressed this question of possible conflict between the Jencks Act and *Brady*. In each of these cases, this Court held that the prosecutor's compliance with the Jencks Act provided timely disclosure under *Brady*. Several of these cases contain broad language suggesting that the timing provisions of the Jencks Act do not conflict with Brady." U.S. v. Campagnuolo, 592 F.2d 852, 859 (5th Cir. 1979).

"The Government seems to be suggesting in its Opposition that because the Jencks Act precludes disclosure of witness statements until after the witness has testified, there is no obligation under Brady/Giglio to turn over any and all inconsistent statements made by the cooperating witnesses in this case until three days before trial. However, Brady/Giglio obligations always trump both the Jencks Act and any limiting language in Rule 16." U.S. v. Daum, 847 F. Supp. 2d 18, 20 (D.D.C. 2012).

“The language of the statute must submit to the constitutional mandate of Brady, and this Court finds that rights of the defendant of ‘a substantial Due Process character’, U.S. v. Harris, 458 F.2d 670, 677 (5th Cir. 1972), cert. denied, 409 U.S. 888, 93 S. Ct. 195, 34 L. Ed. 2d 145 (1972), will be vitiated if disclosure is not had until the night preceding trial.” U.S. v. Thevis, 84 F.R.D. 47, 54 (N.D. Ga. 1979).

63 **Disclosure obligation applies**

“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.” U.S. v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007).

64 **Inapplicable to warrants**

Mays v. City of Dayton, 134 F.3d 809, 816 (6th Cir. 1998), cert. denied, 524 U.S. 942, 118 S. Ct. 2352, 141 L. Ed. 2d 722 (1998).

65 **Inapplicable to post-conviction proceedings**

557 U.S. 52, 57, 129 S. Ct. 2308, 2320, 174 L. Ed. 2d 38 (2009). The Court explained that a convict's due process right "is not parallel to a trial right," and that "*Brady* is the wrong framework" to analyze that right.

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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.

****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 coconspirator 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?

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'(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** 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.

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.

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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.

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UNITED STATES v. AGURS

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United States Supreme Court

UNITED STATES v. AGURS(1976)

No. 75-491

Argued: April 28, 1976Decided: June 24, 1976

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 judge's firsthand appraisal of the entire record was thorough and entirely reasonable. Mooney v. Holohan, 294 U.S. 103 ; Brady v. Maryland, 373 U.S. 83 , distinguished. Pp. 103-114.

(a) A prosecutor does not violate the constitutional duty of [427 U.S. 97, 98] disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 107-109.

(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. Pp. 109-110.

(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. P. 110.

(d) The proper standard of materiality of undisclosed evidence, and the standard applied by the trial judge in this case, is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Pp. 112-114.

167 U.S. App. D.C. 28, 510 F.2d 1249, reversed.
STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined post, p. 114.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were Solicitor General Bork, Assistant Attorney General Thornburgh, John F. Cooney, Jerome M. Feit, and Robert H. Plaxico.

Edwin J. Bradley argued the cause for respondent. With him on the brief were Michael E. Geltner, William Greenhalgh, and Sherman L. Cohn.

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 [427 U.S. 97, 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 .

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. [427 U.S. 97, 100]

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 [427 U.S. 97, 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 [427 U.S. 97, 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 between the claim of self-defense and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

The Court of Appeals reversed. 5 The court found no lack of diligence on the part of the defense and no misconduct by the prosecutor in this case. It held, however, that the evidence was material, and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received. 6

The decision of the Court of Appeals represents a significant departure from this Court's prior holding; because we believe that that court has incorrectly interpreted the constitutional requirement of due process, we reverse. [427 U.S. 97, 103]

II

The rule of Brady v. Maryland, 373 U.S. 83 , 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.

In the first situation, typified by Mooney v. Holohan, 294 U.S. 103 , the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. 7 In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, 8 and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. 9 It is this line of cases on which the [427 U.S. 97, 104] Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the Mooney line of cases is not necessarily applicable to this case.

The second situation, illustrated by the Brady case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material." 10 A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

Brady was found guilty of murder in the first degree. Since the jury did not add the words "without capital punishment" to the verdict, he was sentenced to death. At his trial Brady did not deny his involvement in the deliberate killing, but testified that it was his accomplice, [427 U.S. 97, 105] Boblit, rather than he, who had actually strangled the decedent. This version of the event was corroborated by one of several confessions made by Boblit but not given to Brady's counsel despite an admittedly adequate request.

After his conviction and sentence had been affirmed on appeal, 11 Brady filed a motion to set aside the judgment, and later a post-conviction proceeding, in which he alleged that the State had violated his constitutional rights by suppressing the Boblit confession. The trial judge denied relief largely because he felt that Boblit's confession would have been inadmissible at Brady's trial. The Maryland Court of Appeals disagreed; 12 it ordered a new trial on the issue of punishment. It held that the withholding of material evidence, even "without guile," was a denial of due process and that there were valid theories on which the confession might have been admissible in Brady's defense.

This Court granted certiorari to consider Brady's contention that the violation of his constitutional right to a fair trial vitiated the entire proceeding. 13 The holding that the suppression of exculpatory evidence violated Brady's right to due process was affirmed, as was the separate holding that he should receive a new trial on the issue of punishment but not on the issue of guilt or innocence. The Court interpreted the Maryland Court [427 U.S. 97, 106] of Appeals opinion as

ruling that the confession was inadmissible on that issue. For that reason, the confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process.

The test of materiality in a case like Brady in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made. 14 Indeed, this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made. Before addressing that question, a brief comment on the function of the request is appropriate.

In Brady the request was specific. It gave the 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.

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 [427 U.S. 97, 107] 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. 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. [427 U.S. 97, 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.

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 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 [427 U.S. 97, 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.

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, 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 . 16 The mere possibility that an item of undisclosed information [427 U.S. 97, 110] might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. 17 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. Cf. Giglio v. United States, 405 U.S. 150, 154 . Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

As the District Court recognized in this case, there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. 18 For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he [427 U.S. 97, 111] 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." Berger v. United States, 295 U.S. 78, 88 . This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. 19 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.

On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to [427 U.S. 97, 112] characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." Kotteakos v. United States, 328 U.S. 750, 764 . Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. 20 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. This means that the omission must be evaluated in the context of the entire record. 21 If there is no reasonable doubt about [427 U.S. 97, 113] 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.

This statement of the standard of materiality describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language. 22 It is also the standard which the trial judge applied in this case. He evaluated the significance of Sewell's prior criminal record in the context of the full trial which he recalled in detail. Stressing in particular the incongruity of a claim that Sewell was the aggressor with the evidence of his multiple wounds and respondent's unscathed condition, the trial judge indicated his unqualified opinion that respondent was guilty. He [427 U.S. 97, 114] noted that Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of the evidence that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket when he registered at the motel.

Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is

Reversed.

Footnotes

[Footnote 1] The alcohol level in Sewell's blood was slightly below the legal definition of intoxication.

[Footnote 2] Moreover, the motel clerk testified that Sewell's wife had said he "would use a knife"; however, Mrs. Sewell denied making this statement. There was no dispute about the fact that Sewell carried the bowie knife when he registered.

[Footnote 3] See United States v. Burks, 152 U.S. App. D.C. 284, 286, 470 F.2d 432, 434 (1972).

[Footnote 4] "THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

. . . . .

> "THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item . . . which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specific request for that information, you do not have any obligation to defense counsel?
>
> "MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.
>
> "THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information, you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?
>
> "MR. CLARKE: No. Your Honor . . . .
>
> "But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice." App. 147-149.

[Footnote 5] 167 U.S. App. D.C. 28, 510 F.2d 1249 (1975). The opinion of the Court of Appeals disposed of the direct appeal filed after respondent was sentenced as well as the two additional appeals taken from the two orders denying motions for new trial. After the denial of the first motion, respondent's counsel requested leave to withdraw in order to enable substitute counsel to file a new motion for a new trial on the ground that trial counsel's representation had been ineffective because he did not request Sewell's criminal record for the reason that he incorrectly believed that it was inadmissible. The District Court denied that motion. Although that action was challenged on appeal, the Court of Appeals did not find it necessary to pass on the validity of that ground. We think it clear, however, that counsel's failure to obtain Sewell's prior criminal record does not demonstrate ineffectiveness.

[Footnote 6] Although a majority of the active judges of the Circuit, as well as one of the members of the panel, expressed doubt about the validity of the panel's decision, the court refused to rehear the case en banc.

[Footnote 7] In Mooney it was alleged that the petitioner's 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." 294 U.S., at 110 .

The Court held that such allegations, if true, would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction.

> "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." Id., at 112.

[Footnote 8] Pyle v. Kansas, 317 U.S. 213 ; Alcorta v. Texas, 355 U.S. 28 ; Napue v. Illinois, 360 U.S. 264 ; Miller v. Pate, 386 U.S. 1 ; Giglio v. United States, 405 U.S. 150 ; Donnelly v. DeChristoforo, 416 U.S. 637 .

[Footnote 9] See Giglio, supra, at 154, quoting from Napue, supra, at 271.

[Footnote 10] "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." 373 U.S., at 87 . Although in Mooney 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. See discussions of this development in Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L. J. 136 (1964); and Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112 (1972).

[Footnote 11] 220 Md. 454, 154 A. 2d 434 (1959).

[Footnote 12] 226 Md. 422, 174 A. 2d. 167 (1961).

[Footnote 13] "The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. Rogers v. Richmond, 365 U.S. 534, 545 . The verdict is not saved because other competent evidence would support it. Culombe v. Connecticut, 367 U.S. 568, 621 ." Brief for Petitioner in Brady v. Maryland, No. 490, O. T. 1962, p. 6.

[Footnote 14] See Comment, 40 U. Chi. L. Rev., supra, n. 10, at 115-117.

[Footnote 15] "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. But we cannot [427 U.S. 97, 109] raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. Williams v. New York, 337 U.S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment." 373 U.S., at 90 -91 (footnote omitted).

[Footnote 16] In his opinion concurring in the judgment in Giles v. Maryland, 386 U.S. 66, 98 , Mr. Justice Fortas stated:

"This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."

[Footnote 17] In Brady this Court, as had the Maryland Court of Appeals, expressly rejected the good faith or the bad faith of the prosecutor as the controlling consideration: "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. 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." 373 U.S., at 87 . (Emphasis added.) If the nature of the prosecutor's conduct is not controlling in a case like Brady, surely it should not be controlling when the prosecutor has not received a specific request for information.

[Footnote 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.

[Footnote 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 ; United States v. Houle, 490 F.2d 167, 171 (CA2 1973), cert. denied, 417 U.S. 970 ; 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 557 (1969).

[Footnote 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.

[Footnote 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 [427 U.S. 97, 113] 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.

[Footnote 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, 393 U.S. 1004 ; 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).
MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. But once having recognized the existence of a duty to volunteer exculpatory evidence, the Court so narrowly defines the category of "material" evidence embraced by the duty as to deprive it of all meaningful content.

In considering the appropriate standard of materiality governing the prosecutor's obligation to volunteer exculpatory evidence, the Court observes:

> "[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been [427 U.S. 97, 115] discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [the standard generally applied to a motion under Fed. Rule Crim. Proc. 33 based on newly discovered evidence. 1]. 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." Ante, at 111 (footnote omitted).

I agree completely.
The Court, however, seemingly forgets these precautionary words when it comes time to state the proper standard of materiality to be applied in cases involving neither the knowing use of perjury nor a specific defense request for an item of information. In such cases, the prosecutor commits constitutional error, the Court holds, "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Ante, at 112. As the Court's subsequent discussion makes clear, the defendant challenging the prosecutor's failure to disclose evidence is entitled to relief, in the Court's view, only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. The burden thus imposed on the defendant is at least as "severe" as, if not more [427 U.S. 97, 116] "severe" than, 2 the burden he generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general Rule 33 standard). In short, in spite of its own salutary precaution, the Court treats the case in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source. The "prosecutor's obligation to serve the cause of justice" is reduced to a status, to borrow the Court's words, of "no special significance." Ante, at 111.

Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might

exonerate him. See Moore v. Illinois, 408 U.S. 786, 810 (1972) (opinion of MARSHALL, J.). This fundamental notion of fairness does not pose any irreconcilable conflict for the prosecutor, for as the Court reminds us, the prosecutor "must always be faithful to his client's overriding interest that `justice shall be done.'" Ante, at 111. No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.

I recognize, of course, that the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of trial. And [427 U.S. 97, 117] while the general obligation to disclose exculpatory information no doubt continues during the trial, giving rise to a duty to disclose information whose significance becomes apparent as the case progresses, even a conscientious prosecutor will fail to appreciate the significance of some items of information. See United States v. Keogh, 391 F.2d 138, 147 (CA2 1968). I agree with the Court that these consideration, as well as the general interest in finality of judgments, preclude the granting of a new trial in every case in which the prosecutor has failed to disclose evidence of some value to the defense. But surely these considerations do not require the rigid rule the Court intends to be applied to all but a relatively small number of such cases.

Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.

More fundamentally, the Court's rule usurps the function of the jury as the trier of fact in a criminal case. The Court's rule explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution. The defendant's fate is sealed so long as the evidence does not create a reasonable doubt as to guilt in the judge's mind, regardless of whether the [427 U.S. 97, 118] evidence is such that reasonable men could disagree as to its import - regardless, in other words, of how "close" the case may be. 3

The Court asserts that this harsh standard of materiality is the standard that "courts appear to have applied in actual cases although the standard has been phrased in different language." Ante, at 113 (footnote omitted). There is no basis for this assertion. None of the cases cited by the Court in support of its statement suggests that a judgment of conviction should be sustained so long as the judge remains convinced beyond a reasonable doubt of the defendant's guilt. 4 The prevailing [427 U.S. 97, 119] view in the federal courts of the standard of materiality for cases involving neither a specific request for information nor other indications of deliberate misconduct - a standard with which the cases cited by the Court are fully consistent - is quite different. It is essentially the following: If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside. 5 This standard, unlike the Court's reflects a recognition that the determination must be in terms of the impact of an item of evidence on the jury, and that this determination cannot always be made with certainty. 6 [427 U.S. 97, 120]

The Court approves - but only for a limited category of cases - a standard virtually identical to the one I have described as reflecting the prevailing view. In cases in which "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," ante, at 103, the judgment of conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Ibid. This lesser burden on the defendant is appropriate, the Court states, primarily because the withholding of evidence contradicting testimony offered by witnesses called by the prosecution "involve[s] a corruption of the truth-seeking function of the trial process." Ante, at 104. But surely the 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. An example offered by Mr. Justice Fortas serves to illustrate the point. "[L]et us assume that the State possesses information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us assume that no related testimony was offered by the State." Giles v. Maryland, 386 U.S. 66, 100 (1967) (concurring in judgment). The suppression of the information unquestionably corrupts the truth-seeking process, and the burden on the defendant in establishing his entitlement to a new trial ought be no different from the burden he would face if related testimony had been elicited by the prosecution. See id., at 99-101.

The Court derives its "reasonable likelihood" standard for cases involving perjury from cases such as Napue v. [427 U.S. 97, 121] Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972). But surely the results in those cases, and the standards applied, would have been no different if perjury had not been involved. In Napue and Giglio, co-conspirators testifying against the defendants testified falsely, in response to questioning by defense counsel, that they had not received promises from the prosecution. The prosecution failed to disclose that promises had in fact been made. The corruption of the truth-seeking process stemmed from the suppression of evidence affecting the overall credibility of the witnesses, see Napue, supra, at 269; Giglio, supra, at 154, and that corruption would have been present whether or not defense counsel had elicited statements from the witnesses denying that promises had been made.

It may be that contrary to the Court's insistence, its treatment of perjury cases reflects simply a desire to deter deliberate prosecutorial misconduct. But if that were the case, we might reasonably expect a rule imposing a lower threshold of materiality than the Court imposes - perhaps a harmless-error standard. And we would certainly expect the rule to apply to a broader category of misconduct than the failure to disclose evidence that contradicts testimony offered by witnesses called by the prosecution. For the prosecutor is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless, once again, of whether the evidence relates directly to testimony given in the course of the Government's case.

This case, however, does not involve deliberate prosecutorial misconduct. Leaving open the question whether a different rule might appropriately be applied in cases involving deliberate misconduct, 7 I would hold that the [427 U.S. 97, 122] defendant in this case had the burden of demonstrating that there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. This is essentially the standard applied by the Court of Appeals, and I would affirm its judgment.

[Footnote 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).

[Footnote 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.

[Footnote 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.

[Footnote 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.

[Footnote 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; Clarke v. Burke, 440 F.2d 853, 855 (CA7 1971); Hamric v. Bailey, 386 F.2d 390, 393 (CA4 1967).

[Footnote 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 [427 U.S. 97, 120] 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).

[Footnote 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 [427 U.S. 97, 122] 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 106. 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. [427 U.S. 97, 123]

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104 S.Ct. 2528
Supreme Court of the United States

CALIFORNIA, Petitioner,
v.
Albert Walter TROMBETTA et al.

No. 83-305.
|
Argued April 18, 1984.
|
Decided June 11, 1984.

Synopsis
In various cases, motions to suppress evidence obtained from intoxilyzer breath test were denied. In each municipal court case, the Superior Court, Sonoma County, affirmed, and the Court of Appeal accepted transfer. In other cases defendants sought relief by way of habeas corpus. Cases were consolidated. The Court of Appeal of California, First District, Division Four, 142 Cal.App.3d 138, 190 Cal.Rptr. 319,granted new trials to habeas corpus petitioners and ordered that intoxilyzer results not be admitted as evidence against other two drivers. The State unsuccessfully petitioned for certiorari in the California Supreme Court, and the United States Supreme Court granted certiorari. The Supreme Court, Justice Marshall, held that due process clause does not require that law enforcement agencies preserve breath samples of suspected drunk drivers in order for results of breath-analysis tests to be admissible in criminal prosecutions.

Reversed and remanded.

Justice O'Connor filed concurring opinion.

Syllabus[a1]

When stopped in unrelated incidents on suspicion of drunken driving on California highways, each respondent submitted to a Intoxilyzer (breath-analysis) test and registered a blood-alcohol concentration high enough to be presumed to be intoxicated under California law. Although it was technically feasible to preserve samples of respondents' breath, the arresting officers, as was their ordinary practice, did not do so. Respondents were then all charged with driving while intoxicated. Prior to trial, the Municipal Court denied each respondent's motion to suppress the Intoxilyzer test results on the ground that the arresting officers had failed to preserve samples of respondents' breath that the respondents claim would have enabled them to impeach the incriminating test results. Ultimately, in consolidated proceedings, the California Court of Appeal ruled in respondents' favor, concluding that due process demanded that the arresting officers preserve the breath samples.

Held: The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial, and thus here the State's failure to preserve breath samples for respondents did not constitute a violation of the Federal Constitution. Pp. 2532–2535.

(a) To the extent that respondents' breath samples came into the California authorities' possession, it was for the limited purpose of providing raw data to the Intoxilyzer. The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. The authorities did not destroy the breath samples in a calculated effort to circumvent the due process requirement of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 and its progeny that the State disclose to criminal defendants material evidence in its possession, but in failing to preserve the samples the authorities acted in good faith and in accord with their normal practice. Pp. 2532–2534.

(b) More importantly, California's policy of not preserving breath samples is without constitutional defect. The constitutional duty of the States to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense. The evidence must possess an exculpatory value that was apparent before it was destroyed, and must also be of such a nature that the defendant would be unable to obtain ***480** comparable evidence by other reasonably available means. Neither of these conditions was met on the facts of this case. Pp. 2534–2535.

142 Cal.App.3d 138, 190 Cal.Rptr. 319, reversed and remanded.

Attorneys and Law Firms

Charles R.B. Kirk, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van De Kamp,* Attorney General, *William D. Stein,*

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Assistant Attorney General, and *Gloria F. De Hart,* Deputy Attorney General.

John F. DeMeo argued the cause for respondents. With him on the brief were *Thomas R. Kenney, J. Frederick Haley,* and *John A. Pettis.**

* Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, *James B. Early,* Special Assistant Attorney General, and *Thomas L. Fabel,* Deputy Attorney General, *Jim Smith,* Attorney General of Florida, *Linley E. Pearson,* Attorney General of Indiana, *Edwin Lloyd Tittman,* Attorney General of Mississippi, and *Mike Greely,* Attorney General of Montana; for the Appellate Committee of the California District Attorney's Association by *John R. Vance, Jr.;* and for the National District Attorneys Association, Inc., et al. by *David Crump, Wayne W. Schmidt, James P. Manak,* and *Edwin L. Miller, Jr.*

*George L. Schraer*and *Lisa Short* filed a brief for the State Public Defender of California as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of North Carolina by *Rufus L. Edmisten,* Attorney General, and *Isaac T. Avery III,* Special Deputy Attorney General; for the County of Los Angeles by *Robert H. Philibosian, Harry B. Sondheim,* and *John W. Messer;* and for the California Public Defender's Association et al. by *Albert J. Menaster, William M. Thornbury,* and *Ephraim Margolin.*

Opinion

Justice MARSHALL delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. ****2530** United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); ***481** Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This case raises the question whether the Fourteenth Amendment also demands that the State preserve potentially exculpatory evidence on behalf of defendants. In particular, the question presented is whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions.

I

The Omicron Intoxilyzer (Intoxilyzer) is a device used in California to measure the concentration of alcohol in the blood of motorists suspected of driving while under the influence of intoxicating liquor.[1] The Intoxilyzer analyzes the suspect's breath. To operate the device, law enforcement officers follow these procedures:

"Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then ***482** checked for a reading of zero alcohol. The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant." 142 Cal.App.3d 138, 141–142, 190 Cal.Rptr. 319, 321 (1983) (citations omitted).

In unrelated incidents in 1980 and 1981, each of the respondents in this case was stopped on suspicion of drunken driving on California highways. Each respondent submitted to an Intoxilyzer test.[2] Each respondent registered a blood-alcohol concentration substantially higher than 0.10 percent. Under California law at that time, drivers with higher than 0.10 percent blood-alcohol concentrations were presumed to be intoxicated. Cal.Veh.Code Ann. § 23126(a)(3) (West 1971) (amended 1981). Respondents were all charged with driving while intoxicated in violation of Cal.Veh.Code Ann. § 23102 (West 1971) (amended 1981).

Prior to trial in municipal court, each respondent filed a motion to suppress the Intoxilyzer test results on the ground that the arresting officers had failed to preserve samples of respondents' breath. Although preservation of breath samples is technically feasible,[3] California law enforcement ****2531** officers ***483** do not ordinarily preserve breath samples, and made no effort to do so in these cases. Respondents each claimed that, had a breath sample been preserved, he would have been able to impeach the incriminating Intoxilyzer results. All of respondents' motions to suppress were denied.

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Respondents Ward and Berry then submitted their cases on the police records and were convicted. Ward and Berry subsequently petitioned the California Court of Appeal for writs of habeas corpus. Respondents Trombetta and Cox did not submit to trial. They sought direct appeal from the Municipal Court orders, and their appeals were eventually transferred to the Court of Appeal to be consolidated with the Ward and Berry petitions.[4]

The California Court of Appeal ruled in favor of respondents. After implicitly accepting that breath samples would be useful to respondents' defenses, the Court reviewed the available technologies and determined that the arresting officers had the capacity to preserve breath samples for respondents. 142 Cal.App.3d, at 141–142, 190 Cal.Rptr., at 320–321. Relying heavily on the California Supreme Court's decision in People v. Hitch, 12 Cal.3d 641, 117 Cal.Rptr. 9, 527 P.2d 361 (1974), the Court of Appeal concluded: "Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and ***484** systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant." 142 Cal.App.3d, at 144, 190 Cal.Rptr., at 323.[5] The court granted respondents Ward ****2532** and Berry new trials, and ordered that the Intoxilyzer results not be admitted as evidence against the other two respondents. The State unsuccessfully petitioned for certiorari in the California Supreme Court, and then petitioned for review in this Court. We granted certiorari, 464 U.S. 1037, 104 S.Ct. 696, 79 L.Ed.2d 163 (1984), and now reverse.

***485** II

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela–Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. Napue v. Illinois, 360 U.S. 264, 269–272, 79 S.Ct. 1173, 1177–1179, 3 L.Ed.2d 1217 (1959); see also Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). But criminal defendants are entitled to much more than protection against perjury. A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1196. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. United States v. Agurs, 427 U.S., at 112, 96 S.Ct., at 2401. The prosecution must also reveal the contents of plea agreements with key government witnesses, see Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense, Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

***486** Less clear from our access-to-evidence cases is the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession. On a few occasions, we have suggested that the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial. For instance, in United States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971), and in United States v. Lovasco, 431 U.S. 783, 795, n. 17, 97 S.Ct. 2044, 2051 n. 17, 52 L.Ed.2d 752 (1977), we intimated that a due process violation might occur if the Government delayed an indictment for so long that the defendant's ability to mount an effective defense was impaired. Similarly, in United States v. Valenzuela–Bernal, supra, we acknowledged that the Government could offend the Due Process Clause of the Fifth Amendment if, by deporting potential witnesses, it diminished a defendant's opportunity to put on an effective defense.[6] 458 U.S., at 873, 102 S.Ct., at 3450.

****2533** We have, however, never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. The absence

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of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Cf. United States v. Valenzuela–Bernal, supra, at 870, 102 S.Ct., at 3448. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can ***487** grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing—as the California Court of Appeal did in this case—the State's most probative evidence.

One case in which we have discussed due process constraints on the Government's failure to preserve potentially exculpatory evidence is Killian v. United States, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961). In Killian, the petitioner had been convicted of giving false testimony in violation of 18 U.S.C. § 1001. A key element of the Government's case was an investigatory report prepared by the Federal Bureau of Investigation. The Solicitor General conceded that, prior to petitioner's trial, the F.B.I. agents who prepared the investigatory report destroyed the preliminary notes they had made while interviewing witnesses. The petitioner argued that these notes would have been helpful to his defense and that the agents had violated the Due Process Clause by destroying this exculpatory evidence. While not denying that the notes might have contributed to the petitioner's defense, the Court ruled that their destruction did not rise to the level of constitutional violation:

"If the agents' notes ... were made only for the purpose of transferring the data thereon ..., and if, having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right." Id., at 242, 82 S.Ct., at 308.

In many respects the instant case is reminiscent of Killian v. United States. To the extent that respondents' breath samples came into the possession of California authorities, it was for the limited purpose of providing raw data to the ***488** Intoxilyzer.[7] The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. As the petitioner in Killian wanted the agents' notes in order to impeach their final reports, respondents here seek the breath samples in order to challenge incriminating tests results produced with the Intoxilyzer.

Given our precedents in this area, we cannot agree with the California Court of Appeal that the State's failure to retain breath samples for respondents constitutes a violation of the Federal Constitution. To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny. In failing to preserve breath samples for respondents, the officers here were acting "in good faith and in accord with their normal practice." Killian v. United States, supra, at 242, 82 S.Ct., at 308. The record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence.

****2534** More importantly, California's policy of not preserving breath samples is without constitutional defect. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.[8] ***489** To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S., at 109–110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case.

Although the preservation of breath samples might conceivably have contributed to respondents' defenses, a dispassionate review of the Intoxilyzer and the California testing procedures can only lead one to conclude that the chances are extremely low that preserved samples would have been exculpatory. The accuracy of the Intoxilyzer has been reviewed and certified by the California Department of Health.[9] To protect suspects against machine malfunctions, the Department has developed test procedures that include two independent measurements (which must be closely correlated for the results to be admissible) bracketed by blank runs designed to ensure that the machine is purged of alcohol traces from previous tests. See supra, at 2530. In all but a tiny fraction of cases, preserved breath samples would simply confirm the Intoxilyzer's determination that the defendant had a high level of blood-alcohol concentration at the time of the test. Once the Intoxilyzer indicated that respondents

were legally drunk, breath samples were much more likely to provide inculpatory than exculpatory evidence.[10]

***490** Even if one were to assume that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence. Respondents and amici have identified only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. See Brief for Respondents 32–34; Brief for California Public Defender's Association et al. as Amici Curiae 25–40. Respondents were perfectly capable of raising these issues without resort to preserved breath samples. To protect against faulty calibration, California gives drunken driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations. See supra, at 2530. Respondents could have utilized these data to impeach the machine's reliability. As to improper measurements, the parties have ****2535** identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting. For defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves. Finally, as to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered.[11]

***491** III

We conclude, therefore, that the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial.[12] Accordingly, the judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

Rules concerning preservation of evidence are generally matters of state, not federal constitutional law. See United States v. Augenblick, 393 U.S. 348, 352–353, 89 S.Ct. 528, 531–532, 21 L.Ed.2d 537 (1969). The failure to preserve breath samples does not render a prosecution fundamentally unfair, and thus cannot render breath-analysis tests inadmissible as evidence against the accused. Id., at 356, 89 S.Ct., at 533. Similarly, the failure to employ alternative methods of testing blood-alcohol concentrations is of no due ***492** process concern, both because persons are presumed to know their rights under the law and because the existence of tests not used in no way affects the fundamental fairness of the convictions actually obtained. I understand the Court to state no more than these well-settled propositions. Accordingly, I join both its opinion and judgment.

All Citations

467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413

Footnotes

a1 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 Law enforcement agencies in California are obliged to use breath-analysis equipment that has been approved by the State's Department of Health. See 17 Cal.Admin.Code § 1221 (1976). The Department has approved a number of blood-alcohol testing devices employing a variety of technologies, see List of Instruments and Related Accessories Approved for Breath Alcohol Analysis (Dec. 20, 1979), reprinted in App. 238–247, of which the Omicron Intoxilyzer is the most popular model, see Brief for Petitioner 6, n. 6.

2 Under California law, drunken driving suspects are given the choice of having their blood-alcohol concentration determined by either a blood test, a urine test, or a breath test. Cal.Veh.Code Ann. § 13353 (West 1971 and Supp.1984). Suspects who refuse to submit to any test are liable to have their driving licenses suspended. Ibid.

3 The California Department of Health has approved a device, known as an Intoximeter Field Crimper–Indium Tube Encapsulation Kit (Kit), which officers can use to preserve breath samples. App. 247. To use the Kit, a suspect must breathe directly into an indium tube, which preserves samples in three separate chambers. See 142 Cal.App.3d 138, 142, 190 Cal.Rptr. 319, 321 (1983). The breath trapped in each chamber can later be used to determine the suspect's blood-

alcohol concentration through the use of a laboratory instrument known as a Gas Chromatograph Intoximeter, which has also been approved by the California Department of Health. App. 242–243. Because the suspect must breathe directly into the indium tube, the Kit cannot be used to preserve the same breath sample used in an Intoxilyzer test. See, supra, at 2530. Other devices, similar in function to the Kit, can be attached to an Intoxilyzer and used to collect the air that the Intoxilyzer purges, see Brief for Respondents 18–19, but none of these devices has yet received approval from the California Department of Health, see Reply Brief for Petitioner 3–4.

4 The California Court of Appeal expressed some doubt whether respondents Trombetta and Cox were entitled to appeal their suppression orders and ultimately ordered that their appeals be dismissed. 142 Cal.App.3d, at 140, 143, 190 Cal.Rptr., at 320, 323. The court, however, ruled on the merits of their claims and thereby exercised jurisdiction over their appeals. Id., at 144, 190 Cal.Rptr., at 323. As to Trombetta and Cox, the Court of Appeal decision was comparable to a judgment affirming a suppression order, which is reviewable in this Court under 28 U.S.C. § 1257(3). Cf., e.g., Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984).

5 People v. Hitch involved another device used to measure blood-alcohol concentrations. With that device, a suspect's breath bubbles through a glass ampoule containing special chemicals that change colors depending on the amount of alcohol in the suspect's blood. 12 Cal.3d, at 644, 117 Cal.Rptr., at 12–13, 527 P.2d, at 363–364. In keeping with California procedures, law enforcement officials in Hitch discarded the ampoule after they had completed their testing, even though the ampoule might have been saved for retesting by the defendant. Relying on this Court's decisions in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 153–154, 92 S.Ct. 763, 765–766, 31 L.Ed.2d 104 (1972), the California Supreme Court concluded that the Due Process Clause is implicated when a State intentionally destroys evidence that might have proved favorable to a criminal defendant. 12 Cal.3d, at 645–650, 117 Cal.Rptr., at 13–19, 527 P.2d, at 364–370. The Hitch decision was noteworthy in that it extrapolated from Brady's disclosure requirement an additional constitutional duty on the part of prosecutors to preserve potentially exculpatory evidence. See Note, The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine, 75 Colum.L.Rev. 1355, 1364–1368 (1975); cf. United States v. Bryant, 142 U.S.App.D.C. 132, 141, 439 F.2d 642, 651 (1971) (Wright, J.) (Government must make " 'earnest efforts' to preserve crucial materials and to find them once a discovery request is made").

For a number of years, there was uncertainty whether the California courts would extend the Hitch decision to the Intoxilyzer. In People v. Miller, 52 Cal.App.3d 666, 125 Cal.Rptr. 341 (1975), a Court of Appeal panel refused to extend Hitch because the Intoxilyzer does not reduce breath samples to a preservable form comparable to the ampoules created with the device involved in Hitch. The Court of Appeal in Trombetta declined to follow Miller, and reasoned that as long as there were other methods of preserving specimens (such as the Indium Tube Kit, see n. 3, supra), the State was obliged to preserve a breath sample equivalent to the one used in the Intoxilyzer. 142 Cal.App.3d, at 143–144, 190 Cal.Rptr., at 322–323.

6 In related cases arising under the Sixth and Fourteenth Amendments, we have recognized that criminal defendants are entitled to call witnesses on their own behalf and to cross-examine witnesses who have testified on the government's behalf. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

7 We accept the California Court of Appeal's conclusion that the Intoxilyzer procedure brought respondents' breath samples into the possession of California officials. The capacity to preserve breath samples is equivalent to the actual possession of samples. See n. 5, supra.

8 In our prosecutorial disclosure cases, we have imposed a similar requirement of materiality, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and have rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." Id., at 111, 96 S.Ct., at 2401; see also Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

9 The Intoxilyzer has also passed accuracy requirements established by the National Highway Traffic Safety Administration of the Department of Transportation. See 38 Fed.Reg. 30459 (1973); A. Flores, Results of the First Semi–Annual Qualification Testing of Devices to Measure Breath Alcohol 10 (Dept. of Transportation 1975).

10 The materiality of breath samples is directly related to the reliability of the Intoxilyzer itself. The degree to which preserved samples are material depends on how reliable the Intoxilyzer is. This correlation suggests that a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

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11 Respondents could also have protected themselves from erroneous on-the-scene testing by electing to submit to urine or blood tests, see n. 2, supra, because the State automatically would have preserved urine and blood samples for retesting by respondents. Respondents, however, were not informed of the difference between the various testing procedures when they were asked to select among the three available methods of testing blood-alcohol concentrations. But see Cal.Veh.Code Ann. § 13353.5 (West 1971) (enacted in 1983) (requiring suspects to be informed that samples will be retained only in urine and blood tests). To the extent that this and other access-to-evidence cases turn on the underlying fairness of governmental procedures, it would be anomalous to permit the State to justify its actions by relying on procedural alternatives that were available, but unknown to the defendant. Similarly, it is irrelevant to our inquiry that California permits an accused drunken driver to have a second blood-alcohol test conducted by independent experts, since there is no evidence on this record that respondents were aware of this alternative.

12 State courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution. See, e.g., Lauderdale v. State, 548 P.2d 376 (Alaska 1976); City of Lodi v. Hine, 107 Wis.2d 118, 318 N.W.2d 383 (1982).

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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.

719 F.2d 1462 (CA9 1983) reversed and remanded.

Justice BLACKMUN delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that the prosecutor's failure to

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disclose evidence that could have been used effectively to impeach important Government witnesses requires automatic reversal. Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Pp. 3379–3381.

Justice BLACKMUN, joined by Justice O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue 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. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request, or a specific request. Although the prosecutor's failure to respond fully to a specific request may impair the adversary process by having the effect of representing to the defense that certain evidence does not exist, this possibility of impairment does not necessitate a different standard of materiality. Under the standard stated above, 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. Pp. 3381–3385.

Justice WHITE, joined by THE CHIEF JUSTICE and Justice REHNQUIST, being of the view that there is no reason to elaborate on the relevance of the specificity of the defense's request for disclosure, either generally or with respect to this case, concluded that reversal was mandated simply because the Court of Appeals failed to apply the "reasonable probability" standard of materiality to the nondisclosed evidence in question. P. 3385.

Attorneys and Law Firms

***669** *David A. Strauss* argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott,* and *Deputy Solicitor General Frey.*

****3377** *Thomas W. Hillier II* argued the cause and filed a brief for respondent.*

* *John K. Van de Kamp,* Attorney General, and *Karl S. Mayer, Thomas A. Brady,* and *Charles R.B. Kirk,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

Opinion

Justice BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), 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 punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

> "The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or inducements ***670** made to witnesses in exchange for their testimony." App. 18.[1]

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law-enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[c]opies of all Jencks Act material,"[2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover

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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

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use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley v. Lumpkin,* 719 F.2d 1462 (1983). The Court of Appeals began by noting that, according to precedent in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had presided over the bench trial ***674** concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals, however, stated that it "disagree[d]" with this conclusion. *Id.,* at 1464. In particular, it disagreed with the Government's—and the District Court's—premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and that respondent therefore would not have sought to impeach "his own witness." *Id.,* at 1464, n. 1.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis v. Alaska,* ... the Supreme Court held that the denial of the 'right of *effective* cross-examination' was ' "constitutional error of the first magnitude" ' requiring automatic reversal." 719 F.2d, at 1464 (quoting *Davis v. Alaska,* 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974)) (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." 719 F.2d, at 1464.

We granted certiorari, 469 U.S. 1016, 105 S.Ct. 427, 83 L.Ed.2d 354 (1984), and we now reverse.

II

The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S., at 87, 83 S.Ct., at 1196. See also *Moore v. Illinois,* 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 (1972). The Court explained in *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976): "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of ***675** the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

The *Brady* rule is based on the requirement of due process. Its purpose is ****3380** 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.[6] Thus, the prosecutor is not required to deliver his entire file to defense counsel,[7] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair 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....
>
> "... But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure ***676** unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S., at 108, 96 S.Ct., at 2399.

In *Brady* and *Agurs,* the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidence favorable to an accused," *Brady,* 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("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").

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. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

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

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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.*

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.

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

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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.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses,* that failure to disclose cannot be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving possession of firearms ***686** and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private security guards who aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of Bagley. In 1977 the two guards, O'Connor and Mitchell, worked for the Milwaukee Railroad; for about three years, they had been social acquaintances of Bagley, with whom they often shared coffee breaks. 7 Tr. 2–3; 8 Tr. 2a–3a. At trial, they testified that on two separate occasions they had visited Bagley at his home, where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Valium ****3386** pills. In total, Bagley received $8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back, 14 Tr. 963–964. No testimony to the contrary was introduced. O'Connor and Mitchell each testified that they had worn concealed transmitters and body recorders at these meetings, but the tape recordings were insufficiently clear to be admitted at trial and corroborate their testimony.

Before trial, counsel for Bagley had filed a detailed discovery motion requesting, among other things, "any deals, promises or inducements made to witnesses in exchange for their testimony." App. 17–19. In response to the discovery request, the Government had provided affidavits sworn by ***687** O'Connor and Mitchell that had been prepared during their investigation of Bagley. Each affidavit recounted in detail the dealings the witnesses had had with Bagley and closed with the declaration, "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." Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80–3592–RJK(M) (CD Cal.) Exhibits 1–9. Both of these agents testified at trial thereafter, and the Government did not disclose the existence of any deals, promises, or inducements. Counsel for Bagley asked O'Connor on cross-examination whether he was testifying in response to pressure or threats from the Government about his job, and O'Connor said he was not. 7 Tr. 89–90. In light of the affidavits, as well as the prosecutor's silence as to the existence of any promises, deals or inducements, counsel did not pursue the issue of bias of either guard.

As it turns out, however, in May 1977, seven months prior to trial, O'Connor and Mitchell each had signed an agreement providing that ATF would pay them for information they provided. The form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," and provided that the Bureau would, "upon the accomplishment of the objective sought to be obtained ... pay to said vendor a sum commensurate with services and information rendered." App. 22–23. It further invited the Bureau's special agent in charge of the investigation, Agent Prins, to recommend an amount to be paid after the information received had proved "worthy of compensation." Agent Prins had personally presented these forms to O'Connor and Mitchell for their signatures. The two witnesses signed the last of their affidavits, which declared the absence of any promise of reward, *the day after they signed the ATF forms.* After trial, Agent Prins requested that O'Connor and Mitchell each be paid $500, but the Bureau reduced these "rewards" to $300 each. App. to ***688** Pet. for Cert. 14a. The District Court Judge concluded that "it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation,

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over and above their expenses, for their assistance, though perhaps not for their testimony." *Id.,* at 7a.

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.

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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.

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When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. Unlike a situation in which exculpatory evidence exists but neither the defense nor the prosecutor has uncovered it, in this situation the state already has, resting in its files, material that would be of assistance to the defendant. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government. This proposition is not new. We have long recognized that, within the limit of the state's ability to identify so-called exculpatory information, the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files. See, *e.g., Pyle v. Kansas,* 317 U.S. 213, 215–216, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (1942) (allegation that imprisonment resulted from perjured testimony and deliberate suppression by authorities of evidence favorable to him "charge a deprivation of rights guaranteed by the Federal Constitution").[1]

***694** This recognition no doubt stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel ****3390** is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process,[2] and perhaps ***695** because this reality so directly questions the fairness of our longstanding processes, change has been cautious and halting. Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (access to assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important; step toward equality of justice.[3]

B

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), of course, established this requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment. Since *Brady* was decided, this Court has struggled, in a series of decisions, to define how best to effectuate the right recognized. To my mind, 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 ***696** over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case. Formulation of this right, and imposition of this duty, are "the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." *Moore v. Illinois,* 408 U.S. 786, 809–810, 92 S.Ct. 2562, 2575–2576, 33 L.Ed.2d 706 (1972) (MARSHALL, J., concurring in part and dissenting in part). If that right is denied, or if that duty is shirked, however, I believe a reviewing court should not automatically reverse but instead should apply the harmless-error test the Court has developed for instances of error affecting constitutional rights. See *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection to the defendant that a different rule would offer. ****3391** To implement *Brady,* courts must of course work within the confines of the criminal process. Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern with justice, not convictions. *Brady,* of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate

the *Brady* right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady.* The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady,* the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the ***697** material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor. One telling example, offered by Judge Newman when he was a United States Attorney, suffices:

> "I recently had occasion to discuss *[Brady]* at a PLI Conference in New York City before a large group of State prosecutors.... I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, 'This is the man.' In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, 'This is *not* the man.'
>
> "The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said 'that is not the man'? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case—the clearest case for disclosure of exculpatory information!" J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in Criminal Cases, 44 F.R.D. 481, 500–501 (1968) (hereafter Newman).

***698** While familiarity with *Brady* no doubt has increased since 1967, the dual role that the prosecutor must play, and the very real pressures that role creates, have not changed.

The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, ****3392** I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

If a trial will thereby be more just, due process would seem to require such a rule absent a countervailing interest. I see little reason for the government to keep such information ***699** from the defendant. Its interest in nondisclosure at the trial stage is at best slight: the government apparently seeks to avoid the administrative hassle of disclosure, and to prevent disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence.[4] Neither of these concerns, however, counsels in favor of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open

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file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous 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 evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, ****3394** is in little better position to review the withheld evidence than the prosecutor.

I simply cannot agree with the Court that the due process right to favorable evidence recognized in *Brady* was intended to become entangled in prosecutorial determinations of the likelihood that particular information would affect the outcome of trial. Almost a decade of lower court practice with *Agurs* convinces me that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants." *United States v. Oxman, supra,* at 1310–1311. Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality. Eager to apply the "materiality" standard at the pretrial stage, as the Court permits them to do, prosecutors lose sight of the basic principles underlying the doctrine. I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No ***703** prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure.[5]

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In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial. See *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also *Agurs,* 427 U.S., at 119–120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting).[6]

***705** Any rule other than automatic reversal, of course, dilutes the *Brady* right to some extent and offers the prosecutor an incentive not to turn over all information. In practical effect, it might be argued, there is little difference between the rule I propose—that a prosecutor must disclose all favorable evidence in his files, subject to harmless-error review—and the rule the Court adopts—that the prosecutor must disclose only the favorable information that might affect the outcome of the trial. According to this argument, if a constitutional right to all favorable evidence leads to reversal only when the withheld evidence might have affected the outcome of the trial, the result will be the same as with a constitutional right only to evidence that will affect the trial outcome. See Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Ford.L.Rev. 391, 409–410, n. 117 (1984). For several reasons, however, I disagree. First, I have faith that a prosecutor would treat a rule requiring disclosure of all information of a certain kind differently from a rule requiring disclosure only of some of that information. Second, persistent or egregious failure to comply with the constitutional duty could lead to disciplinary actions by the courts. Third, the standard of harmlessness I adopt is more protective of the defendant than that chosen by the Court, placing the burden on the prosecutor, rather than the defendant, to prove the harmlessness of his actions. It would be a foolish prosecutor who gambled too glibly with that standard of review. And finally, it is unrealistic to ignore the fact that at the appellate stage the state has an interest in avoiding retrial where the error is harmless beyond a reasonable doubt. That interest counsels against requiring a new trial in every case.

***706** Thus, while I believe that some review for harmlessness is in order, I disagree with the Court's standard,

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even were it merely a standard for review and not a definition of "materiality." First, I see no significant difference for truth-seeking purposes between the *Giglio* situation and this one; for the same reasons I believe the result must therefore be the same here as in *Giglio,* see *supra,* at 3388, I also believe the standard for reversal should be the same. The defendant's entitlement to a new 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

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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

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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 ****3400** 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

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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 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.

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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.

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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.

12 The Court in *Agurs* noted: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." 427 U.S., at 104, 96 S.Ct., at 2397. Since the *Agurs* Court identified *Brady* as a "specific request" case, see n. 11, *supra,* this language might be taken as indicating the standard of materiality applicable in such a case. It is clear, however, that the language merely explains the meaning of the term "materiality." It does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.

13 In particular, the Court explained in *Strickland:* "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S., at 695, 104 S.Ct., at 2068–2069.

1 As early as 1807, this Court made clear that prior to trial a defendant must have access to impeachment evidence in the Government's possession. Addressing defendant Aaron Burr's claim that he should have access to the letter of General Wilkinson, a key witness against Burr in his trial for treason, Chief Justice Marshall wrote:

> "The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:
>
> "First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." *United States v. Burr,* 25 F.Cas. 30, 36 (No. 14,692d) (CC Va. 1807).

2 See Fortas, The Fifth Amendment: Nemo Tenetur Prodere Seipsum, 25 Clev.B.A.J. 91, 98 (1954) ("The state and [the defendant] could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument"); see also Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan.L.Rev. 1133, 1142–1145 (1982) (discussing challenge *Brady* poses to traditional adversary model).

3 Indeed, this Court's recent decision stating a stringent standard for demonstrating ineffective assistance of counsel makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater. See *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *id.,* at 712–715, 104 S.Ct., at 2077–2079 (MARSHALL, J., dissenting); Babcock, *supra,* at 1163–1174 (discussing the interplay between the right to *Brady* material and the right to effective assistance of counsel).

4 See Newman, 44 F.R.D., at 499 (describing the "serious" problem of witness intimidation that arises from prosecutor's disclosure of witnesses). But see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279, 289–290 (disputing a similar argument).

5 *Brady* not only stated the rule that suppression by the prosecution of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment," 373 U.S., at 87, 83 S.Ct., at 1196, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id.,* at 86, 83 S.Ct., at 1196. Neither of those decisions limited the right only to evidence that is "material" within the meaning that the Court today articulates. Instead, they provide strong evidence that *Brady* might have used the word in its evidentiary sense, to mean, essentially, germane to the points at issue.

> In *United States ex rel. Almeida v. Baldi,* 195 F.2d 815 (CA3 1952), cert. denied, 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed. 1341 (1953), the appeals court granted a petition for habeas corpus in a case in which the State had withheld from the defendant evidence that might have mitigated his punishment. After describing the withheld evidence as "relevant" and "pertinent," 195 F.2d, at 819, the court concluded: "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process." *Id.,* at 820. Similarly, in *United States ex rel. Thompson v. Dye,* 221 F.2d 763, 765 (CA3), cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955), the District Court had denied a petition for habeas corpus after finding that certain evidence of defendant's drunkenness at the time of the offense

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in question was not "vital" to the defense and did not require disclosure. 123 F.Supp. 759, 762 (WD Pa.1954). The Court of Appeals reversed, observing that whether or not the jury ultimately would credit the evidence at issue, the evidence was substantial and the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense here." 221 F.2d, at 767.

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

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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.

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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

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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.

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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"

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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.

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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

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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

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).

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 inculpate 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.

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]

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

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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]

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").

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.

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

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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.

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

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.

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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–feet 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 lound [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

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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.

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

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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

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

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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-

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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

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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]

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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-feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than 5 ½-feet 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.

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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]

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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

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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 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*

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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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122 S.Ct. 2450
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Angela RUIZ.

No. 01–595.
|
Argued April 24, 2002.
|
Decided June 24, 2002.

Synopsis
After she refused to accept "fast track" plea bargain, under which government would recommend downward departure under Sentencing Guidelines if she pleaded guilty, because it contained waiver of *Brady* right to disclosure of impeachment evidence, defendant ultimately entered guilty plea, and was convicted in the United States District Court for the Southern District of California, Howard B. Turrentine, J., of importing marijuana. Defendant appealed, challenging government's refusal to recommend, and court's refusal to grant, downward departure. The Court of Appeals for the Ninth Circuit, 241 F.3d 1157,vacated sentence and remanded. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) Court had jurisdiction over appeal; (2) Constitution does not require government to disclose impeachment information prior to entering plea agreement with criminal defendant; and (3) plea agreement requiring defendant to waive her right to receive information the government had regarding any "affirmative defense" she would raise at trial did not violate the Constitution.

Reversed.

Justice Thomas filed an opinion concurring in the judgment.

****2451 *622** *Syllabus*[*]

After immigration agents found marijuana in respondent Ruiz's luggage, federal prosecutors offered her a "fast track" plea bargain, whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. Among other things, the prosecutors' standard "fast track" plea agreement acknowledges the Government's continuing duty to turn over information establishing the defendant's factual innocence, but requires that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defense she raises if the case goes to trial. Because Ruiz would not agree to the latter waiver, the prosecutors withdrew their bargaining offer, and she was indicted for unlawful drug possession. Despite the absence of a plea agreement, Ruiz ultimately pleaded guilty. At sentencing, she asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. In vacating the sentence, the Ninth Circuit took jurisdiction under 18 U.S.C. § 3742; noted that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial; decided that this obligation entitles defendants to the information before they enter into a plea agreement; ruled that the Constitution prohibits defendants from waiving their right to the information; and held that the "fast track" agreement was unlawful because it insisted upon such a waiver.

Held:

1. Appellate jurisdiction was proper under § 3742(a)(1), which permits appellate review of a sentence "imposed in violation of law." Respondent's sentence would have been so imposed if her constitutional claim were sound. Thus, if she had prevailed on the merits, her victory would also have confirmed the Ninth Circuit's jurisdiction. Although this Court ultimately concludes that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States v. Mine Workers,* 330 U.S. 258, 291, 67 S.Ct. 677, 91 L.Ed. 884. In order to make that determination, ***623** it was necessary for the Ninth Circuit to address the merits. P. 2454.

****2452** 2. The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the Fifth and Sixth Amendments provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, *e.g., Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, a defendant who pleads guilty forgoes a fair trial as well as various other

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accompanying constitutional guarantees, *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e.g., id.,* at 242, 89 S.Ct. 1709. The Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that they would have had to make had the defendant insisted upon a trial. Several considerations, taken together, demonstrate that holding's error. First, impeachment information is special in relation to *a trial's fairness,* not in respect to whether a plea is *voluntary.* It is particularly difficult to characterize such information as critical, given the random way in which it may, or may not, help a particular defendant. The degree of help 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. Second, there is no legal authority that provides significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge, 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. See, *e.g., Brady v. United States,* 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747. Third, the very due process considerations that have led the Court to find trial-related rights to exculpatory and impeachment information—*e.g.,* the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests, *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53—argue against the existence of the "right" the Ninth Circuit found. Here, that right's added value to the defendant is often limited, given that the Government will provide information establishing factual innocence under the proposed plea agreement, and that the defendant has other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11. Moreover, the Ninth Circuit's rule could seriously ***624** interfere with the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm, thereby forcing the Government to modify its current practice, devote substantially more resources to preplea trial preparation, or abandon its heavy reliance on plea bargaining. Due process cannot demand so radical a change in order to achieve so comparatively small a constitutional benefit. Pp. 2454–2457.

3. Although the "fast track" plea agreement requires a defendant to waive her right to affirmative defense information, the Court does not believe, for most of the foregoing reasons, that the Constitution requires provision of this information to the defendant prior to plea bargaining. P. 2457.

241 F.3d 1157, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, ****2453** KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 2457.

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Opinion

***625** Justice BREYER delivered the opinion of the Court.

In this case we primarily consider whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose "impeachment information relating to any informants or other witnesses." App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure.

I

After immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain—standard in that district—asks a defendant to waive indictment, trial, and an appeal. In return, the Government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence. In Ruiz's case, a two-level departure downward would have shortened the ordinary Guidelines-specified 18–

to–24–month sentencing range by 6 months, to 12–to–18 months. 241 F.3d 1157, 1161 (C.A.9 2001).

The prosecutors' proposed plea agreement contains a set of detailed terms. Among other things, it specifies that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the defendant," and it acknowledges the Government's "continuing duty to provide such information." App. to Pet. for Cert. 45a–46a. At the same time it requires that the defendant "waiv[e] the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. *Id.,* at 46a. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite ***626** the absence of any agreement, Ruiz ultimately pleaded guilty.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the Government would have recommended had she accepted the "fast track" agreement. The Government opposed her request, and the District Court denied it, imposing a standard Guideline sentence instead. 241 F.3d, at 1161.

Relying on 18 U.S.C. § 3742, see *infra,* at 2454, 2455, Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. 241 F.3d, at 1166. It decided that this obligation entitles defendants to receive that same information before they enter into a plea agreement. *Id.,* at 1164. The Ninth Circuit also decided that the Constitution prohibits defendants from waiving their right to that information. *Id.,* at 1165–1166. And it held that the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. *Id.,* at 1167. The Ninth Circuit remanded the case so that the District Court could decide any related factual disputes ****2454** and determine an appropriate remedy. *Id.,* at 1169.

The Government sought certiorari. It stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding. And it added that the holding is unique among courts of appeals. Pet. for Cert. 8. We granted the Government's petition. 534 U.S. 1074, 122 S.Ct. 803, 151 L.Ed.2d 689 (2002).

II

At the outset, we note that a question of statutory jurisdiction potentially blocks our consideration of the Ninth Circuit's constitutional holding. The relevant statute says that a

> ***627** "defendant may file a notice of appeal ... for review ... if the sentence
>
> "(1) was imposed in violation of law;
>
> "(2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> "(3) is greater than [the Guideline] specified [sentence] ...; or
>
> "(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U.S.C. § 3742(a).

Every Circuit has held that this statute does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart. See, *e.g., United States v. Conway,* 81 F.3d 15, 16 (C.A.1 1996); *United States v. Lawal,* 17 F.3d 560, 562 (C.A.2 1994); *United States v. Powell,* 269 F.3d 175, 179 (C.A.3 2001); *United States v. Ivester,* 75 F.3d 182, 183 (C.A.4 1996); *United States v. Cooper,* 274 F.3d 230, 248 (C.A.5 2001); *United States v. Scott,* 74 F.3d 107, 112 (C.A.6 1996); *United States v. Byrd,* 263 F.3d 705, 707 (C.A.7 2001); *United States v. Mora–Higuera,* 269 F.3d 905, 913 (C.A.8 2001); *United States v. Garcia–Garcia,* 927 F.2d 489, 490 (C.A.9 1991); *United States v. Coddington,* 118 F.3d 1439, 1441 (C.A.10 1997); *United States v. Calderon,* 127 F.3d 1314, 1342 (C.A.11 1997); *In re Sealed Case No. 98–3116,* 199 F.3d 488, 491–492 (C.A.D.C.1999).

The statute does, however, authorize an appeal from a sentence that "was imposed in violation of law." Two quite different theories might support appellate jurisdiction pursuant to that provision. First, as the Court of Appeals recognized, if the District Court's sentencing decision rested on a mistaken belief that it lacked the legal power to grant a departure, the quoted provision would apply. 241 F.3d, at 1162, n. 2. Our reading of the record, however, convinces us that the District Judge correctly understood that he had such

discretion but decided not to exercise it. We therefore reject ***628** that basis for finding appellate jurisdiction. Second, if respondent's constitutional claim, discussed in Part III, *infra,* were sound, her sentence would have been "imposed in violation of law." Thus, if she had prevailed on the merits, her victory would also have confirmed the jurisdiction of the Court of Appeals.

Although we ultimately conclude that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States v. Mine Workers,* 330 U.S. 258, 291, 67 S.Ct. 677, 91 L.Ed. 884 (1947). In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper.

III

The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material—a right that the Constitution provides as part of its basic "fair trial" guarantee. See U.S. Const., Amdts. 5, 6. See also *Brady v.* ****2455** *Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (Due process requires prosecutors to "avoi[d] ... an unfair trial" by making available "upon request" evidence "favorable to an accused ... where the evidence is material either to guilt or to punishment"); *United States v. Agurs,* 427 U.S. 97, 112–113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (defense request unnecessary); *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").

When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. ***629** *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); see also *Boykin, supra,* at 242, 89 S.Ct. 1709.

In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

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. *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case"). And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his ***630** right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. Cf. *Colorado v. Spring,* 479 U.S. 564, 573–575, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (Fifth Amendment privilege against self-incrimination waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment

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information can provide will depend upon the defendant's own independent ****2456** knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose.

Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provides significant support for the Ninth Circuit's decision. To the contrary, this 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. See *Brady v. United States,* 397 U.S., at 757, 90 S.Ct. 1463 (defendant "misapprehended the quality of the State's case"); *ibid.* (defendant misapprehended "the likely penalties"); *ibid.* (defendant failed to "anticipate" a change in the law regarding relevant "punishments"); *McMann v. Richardson,* 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (counsel "misjudged the admissibility" of a "confession"); *United States v. Broce,* 488 U.S. 563, 573, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (counsel failed to point out a potential defense); ***631** *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Third, due process considerations, the very considerations that led this Court to find trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio,* argue against the existence of the "right" that the Ninth Circuit found here. This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests. *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a defendant is often limited, for it depends upon the defendant's independent awareness of the details of the Government's case. And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual innocence of the defendant" regardless. That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy v. United States,* 394 U.S. 459, 465–467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights).

At the same time, 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. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could "disrupt ongoing ***632** investigations" and expose prospective witnesses to serious harm. Brief for United States 25. Cf. Amendments to Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 92 (1975) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Div., Dept. of Justice) (opposing mandated witness disclosure three days before trial because of documented instances of witness intimidation). And the careful tailoring that characterizes most legal Government witness disclosure requirements suggests ****2457** recognition by both Congress and the Federal Rules Committees that such concerns are valid. See, *e.g.,* 18 U.S.C. § 3432 (witness list disclosure required in capital cases three days before trial with exceptions); § 3500 (Government witness statements ordinarily subject to discovery only after testimony given); Fed. Rule Crim. Proc. 16(a)(2) (embodies limitations of 18 U.S.C. § 3500). Compare 156 F.R.D. 460, 461–462 (1994) (congressional proposal to significantly broaden § 3500) with 167 F.R.D. 221, 223, n. (judicial conference opposing congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of

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federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

***633** These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

In addition, we note that the "fast track" plea agreement requires a defendant to waive her right to receive information the Government has regarding any "affirmative defense" she raises at trial. App. to Pet. for Cert. 46a. We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining—for most (though not all) of the reasons previously stated. That is to say, 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; the value in terms of the defendant's added awareness of relevant circumstances is ordinarily limited; yet the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process.

For these reasons the judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

Justice THOMAS, concurring in the judgment.

I agree with the Court that the Constitution does not require the Government to disclose either affirmative defense information or impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant. The Court, however, suggests that the constitutional analysis turns in some part on the "degree of help" such information would provide to the defendant at the plea stage, see *ante,* at 2455, 2456, a distinction that is neither necessary nor accurate. To the extent that the Court is implicitly drawing a line based on a ***634** flawed characterization about the usefulness of certain types of information, I can only concur in the judgment. The principle supporting *Brady* was "avoidance of an unfair trial to the accused." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). That concern is not implicated at the plea stage regardless.

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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.

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Litigating Brady v. Maryland: Games Prosecutors Play

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LITIGATING *BRADY V. MARYLAND*: GAMES PROSECUTORS PLAY

Bennett L. Gershman[†]

INTRODUCTION

By any measure, *Brady v. Maryland*[1] has not lived up to its expectations. *Brady*'s announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory.[2] Nevertheless, prosecutors over the years have not accorded *Brady* the respect it deserves. Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice. Moreover, as interpreted by the judiciary, *Brady* actually invites prosecutors to bend, if not break, the rules,[3] and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance.[4]

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1 373 U.S. 83 (1963).

2 *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 punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Court observed: "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. Brady*'s constitutional due process standard has been incorporated into an explicit ethical duty upon government attorneys. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004) [hereinafter MODEL RULES]; MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004) [hereinafter MODEL CODE]; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-3.11(a) (1992) [hereinafter ABA STANDARDS].

3 *See* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U.L. REV. 833, 836 (1997) (*Brady* "is a right that almost begs to be violated"); Eugene Cerruti, *Through the Looking Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 274 (2005) ("*Brady* is now best understood as a rule of prosecutorial privilege rather than a rule of disclosure."). I am reminded of Judge Jerome Frank's famous

To be sure, U.S. litigation tolerates a certain amount of gamesmanship—especially in civil litigation—where there exists a semblance of adversarial equality and where attorneys representing private clients are bound by rules of ethics to serve their clients' private interests zealously within the bounds of the law.[5] But criminal litigation is different, and one might reasonably expect there should be less tolerance for gamesmanship. In contrast to an attorney in civil litigation, a prosecutor does not represent a private client; he represents the entire community.[6] And, as the most powerful official in the criminal justice system, the prosecutor effectively decides whether a person should live, die, be incarcerated for life, or receive special benefits and immunities.[7] Finally, a prosecutor is constitutionally and ethically obligated to carrying out his responsibilities to promote public justice rather than private vengeance.[8] There is no place in such a regime for prosecutorial gamesmanship.

Moreover, the criminal justice system typically features an imbalance in power and resources that increasingly favors the prosecutor and therefore makes gamesmanship even less acceptable. Most commentators would agree that the balance of advantage in the criminal justice system tilts heavily to the prosecutor.[9] This is noticeable in every phase of the process, but most notably in the

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aphorism that the rules regulating misconduct by prosecutors are seen by prosecutors as "pretend rules" when courts do not enforce them. *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

[4] The term "gamesmanship" has been employed to describe a prosecutor's treatment of *Brady*. See United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984)("this court has been faced with annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose"); United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984) ("the [*Brady*] game will go on, but justice will suffer"). *See also* Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, CRIMINAL PROCEDURE STORIES, (Carol S. Streiker ed. 2006), at 129.

[5] *See* MODEL CODE, *supra* note 2, Canon 7 ("A lawyer should represent a client zealously within the bounds of the law.").

[6] *See* ABA STANDARDS, *supra* note 2, Standard 3-3.2 cmt. ("the prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction").

[7] *See* Young v. United States, 481 U.S. 787, 813 (1987) ("Between the private life of the citizen and th public glare of accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.").

[8] *See* MODEL RULES, *supra* note 2, R. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE, *supra* note 2, EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA STANDARDS, *supra* note 2, Standard 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict.").

[9] *See* YALE KAMISAR, WAYNE LA FAVE, JEROLD H. ISRAEL, & NANCY KING, MODERN CRIMINAL PROCEDURE 1221 (11th ed. 2002); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 809 (6th ed. 2000) ("[T]he prosecutor has become the most powerful office in the criminal justice system.").

prosecutor's control over the evidence relevant to a defendant's guilt. The prosecutor's acquisition of evidence from a broad variety of sources, his ability to sift, evaluate, and test this information in private, coupled with a defendant's limited ability to uncover evidence advantageous to his case, recalls Justice Brennan's famous metaphor that the criminal process may be more like a "sporting event" than a quest for truth.[10] And there is no better illustration of this than the prosecutor's treatment of *Brady*.

In fact, no rule in criminal procedure has been as controversial, and has generated as much gamesmanship, as the *Brady* rule. This is not surprising. *Brady* depends on the integrity, good faith, and professionalism of the prosecutor for its effectiveness. But at the same time, *Brady* presents a significant and unique departure from the traditional, adversarial mode of litigation. This schizophrenic situation means that the effective enforcement of *Brady* is an ideal of justice that may be impossible to achieve. It requires a prosecutor to balance competing and contradictory objectives, and is so malleable that it affords prosecutors an extremely broad opportunity to exercise discretion in ways that impede—rather than promote—the search for truth. Not surprisingly, violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences: innocent people are wrongfully convicted, imprisoned, and even executed;[11] the reputation of U.S. prosecutors suffers;[12] and the absence of meaningful legal and ethical enforcement and accountability has a corrosive effect on the public's perception of a justice system that often appears to be arbitrary, unjust, and simply unreliable.[13]

The manner in which *Brady* is treated in federal and state courts reveals a confusing and inconsistent understanding and application of its objectives. This dysfunctional treatment is largely attributable to

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[10] William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event of Quest for Truth?*, 1963 WASH. U. L.Q. 279. For an update to that famous article, *see* William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 1990 WASH. U. L.Q. 1.

[11] *See* Bennett L. Gershman, *Reflections on* "Brady v. Maryland", 47 S. TEX. L. REV. 685, 688 (2006).

[12] Several recent studies have documented widespread abuses by U.S. prosecutors that have seriously damaged the reputation of prosecutors as "ministers of justice." *See, e.g.*, Frederic N. Tulsky, *Tainted Trials: Stolen Justice*, MERCURY NEWS, Jan. 22, 2006, at 1; Steve Weinberg, *Harmful Error,* THE CENTER FOR PUBLIC INTEGRITY (2003); Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 1.

[13] *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 299 (2004) (arguing that misconduct by prosecutors and lack of meaningful discipline and accountability has eroded public confidence in integrity of criminal justice system).

the Supreme Court's permissive approach to prosecutorial discretion as well as a hands-off approach by judicial, legislative, and disciplinary bodies. *Brady* is enforced by the judiciary through widely inconsistent approaches as to what constitutes *Brady* evidence, the specific types of information required to be disclosed, when it must be disclosed, and the sanctions for noncompliance.[14] In addition, given the various enforcement protocols of different prosecutors offices, and even of individual prosecutors in the same office,[15] it is virtually impossible to identify clear and consistent norms of compliance by prosecutors as to what evidence is required to be disclosed, when it must be disclosed, and permissible reasons for noncompliance. As a result, prosecutors are encouraged to play the *Brady* game without meaningful legal or ethical oversight or resistance.

OVERVIEW OF *BRADY* LITIGATION

Brady litigation spans the entire life of a criminal case, from the time a defendant is arraigned on a criminal charge, to pre-trial and trial proceedings, to the period following his conviction, to when he is incarcerated, and in some cases on Death Row awaiting execution. Typically, a defendant—at his arraignment on a federal criminal charge—makes a motion for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and in all fifty states pursuant to their individual rules and statutes governing discovery. A defendant typically includes a request for *Brady* evidence in his initial discovery motion.

Prosecutorial disclosure of *Brady* evidence is not automatic. Prosecutors are typically required to provide *Brady* evidence only upon a request.[16] Based on my experience, some prosecutors disclose *Brady* evidence early in the proceedings, along with their disclosure of other discovery materials. Most commonly, a prosecutor will respond to a *Brady* request by representing that he is aware of his obligation under *Brady* and will comply. Most federal and state jurisdictions do not mandate the disclosure of *Brady* evidence within

[14] *See 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, (Federal Judicial Center 2004) [hereafter "*Advisory Committee Report*"].

[15] *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1521–22 (2000) (noting "significant disparity" in policies of different prosecutor offices with respect to discovery); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 684 (noting differences among offices and among prosecutors within same office).

[16] *See Advisory Committee Report*, *supra* note 14, at 11, 22–3.

a specified time period,[17] nor do they specify any due diligence requirements upon prosecutors.[18] No federal district imposes sanctions or remedies for a prosecutor's nondisclosure or untimely disclosure of *Brady* evidence.[19] All states, by contrast, provide remedies for prosecutorial nondisclosure that track Rule 16(d)(2) of the Federal Rules of Criminal Procedure, including granting a continuance or disallowing proof relating to the Brady violation.[20]

A prosecutor may comply with his discovery and *Brady* obligations in several ways. A prosecutor may furnish the defense with all evidence specifically required by the rules of discovery, as well as all exculpatory and impeachment evidence the prosecutor believes is required to be disclosed under *Brady*. Some prosecutors may go beyond the strictures of discovery rules and furnish a defendant with the entire file of the case, including all potentially *Brady* evidence.[21] And some prosecutors, alert to their *Brady* obligation, may seek the court's assistance in determining whether and to what extent they are required to comply with *Brady*.[22] Since a prosecutor's *Brady* duty is a continuing one,[23] a prosecutor is obligated—throughout the pre-trial and trial proceedings—to disclose *Brady* evidence when he learns about it, and is required to make a diligent search for *Brady* evidence in places where *Brady* evidence is readily available.[24] Moreover, after initially receiving discovery materials and gaining more familiarity with the case, a defendant may make a further and more focused request for *Brady* evidence to which the prosecutor is obligated to respond. Needless to say, a belated

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[17] *Id.* at 12–13, 23–24.

[18] *Id.* at 14, 27.

[19] *Id.* at 14–15.

[20] *Id.* at 27–28.

[21] *See infra* notes 65–92, and accompanying text.

[22] *See, e.g.*, United States v. Blanco, 392 F.3d 382 (9th Cir. 2004) (*in camera* review to ensure safety of government witnesses); United States v. Pena, 227 F.3d 23 (2d Cir. 2000) (*in camera review* of confidential pretrial services and pre-sentence reports of government witnesses); United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993) (*ex parte* proceeding to determine whether sensitive material in prosecutor's files was *Brady* material). The Supreme Court has suggested that in some circumstances such pre-trial review would be appropriate. *See* United States v. Agurs, 427 U.S. 97, 110 (1976).

[23] The Supreme Court's treatment of *Brady* has routinely viewed the prosecutor's duty as a continuing one. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (due process violated where prosecutor learned during trial that committed perjury but failed to inform defendant). *See also Advisory Committee Report*, *supra* note 14, at 13, 26 (noting federal and state courts that explicitly make the prosecutor's disclosure obligation "a continuing one."). Moreover, the prosecutor's duty under *Brady* does not end with the verdict but continues. *See* Canion v. Cole, 91 P.3d 355, 360 (Ariz. Ct. App. 2004) ("The defendant's right to due process with regard to the disclosure of exculpatory evidence does not cease to exist after the verdict is rendered; the prosecution has a continuing duty to provide such evidence as was unlawfully withheld").

[24] *See infra* notes 102–137, and accompanying text.

disclosure of *Brady* evidence typically generates a claim by the defendant that the prosecutor—through his untimely disclosure—has impaired the defendant's ability to receive a fair trial.[25]

When a defendant pleads guilty or the case goes to trial, there is a presumption that a prosecutor has complied with his disclosure obligations.[26] However, it is commonly believed that most *Brady* evidence never gets disclosed; rather, it remains buried in drawers, boxes, and file cabinets in the offices of the prosecutor, the police, and other law enforcement and government agencies connected to the case.[27] The *Brady* decisions we read only present a very small and select sampling of exculpatory and impeachment evidence that has been discovered after the trial. When *Brady* evidence is discovered after the trial but before an appeal, a defendant may make a motion for a new trial based on newly discovered evidence, or raise the *Brady* issue on his appeal.[28] Post-conviction, Brady litigation most often occurs when a defendant who is incarcerated for a long prison term, or who awaits execution, has discovered that *Brady* evidence that was concealed from him during his trial seeks to vacate his conviction and sentence because of the prosecutor's unconstitutional nondisclosure. Defendants who have been convicted by a guilty plea,[29] or have

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[25] *See infra* notes 153–164, and accompanying text.

[26] *See* Bracy v. Gramley, 520 U.S. 899, 909 (1997) (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926)) ("Ordinarily, we presume that public officials have properly discharged their official duties.").

[27] *See* United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable"); United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) ("material favorable to the defense may never emerge from secret government files"). *See also* Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1455 (2006) ("Defendants only rarely unearth suppressions."); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1579 (2000) (arguing that in most cases, "withheld evidence will never see the light of day"); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 909 (1995) ("it is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported").

[28] *See infra* notes 165–174 and accompanying text.

[29] The extent to which *Brady* applies in the context of plea bargaining and guilty pleas is unclear. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 958 (1989) (noting that although *Brady* issues are raised in the plea bargaining process, the extent of a prosecutor's duty to disclose exculpatory evidence during plea negotiations is unclear). The Supreme Court has held that a prosecutor does not suppress evidence under *Brady* when he fails to disclose, during plea negotiations, evidence that a defendant could use at trial to impeach a government witness. *See* United States v. Ruiz, 536 U.S. 622, 623 (2002). However, *Brady* may apply in the plea bargaining process when the prosecutor's failure to disclose evidence was sufficiently outrageous as to constitute a material misrepresentation rendering the plea involuntary. *See* Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) ("government's nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary."); Matthew v. Johnson, 201 F.3d 353, 364 n. 15 (5th Cir. 2000) (even if nondisclosure is not a *Brady* violation, there may be situations in which the prosecutor's

completed their prison sentence, usually do not search for undisclosed *Brady* evidence or raise and litigate a *Brady* claim. Moreover, because a prosecutor ordinarily enjoys absolute immunity from civil liability for *Brady* violations,[30] and it is unlikely that a defendant whose case has been completed and who is no longer incarcerated will seek to litigate a civil rights action against the prosecutor.

How does undisclosed *Brady* evidence get discovered after the trial? *Brady* evidence may be discovered after conviction in different ways. Sometimes a defendant is able to locate such evidence pursuant to a request under the Freedom of Information Act.[31] A defendant may initiate his own investigation, usually through relatives and friends, to attempt to locate witnesses to prove that the prosecutor suppressed *Brady* evidence.[32] Additional *Brady* evidence may be discovered after a court grants an evidentiary hearing, orders discovery, and takes testimony on a defendant's motion to vacate the conviction.[33] And there have been instances when Brady evidence is discovered serendipitously.[34]

Assuming that previously undisclosed *Brady* evidence has been discovered after conviction, and assuming further that there are no procedural obstacles that would bar review, a court addressing the merits of a *Brady* claim must answer three questions: (1) Did the prosecutor suppress evidence? (2) Was the evidence favorable to the accused? (3) Was the suppression prejudicial to the accused? These three questions comprise what are commonly referred to as the "three components of a true *Brady* violation."[35] They are the basis not only for examining the judiciary's interpretation and application of the *Brady* rule, but also for examining the tactics that prosecutors

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nondisclosure makes it "impossible [for defendant] to enter a knowing and intelligent plea.").

[30] *See, e.g.*, Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003); Lyles v. Sparks, 79 F.3d 372 (4th Cir. 1996).

[31] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 671 (1985).

[32] *See, e.g.*, State v. Larkins, 2003 WL 22510579 (Ohio App. 8th). (Bishop Alfred Nickles filed a public records request with the Cleveland Police Department, seeking the same police reports previously denied to Larkins, and after receiving the documents, forwarded them to Larkins).

[33] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 278 (1999).

[34] *See, e.g.*, United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994) (*Brady* evidence discovered by U.S. probation officer during routine pre-sentence investigation which revealed documents casting doubt on the credibility of key government witness); Sean Gardner, *$5 Million Cannot Undo 7 Years; City Settles Over Wrong Conviction*, NEWSDAY, Dec. 17, 2003 (*Brady* evidence inadvertently discovered by an investigator for an insurance company representing New York City and a day care center in a civil lawsuit brought by parents of the victim of a sexual abuse crime).

[35] *See Strickler*, 527 U.S. at 281–82.

employ, and the games that prosecutors play, to avoid complying with *Brady*.

THE METAPHOR OF GAMES

Discussion of U.S. litigation frequently employs the metaphors of sports and games. We refer to contests, fights, winning, losing, fair play, foul play, harmful errors, harmless errors, plain errors, points, and penalties. Discovery doctrine also makes reference to games, especially when the issue involves the difficulty for one party to acquire relevant information, and the duty of the other party to disclose relevant information to the adversary. The Supreme Court long ago recognized that one of the overriding objectives of the rules of discovery was to make a trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[36] More recently, the Court has invoked the games of "gambling,"[37] "hide and seek,"[38] and "scavenger hunts"[39] to characterize the perverse conduct of prosecutors in seeking to avoid their responsibilities under *Brady*. Indeed, there is probably no better context in which to examine prosecutorial gamesmanship than in connection with the *Brady* rule. What follows are the games that prosecutors most commonly play to avoid compliance with *Brady*. These games include charades, scavenger hunts, gambling, blind man's bluff, hide and seek, delay and conquer, obstacle courses, mazes, and Simon Sez. And, needless to say, prosecutors win almost all the time.

CHARADES: DISGUISE AND DECEIVE

One of the most insidious prosecutorial schemes to subvert *Brady* is the orchestration of a plan whereby a key prosecution witness, who ordinarily would have a motive to lie by virtue of having made a deal with the government, testifies that no deal was made. In fact, the witness's testimony that he has made no deal with the prosecutor may be accurate because the witness himself may not know about it. Unbeknownst to the judge, the jury, and the witness himself, a

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[36] United States v. Procter & Gamble Company, 356 U.S. 677, 682 (1958).

[37] *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (*Brady* "invites a prosecutor, whose interests are conflicting, to gamble, to play the odds").

[38] Banks v. Dretke, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecution may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

[39] *Id.* at 695 ("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.").

prosecutor may make a deal with a witness's attorney in which the prosecutor agrees to reward the witness for his testimony as long as the attorney's promises not to tell his client about the agreement. Employing this charade, the prosecutor can later claim that the witness's testimony about the absence of a deal is not perjury and there was no deal with the witness motivating him to provide impeachable testimony. How often prosecutors engage in this game is difficult to say. Several cases have been reported that describe such conduct. In *Hayes v. Brown*,[40] for example, the prosecutor made an agreement with the attorney for a key witness in a murder case to give the witness transactional immunity and dismiss other pending charges in exchange for his client's testimony. However, seeking to keep the arrangement from the judge and jury, the prosecutor extracted a promise from the witness's attorney that he would not tell his client about the deal; in that way, the witness could honestly testify without perjuring himself because he would not be personally informed of the deal.[41] At the trial, when the defendant's attorney asked the prosecutor whether there had been any negotiated settlement in exchange for the witness's testimony, the prosecutor responded in open court that "[t]here has been absolutely no negotiations whatsoever in regard to his testimony,"[42] and that there were "absolutely no promises and no discussions in regard to any pending charges."[43]

On appeal following the conviction, after this charade was divulged, the government argued that the witness did not give false testimony, and therefore the prosecutor did not violate the *Brady* rule by allowing false testimony to be given without correction. Rejecting this argument in scathing language, the Ninth Circuit observed: "It is reprehensible for the State to seek refuge in the claim that a witness did not commit perjury, when the witness unknowingly presents false testimony at the behest of the State."[44] Citing a series of Supreme Court decisions involving a prosecutor's presentation of false testimony,[45] the appellate court vacated the conviction and harshly

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[40] 399 F.3d 972, 977 (9th Cir. 2005) (en banc).

[41] Although the court assumed that the witness was unaware of the deal, the court noted the "distinct risk that, in preparing [the witness] for his testimony, [the witness's] counsel—who did know about the deal—might have influenced the content of that testimony, deliberately or not." *Id.* at 981 n. 1.

[42] *Id.* at 979.

[43] *Id.* at 980.

[44] *Id.* at 981. See also Wilhoite v. Vasquez, 921 F.2d 247, 251 (9th Cir. 1990) (Trott, J., concurring) ("This saves [the witness] from perjury, but it does not make his testimony truthful.").

[45] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942).

condemned the prosecutor's scheme as a "covert subornation of perjury."[46]

A similar—but less overt—form of prosecutorial gamesmanship that achieves the same objective is the prosecutor's ploy of making a tacit deal with a witness without actually verbalizing the agreement. For example, a witness may approach a prosecutor and seek to make a deal for his testimony. A prosecutor may reward the witness without verbalizing or memorializing his intention. A prosecutor could thereby claim that he did not violate *Brady* by soliciting the testimony of a cooperating witness who could credibly say he made no deal and received no benefits for his testimony. Some courts actually allow the prosecutor to engage in this type of charade, as long as the prosecutor does not make an overt promise of assistance before the witness testifies, even if the prosecutor in fact intends to reward the witness with favorable treatment after the testimony and does so.[47] It is not difficult to imagine, as one court observed, that "such a formalistic and technical evasion would eviscerate the *Brady* rule."[48] Given the potential for gamesmanship and abuse, many courts agree that allowing a prosecutor to make such a secret agreement would be a means for a prosecutor to circumvent his *Brady* obligation.[49] Thus, as reported in *Bell v. Bell*,[50] where a witness approached the prosecutor and sought benefits from the prosecutor (and, the court noted, most cooperating witnesses do not testify from altruistic motives[51]) and the prosecutor understood this expectation and fulfilled the witness's expectation by actually bestowing benefits, the court found an implied agreement that reasonably impacted on the witness's credibility.[52] To allow this type charade not to be disclosed, the court observed, merely encourages further gamesmanship.[53]

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[46] 399 F.3d at 981. *See also* People v. Steadman, 623 N.E.2d 509, 511 (N.Y. 1993) ("scheme employed by the District Attorney's office undermines [*Brady*]" and "cannot be condoned.").

[47] Shabazz v. Artuz, 336 F.3d 154 (2d Cir. 2003) (favorable treatment for witness insufficient to show agreement between prosecution and witness).

[48] Bell v. Bell, 460 F.3d 739, 753 (6th Cir. 2006), *reh'g granted en banc*, 2006 U.S. App. LEXIS 32575.

[49] *Id.* at 754–55 (6th Cir. 2006); Wisehart v. Davis, 408 F.3d 321, 323–24 (7th Cir. 2005) (tacit understanding between prosecution and witness must be disclosed); Reutter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989); United States v. Shaffer, 789 F.2d 682, 685 (9th Cir. 1986).

[50] 460 F.3d 739 (6th Cir. 2006).

[51] Bell v. Bell, 460 F.3d at 753 ("a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return.").

[52] *Id.* at 755 ("A tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement.").

[53] *Id.* (court's rule "is necessary to prevent the prosecution from shirking its *Brady* responsibilities by simply waiting until after the petitioner's trial to act upon the tacit agreement.").

Prosecutors have concocted similarly deceptive schemes to subvert the *Brady* rule and thereby insulate their witnesses from attacks on their credibility. For example, in *Silva v. Brown*, the prosecutor made a secret deal with the attorney for a key witness to forestall a psychiatric examination of the witness prior to his testimony.[54] The witness was the accomplice in a murder who had sustained severe brain damage years earlier. The witness's attorney planned to have his client psychiatrically evaluated after his arraignment because he was either unable to cooperate in his defense or was insane. However, because a psychiatric evaluation would have to be disclosed and under *Brady* would "supply ammunition to the defense," the prosecutor struck a bargain with the witness's lawyer under which he would delay the examination until after the witness's testimony in exchange for dismissing the murder charges against his client.[55]

According to the appellate court, which reversed the defendant's conviction, the "prosecutor's unscrupulous decision to keep secret the deal he made to prevent an evaluation of the competence of the State's star witness" was crucial impeaching evidence under *Brady* because, as the prosecutor well knew, the examination results would have had a powerful impact on the jury's assessment of the witness's testimony.[56] Moreover, "the very fact that the [prosecutor] had sought to keep evidence of [the witness's] mental capacity away from the jury might have diminished the State's own credibility as a presenter of evidence."[57]

Finally, the connection between a prosecutor's nondisclosure of *Brady* evidence and his coaching of a witness should be noted. Improper coaching is itself a form of lawyer gamesmanship. It has been called one of the "dark secrets" of the U.S. adversary system in the way it undermines the search for truth,[58] and is very difficult to detect because neither the lawyer nor the witness would reveal the secret. Sometimes the coaching is obvious. In a recent egregious case, undisclosed *Brady* evidence depicted a federal prosecutor ordering a police investigator to take a recanting witness out of the room and "straighten him out."[59] Indeed, one of the prominent features in

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[54] 416 F.3d 980, 984 (9th Cir. 2005).

[55] *Id.*

[56] *Id.* at 991.

[57] *Id.* at 988.

[58] John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) ("Witness preparation is treated as one of the dark secrets of the legal profession.").

[59] Ferrara v. United States, 456 F.3d 278, 282 (1st Cir. 2006). The court found that the prosecutor "manipulated the witness and deliberately tried to cover up the evidence," and that this "blatant misconduct . . . was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary." *Id.*

several of the Supreme Court's *Brady* decisions has been an effort by the prosecutor to coach witnesses in order to avoid revealing the existence of *Brady* evidence. In *Banks v. Dretke*,[60] a key piece of suppressed evidence was a transcript of a practice session showing how the prosecutor "intensively coached" and "closely rehearsed" the testimony of witnesses. In *Kyles v. Whitley*,[61] there was a clear implication of coaching from the suppressed evidence that would have shown how the witness's testimony became much more precise at a re-trial.[62]

A good example of a prosecutor's manipulating a witness to evade *Brady* is *Walker v. City of New York*, in which a prosecutor almost certainly coached a cooperating witness to give false testimony to conceal information that would have destroyed the witness's credibility.[63] In *Walker*, the cooperating witness in a murder prosecution initially identified two individuals as the perpetrators. However, when the prosecutor learned that one of these alleged perpetrators could not have committed the crime because he was in prison at the time, he elicited testimony from the cooperator, before the grand jury and at trial, that he did not mention a second accomplice. The appellate court, in reversing the conviction, condemned the prosecutor's failure to disclose the stark inconsistency in the witness's story, but the implication of witness manipulation is obvious.

THE SCAVENGER HUNT: OPEN FILE DISCOVERY

Some prosecutors represent that their office maintains a so-called "open file" discovery policy, whereby the entire file of a case is routinely made available to the defense, in all cases, well in advance of the trial. To be sure, an open file policy may be a responsible means of insuring a fair and orderly prosecution. According to one prosecutor, "We're taking the approach now that every document that we gather in the course of an investigation will be made available to the defense. And it should be made available at the time of arraignment."[64] Under such an open-file approach, materials that are

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at 293.

[60] 540 U.S. 668, 677, 685, 705 (2004).

[61] 514 U.S. 419, 443, 443 n.14, 454 (1995).

[62] For other *Brady* decisions by the Supreme Court that appear to have involved a prosecutor's coaching of witnesses, see *Strickler*, 527 U.S. 263; *Alcorta*, 355 U.S. 28.

[63] 974 F.2d 293, 295, 301 (2d Cir. 1992).

[64] Panel Discussion, *Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 786 (1999) (comments of G. Douglas Jones, United States Attorney for the Northern District of

often viewed as critical to defense discovery, including a list of the government's witnesses, statements of those witnesses, summaries of statements made by witnesses, and relevant police reports, are turned over to the defense early in the case.[65] An open file policy that discloses every relevant item in the government's case to the defense may, theoretically, offer a better chance of a prosecutor complying with *Brady* than a more restrictive discovery approach.[66] However, even under the most expansive open file policy, prosecutors typically make a distinction between what is required under discovery rules, and what is required under *Brady*, disclosing the former but not the latter.[67]

Prosecutors ostensibly maintain an open file policy for several reasons. Such a policy may enhance a prosecutor's reputation for transparency and fairness. It may also foster in judges and defense lawyers a sense of trust of the prosecutor that reduces the occasions for contentious discovery litigation. And an open file arrangement may encourage defendants to plead guilty in the belief that having been fully informed about the prosecution's case, they may assume that they will receive a favorable bargain from a prosecutor who acts with integrity. To be sure, this informal arrangement defies generalization, because as many commentators have observed, it is implemented in vastly different ways, by different offices, and indeed, by different prosecutors in the same office.[68]

Given the superficial attractiveness of an open file policy, and the institutional benefits allegedly accruing from such a policy, one might assume that such a policy enhances a defendant's ability to obtain more complete discovery, including the disclosure of *Brady* evidence, well in advance of trial, enabling a defendant to make an informed

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Alabama) [hereinafter *Panel Discussion*].

[65] Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1522 (2000) ("Some defense attorneys are fortunate to practice in jurisdictions that have "open-file" discovery practices and thus receive the material early in the case.").

[66] This assumes, of course, that the prosecutor has carefully reviewed the file, is aware of the details in the file, including potential *Brady* material, and has made the decision to disclose all of this information to the defense. However, this assumption is not necessarily justified. *See Panel Discussion*, *supra* note 65, at 805 (comments of Art Leach, Assistant United States Attorney and chief of Organized Crime Strike Force) ("open file discovery is the lazy approach to handling discovery" because prosecutors are "unaware of many details that appear in what you are presenting for discovery").

[67] *See Panel Discussion*, *supra* note 65, at 786 (comments of U.S. Attorney Jones) (open file discovery "doesn't necessarily include the 'Brady' material").

[68] *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 461 (2001) ("Different prosecutors may offer 'open file discovery' and have vastly different ideas of what that means.").

decision whether to go to trial or plead guilty. However, this assumption may be flawed. To the extent that an open file policy represents to a defendant that a prosecutor has disclosed everything in her file relevant to the case, it may lull a defendant into believing that he need take no further action to enforce discovery requirements. In such a case, an open file policy may become a trap for the unwary. Through the pretense of transparency, prosecutors have the ability to not only withhold *Brady* evidence—as they may do in any case—but also by suggesting that full disclosure has been made, forestall any further inquiry and, in fact, change the nature of the defense. Indeed, several of the most egregious *Brady* violations have been reported in cases where prosecutors represented that they allegedly maintained an open file policy and had claimed to disclose everything in the file relating to the case, including *Brady* evidence.[69]

The opportunities for gamesmanship under an open file policy are considerable. First, so-called open file discovery is really a misnomer. Even those prosecutors who boast that, upon arraignment, they disclose to defendants every document that has been gathered in the course of an investigation, from every agency involved in the investigation—including the statements of witnesses and other evidence material to the defense—candidly acknowledge that much evidence is *not* disclosed under this policy and that defendants must scavenge for additional evidence.[70] Among the evidence that is not ordinarily disclosed are a prosecutor's work product, summaries of interviews with witnesses, notes and communications with other law enforcement officials, information that is privileged or confidential, and information whose disclosure might threaten the safety of witnesses.[71]

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[69] *See, e.g.*, *Banks*, 540 U.S. at 693 (prosecution represented that it had fully disclosed all relevant information its file contained; file did not include critical exculpatory information relating to one of state's key witness); *Strickler*, 527 U.S. at 276 n. 14 (prosecutor told petitioner that the prosecutor's files were open and thus there was no need for a formal *Brady* motion; prosecution file given to the petitioner did not include several important documents prepared by one of the prosecutor's key witnesses).

[70] *Panel Discussion*, *supra* note 65, at 786–87 (comments of U.S. Attorney Jones) (noting that open file discovery may not include summaries of witness interviews or statements of witnesses whose safety needs to be protected).

[71] *Id.* at 787–88 (evidence withheld to protect safety of witnesses); *Id.* at 805 (agent's notes of interviews with witnesses not required to be disclosed); *Id.* at 805 ("work product" evidence reflecting prosecutor's impressions, strategies, and legal theories not required to be disclosed). *See* Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 55-858 (2004) (discussing extent to which privileged communications are able to be disclosed under *Brady*). The Supreme Court has not decided whether a prosecutor's "work product" must be disclosed under *Brady*. However, lower courts have discussed the question of whether a prosecutor's "work product" that includes *Brady* evidence must be disclosed. *Compare* Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006) (*Brady* rule does not extend to prosecutor's work product because it "would greatly impair the government's ability to prepare

Second, prosecutors acknowledge that even under the most liberal open file policy, open file disclosure does not necessarily include all relevant documents, including *Brady* evidence.[72] Prosecutors know that *Brady* evidence may be in the files of other government agencies, i.e., the police and other law enforcement agencies involved in the investigation.[73] To the extent that a prosecutor represents that he maintains an open file policy, he knows that he may be misleading the defense into believing they are getting a complete file. A good example is *Strickler v. Greene*,[74] where the prosecutor allegedly maintained an open file policy that allowed the defense to inspect the entire case file, including police reports and witness statements. However, several items of evidence that would have seriously discredited a key prosecution witness were not included in the file; they were located in the files of the police and the prosecutor's office in a different county. Relying on the prosecutor's open file representation, defense counsel did not file a pre-trial motion for *Brady* evidence.[75] Thus, whether from negligence or deceit, the prosecutor's assurance caused the defense not to hunt for additional evidence.

That an open file policy may result in *Brady* evidence being withheld by other government officials, including other prosecutors, and not disclosed to the prosecutor who is preparing the case for trial, should not be a surprise. Governmental agencies involved in an investigation may decide not to disclose *Brady* evidence to the prosecutor for various reasons, including a fear that disclosure may undermine the safety of witnesses, compromise the integrity of the case, or damage other ongoing investigations. The relationship between prosecutors and the police has not been sufficiently examined with respect to the formulation and dissemination of rules and policies for the creation, retention, and disclosure of *Brady* evidence. But it is reasonable to expect that some prosecutors, particularly those who are young and inexperienced, may not press

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for trials") *and* Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000) (reaching the same conclusion as *Morris* regarding prosecutor's work) *with* Mincey v. Head, 206 F.3d 1106, 1133 n. 63 (11th Cir. 2000) (citing lower federal and state court cases and noting "that most have concluded that there is no automatic exemption from disclosure of work product under *Brady*").

72 *Id.* at 786 (open file "doesn't necessarily include the *Brady* material).

73 *See infra* notes 109–111 and accompanying text.

74 527 U.S. 263, 276 (1999).

75 *Id.* The Court noted 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*." *Id.* at 283 n. 23.

the more experienced police agents too hard.[76] Moreover, there are occasions when the competitive relationship between federal and state law enforcement agencies may result in important evidence in the possession of federal officials being withheld from their state counterparts.[77]

Third, an open file policy may provide a prosecutor with an opportunity to conceal *Brady* evidence with the excuse that he inadvertently slipped up.[78] For example, the prosecutor in the Duke lacrosse rape case, Michael B. Nifong, the former District Attorney of Durham, North Carolina, who apparently had a reputation for giving defense lawyers open access to his evidence,[79] was recently disbarred for suppressing critical exculpatory evidence—a finding by a laboratory that showed DNA evidence from four unidentified men on the clothes of the alleged victim, but no DNA evidence from any lacrosse player.[80] Indeed, the director of the laboratory testified that this information was excluded from his report at the prosecutor's direction, notwithstanding the prosecutor's representation to the court that the report was a complete description of the laboratory's findings.[81] The prosecutor's excuse for his failure to disclose the information was that it got lost in the massive amount of evidence in

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[76] *See* United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) (commenting on "disastrous consequences" from young, untrained, and ambitious prosecutors). *See also* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 295 (3d ed. 2001) ("Many prosecutors are relatively young, inexperienced, and ambitious, which makes them particularly vulnerable to adversarial pressures."); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945 (1999). ("The relationship between the prosecutor and the agent who investigated the case has also resulted in assistants acting in a less than diligent fashion").

[77] *See* People v. Santorelli, 741 N.E.2d 493 (N.Y. 2000) (no *Brady* violation where FBI refused to turn over to state prosecutor interview reports with key witness obtained during independent and preexisting federal investigation).

[78] *See* Douglass, *supra* note 69, at 461 ("The *Brady* case law is filled with examples of defendants who received "open file" discovery from well-meaning, but negligent prosecutors.").

[79] *See* David Barstow and Duff Wilson, *DNA Witness Jolted Dynamic of Duke Case*, N.Y. TIMES, Dec. 24, 2006 ("[Nifong] has long been known locally for giving defense lawyers open access to his evidence, even before a state law required that.").

[80] *See* Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21.

[81] *Id.* After the court asked Nifong: "So you represent that there are no other statements from Dr. Meehan?" Nifong replied: "No other statements . . . No other statements made to me." Nifong has been charged in an ethics complaint by the North Carolina State Bar with making inflammatory statements to the media and misleading the public about evidence in the case. *See* David Barstow and Duff Wilson, *Prosecutor in Duke Case Faces Ethics Complaint*, N.Y. TIMES, Dec. 29, 2006. Following the ethics complaint, the State Attorney General, at Nifong's request, took over the prosecution and after conducting his own investigation, dismissed the charges against the three former Duke lacrosse players, declaring them to be innocent and wrongly accused by an "unchecked" and "overreaching" district attorney. *See* David Barstow and Duff Wilson, *Duke Prosecutor Throws Out Case Against Players*, N.Y.TIMES, April 12, 2007, at A1.

the case, and that he was distracted by other pressing matters in his office. "You know," he stated, "it's not the only case I have right now."[82]

Even assuming that prosecutors who administer a well-intentioned open file policy may inadvertently omit some crucial *Brady* evidence, there is no doubt that some unscrupulous prosecutors intentionally administer an open file arrangement to trap an unwary defense counsel into believing that he has received full disclosure and that he need not engage in further and unnecessary discovery litigation. One of the most notorious perpetrators of this type of misconduct is the former chief prosecutor in Cuyahoga County, Ohio, Carmen Marino. As anybody who has followed Marino's prosecutorial career is aware, he has been the subject of widespread criticism by courts and commentators for his overzealous and unethical conduct.[83] In several cases, particularly capital prosecutions, Marino's practice was to "open" his files to the inspection and discovery by the defense.[84] According to testimony by defense lawyers, Marino's custom was to have his colleagues lead members of the defense team into the prosecutor's office "to allow defense counsel to look at the file."[85] Under this arrangement, "the defense was not permitted to physically

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[82] *See* Barstow and Duff, *supra* note 80. Nifong's justification for failing to disclose the DNA evidence is not unusual. Prosecutors frequently argue that excessive workloads, inadequate funding, and the involvement of many government agencies in an investigation places an unfair burden on prosecutors to comply with *Brady*. *See, e.g.*, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006) at xxvii (prosecutors' "daily struggle to handle each day's crises," together with "enormous workloads" and "without adequate funding... makes it hard for prosecutors to ensure [compliance with *Brady*]"); Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U.L. REV. 601, 604, 617 (1999) ("proliferating proceedings," "avalanche of documents" and involvement in investigation of many other government agencies would be "disruptive" and "impose an unfair burden on the Government."). *But see* Giglio v. United States, 405 U.S. 150, 154 (1972) ("To the extent [*Brady*'s disclosure duty] 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.").

[83] *See* In re Lott, 366 F.3d 431, 433 n.1 (6th Cir. 2004) (citing ten cases in which Ohio state courts found that Marino engaged in prosecutorial misconduct); Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, THE CENTER FOR PUBLIC INTEGRITY (2003) (identifying Carmen Marino as a "recidivist prosecutor" who has frequently been cited for misconduct); Regina Brett, *A prosecutor's Win Not Always Justice*, THE PLAIN DEALER, July 12, 2006 (according to Cuyahoga County Common Pleas Judge Daniel Gaul: "Marino should be criminally prosecuted for the abuses. It's nothing but one deceitful act after another. To permit anyone to be put to death after being prosecuted by Carmen Marino would be so ethically inappropriate you'd almost be culpable yourself.").

[84] *See* D'Ambrosio v. Bagley, 2006 WL 1169926, at *17–18 (N.D. Ohio) (describing the open file policy in Cuyahoga County Prosecutor's Office); State v. Larkins, 2003 WL 22510579, *3 (Ohio App. 8th) (witnesses at hearing "all attested to the 'open' discovery policy of Marino").

[85] *Id.*

view the police reports and a prosecutor read them to defense counsel."[86] Nevertheless, this practice was a ploy by Marino to lull the defense into believing it had received a complete accounting of the prosecutor's file. As disclosed in legal proceedings many years later, critical *Brady* evidence was hidden from the defense, including evidence that strongly suggested that innocent persons had been wrongfully prosecuted and convicted of capital murder and sentenced to death without access to evidence that would have exonerated them.[87]

Finally, a variation of the open file gambit that has attracted only modest attention is the practice by some prosecutors, particularly in corporate fraud, tax, and other white-collar crime cases, to overwhelm the defense with massive amounts of documents, including items that may be potential *Brady* evidence, and that are virtually impossible to read and digest in the limited time available for pretrial preparation.[88] For example, in one of the "Enron" cases,[89] the prosecution's open file policy required the defense to review over 80 million pages of documents, without identifying potential *Brady* evidence. In another financial fraud case,[90] the prosecution made roughly 160 boxes and 36 file cabinets of warehouse records available to the defense, without segregating the files or identifying potential *Brady* evidence. To be sure, some prosecutors provide indexes and other identifying data to aid the defense in inspecting the material. But so long as the prosecution has made the files available for defense inspection, the courts do not require the prosecution to "point the defense to specific documents within a larger mass of material that it has already turned over."[91]

GAMBLING: PLAYING THE ODDS ON MATERIALITY

As already noted, most *Brady* evidence that has been suppressed by prosecutors is never uncovered.[92] The evidence remains buried

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[86] *Id.*

[87] The opinions in *D'Ambrosio v. Bagley* and *State v. Larkins*—capital murder convictions prosecuted by Marino—detail the numerous *Brady* violations committed by Marino. Given these serious violations, and the many other citations to Marino's misconduct, one can only wonder how many other "Marino prosecutions" included exculpatory evidence that Marino concealed from the defense.

[88] *See Panel Discussion*, *supra* note 65, at 800–01 (comments of Nina A. Ginsberg)(describing problems of open file discovery in "big document cases" as "overwhelming task," since it is "impossible to go through file cabinets full of documents, make any sense out of them, figure out what might be helpful to you").

[89] United States v. Causey, 356 F.3d 681 (S.D. Tex. 2005).

[90] United States v. Pelullo, 399 F.3d 197 (3d Cir. 2005).

[91] United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997).

[92] *See supra* note 28.

somewhere, and as one court noted, "may never emerge from secret government files."[93] Although there are many reasons why prosecutors suppress *Brady* evidence, probably the most powerful justification most often relied on is the prosecutor's unilateral conclusion that the evidence is not material.[94] This prosecutor's calculation is not based on an estimate of whether the evidence will be favorable, helpful, or advantageous to the defense; rather, the only question is whether the evidence will be viewed by a court after the trial has been completed as being sufficiently important that it is "reasonably probable" that with the evidence the defendant would not have been found guilty,[95] and that without the evidence, the guilty verdict is not "worthy of confidence."[96] Thus, the central issue in most of the cases in which suppressed *Brady* evidence is discovered and litigated, often many years after a defendant's conviction—and there are thousands of such cases—concerns the materiality of the suppressed evidence. And as with other issues in *Brady* litigation, the lenient standard of materiality encourages prosecutorial gamesmanship by allowing prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court.

Indeed, under the standard of materiality applied by the courts, gamesmanship by the unethical prosecutor is to be expected. The rogue prosecutor who wants to "outwit and entrap [his] quarry"[97] will almost always deliberately suppress *Brady* evidence, believing that it will probably never be discovered, but even if it is discovered, perhaps long after the conviction, it is unlikely to be found material. Even the ethical prosecutor knows he cannot lose this game, and following her adversarial instincts, might reasonably determine not to disclose evidence that is obviously favorable to the defense. Consider Professor Sundby's description, most likely imagined with tongue lodged firmly in cheek, of the "ethical" prosecutor thinking about a

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[93] United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984).

[94] Most of the criticism of the judiciary's application of the *Brady* rule centers on the issue of materiality, and the conclusion most often reached by the courts that notwithstanding the prosecutor's suppression of evidence favorable to the accused, the evidence was not material and therefore no constitutional violation was committed.

[95] *Bagley*, 473 U.S. at 682 ("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.").

[96] Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("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.").

[97] Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

particular piece of favorable evidence under *Brady*'s materiality standard:

> This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.[98]

Prosecutors are, in case after case, increasingly "play the odds" that their suppression of important items of evidence will be viewed retrospectively by a reviewing court as not material and therefore not a violation of *Brady*. When this type of prosecutorial gamesmanship is exposed, courts occasionally check-mate the prosecutor, as a federal court recently did in vacating a murder conviction arising from a fight outside of a bar in New Rochelle, New York.[99] There, the prosecutor withheld from the defense, until the trial was almost over, another individual's confession that he stabbed the victim twice. The prosecutor argued at a hearing that this confession was not material, first, because it was more inculpating than exculpating, and second, because it was patently unreliable and therefore did not need to be disclosed. The confession was obviously material, as the federal court concluded several years after the conviction. The court also pointed out that it was not a prosecutor's prerogative in making a materiality determination to evaluate the credibility of a piece of evidence, as "[t]o allow otherwise would be to appoint the fox as henhouse guard."[100]

BLIND MAN'S BLUFF: THE PROSECUTOR AS OSTRICH

As discussed below, a defendant's knowledge of *Brady* evidence ordinarily relieves a prosecutor of her disclosure obligation. By the same token, a prosecutor's lack of knowledge of *Brady* evidence also

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[98] Scott E. Sunby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 653 (2002).

[99] DiSimone v. Phillips, 461 F.3d 181 (2d Cir. 2006). Following remand, a federal district court vacated the conviction and dismissed the indictment. *See* DiSimone v. Phillips, # 04 Civ. 3128 (CLB) (S.D.N.Y. Feb. 5, 2007). *See also* Shawn Cohen and Bruce Golding, *Conviction in Balancio Slaying Overturned*, THE JOURNAL NEWS, Feb. 8, 2007, at 1A.

[100] *Id.* at 195. *See also Kyles*, 514 U.S. at 440 (it is "the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false."). Nor may a prosecutor unilaterally conclude that evidence is cumulative or redundant. *See* Monroe v. Angelone, 323 F.3d 286, 301 (4th Cir. 2003) ("[T]he prosecution has a duty to disclose material even if it may seem redundant.").

may relieve a prosecutor of her *Brady* duty. The parties' knowledge of the evidence is the touchstone of *Brady*. Justice White made this point in *Giles v. Maryland*: "[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense."[101] Courts continue to recite the litany that prosecutors who may lack knowledge of the existence of *Brady* evidence have a constitutional and ethical duty to learn about its existence, but prosecutors continue to invoke their own familiar litany when a defendant requests *Brady* evidence: "We are aware of our *Brady* obligation and will comply." However, prosecutors are aware that if they lack knowledge of the existence of *Brady* evidence, there is nothing for them to suppress—or disclose. Thus, prosecutors can avoid complying with *Brady* by asserting either that they are unaware of the existence of *Brady* evidence, or that any *Brady* evidence, even if it exists, is not in their possession or control. Clearly, a claim of ignorance offers a prosecutor a convenient opportunity to engage in gamesmanship to avoid compliance with *Brady*.

The prosecutor's claim of ignorance as an excuse for compliance with *Brady* resembles a defendant's claim of ignorance as an excuse to avoid criminal liability. With respect to criminal defendants, ignorance or mistake may excuse criminal liability if it eliminates the mental state necessary for the crime.[102] However, a defendant's claim of ignorance is rejected when the defendant deliberately avoids knowledge.[103] Or, using the so-called "Ostrich instruction,"[104] a judge typically advises a jury that a defendant may not avoid guilty knowledge by "shut[ting] his eyes for fear that he would learn,"[105] or "bury[ing] his head in the sand so that [he] will not see or hear bad things."[106] Should a prosecutor who claims ignorance of *Brady* evidence as an excuse for non-compliance be held to a less demanding standard?[107] Indeed, if a prosecutor believes that there is a

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[101] 386 U.S. 66, 96 (1967) (White, J., concurring).

[102] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 5.1, at 432 (3d ed. 2000).

[103] *See, e.g.*, MODEL PENAL CODE (Proposed Official Draft 1962) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

[104] *See* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 223–27 (1990).

[105] United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc).

[106] United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990).

[107] *But see* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 976 (1999) ("in legal ethics, unlike criminal law, there is no willful blindness doctrine."). However, there is a huge distinction between a private lawyer failing "to press her client for knowledge or to corroborate what her client tells her," *Id.*, and a public prosecutor failing to press the police for knowledge or to corroborate what the defense counsel tells her. *See supra* notes 5–8, and accompanying

high probability *Brady* evidence exists and deliberately chooses to be indifferent to finding it, it would not seem unreasonable to charge a prosecutor with constructive knowledge of its existence. This conclusion would, in turn, render the prosecutor's nondisclosure a suppression of *Brady* evidence.

A prosecutor's ability to claim ignorance of *Brady* evidence as a basis for non-disclosure affords a prosecutor a considerable opportunity for gamesmanship. To be sure, under the Supreme Court's evolving standards governing a prosecutor's *Brady* duty, a prosecutor may not successfully claim ignorance if the evidence actually contained in the prosecutor's own files, the files of police agencies involved in the investigation, and the files of other investigative agencies that are part of the "prosecution team."[108] As the Court has noted, these are contexts in which a prosecutor, even if he lacks actual knowledge of the evidence, "should have known" of the evidence,[109] or, as elaborated in *Kyles v. Whitley*, "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."[110]

But the extent of a prosecutor's duty to search for *Brady* evidence in places where a prosecutor is charged with constructive knowledge has not been carefully analyzed or explained. The reasoning tends to be ad hoc, and often concludes with a finding that the evidence is not material in any event and therefore the prosecutor's non-compliance does not violate *Brady*.[111] But, again, a prosecutor is well aware that if

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text.

[108] *See* United States v. Risha, 445 F.3d 298, 302 (3d Cir. 2006) ("if a team or joint investigation did exist here, or if any state agent was acting on behalf of the federal government, the federal prosecution may be charged with the knowledge of the state Attorney General's Office").

[109] United States v. Agurs, 427 U.S. 97, 103 (1976). *See also* Giglio v. United States, 405 U.S. 150, 154 (1972) ("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.").

[110] *Kyles*, 514 U.S. at 437. However, there is no correlative duty on the part of the police to impart such information to the prosecutor. *See* Stanley Z. Fisher, *"Just the Facts, Ma'am:" Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 53 (1993) (claiming that police operate independently of prosecutors, answer to different constituencies, and may not reveal to prosecutors exculpatory evidence). *See also* Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379 (2000) (proposing amendments to ethics codes to require prosecutors to learn of exculpatory evidence known to police and to provide guidance on implementing responsibility).

[111] *But see* United States v. Brooks, 966 F.2d 1500, 1503 (App. D.C. 1992) ("the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that 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"); United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980) ("if disclosure were excused in instances where the

he chooses to remain ignorant of evidence located in the files of another agency, or fails to aggressively look for it, he will only be held accountable for non-compliance with *Brady* if the evidence is eventually is discovered, is deemed to have been in the prosecutor's possession or control, and is found to be material. Accordingly, a prosecutor who seeks to game the system in this way will almost always choose to avoid knowledge and assume the risk—an extremely safe risk—that he will never be held accountable.[112]

A prosecutor's deliberate blindness is most commonly encountered with respect to specific types of witnesses—scientific experts, cooperating witnesses, and eyewitnesses. A prosecutor's failure to carefully scrutinize the accuracy and credibility of scientific experts, and to search for evidence that would demonstrate the expert is fabricating or mistaken has been one of the recognized causes of wrongful convictions.[113] Indeed, scientific evidence, because it is so technical and complex, and has a unique capacity to persuade juries, requires close scrutiny by a responsible prosecutor.[114] Discovery rules require prosecutors to disclose results, reports, and statements by scientific experts the prosecutor intends to use at trial, in order to allow the defense sufficient time to analyze the scientific information, to conduct independent tests of their own, and to prepare their own experts.[115]

There are many instances, however, of a prosecutor's failure to disclose evidence showing that the testimony of the prosecutor'sscientific expert was either false or misleading.[116] There

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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 government."); *In re* Brown, 952 P.2d 715, 721 (Cal. 1998) ("Here, as in most circumstances, *Brady* compliance demanded no more than simple advertence. The evidence was readily accessible to the prosecution.").

[112] *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 568 ("Some prosecutors remain willing to take their chances that the evidence will never come to light or, if unearthed, will result in no significant penalty to the prosecution.").

[113] *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE (2000), at 158–171.

[114] *See* United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (expert usually viewed by jury with an "aura of special reliability and trustworthiness").

[115] *See* FED. R. CRIM. P. 16(a)(1)(C) and (D); ABA STANDARDS FOR JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-2.1(iv) and (v) (3d ed. 1996).

[116] *See* Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 21–8 (2003). In a recent murder case exoneration from upstate New York, the prosecutor suppressed a report from the nation's leading odontologist that "excluded" the defendant for causing a bite mark on the victim's arm, and used the testimony of a local dentist to convict the defendant, who spent 15 years in prison until freed by DNA evidence. *See* Fernanda Santos, *With DNA From Exhumed Body, Man Finally Wins Freedom*, N.Y. TIMES, Jan. 24, 2007, at B5.

are many instances involving a prosecutor's incomplete, untimely or total failure to comply with discovery obligations.[117] Moreover, there are other disturbing examples of prosecutors who appear to be ignorant of their expert's dishonest and incompetent analysis, as well as the expert's use of so-called "junk testimony," notwithstanding obvious signs of pervasive and systematic fraud, incompetence, and misconduct by the expert.[118] Indeed, in order to obtain the benefits of their expert's testimony, prosecutors have deliberately ignored and concealed complaints of misconduct, and have publicly praised and rewarded the work of some of the most notorious of these so-called "experts."[119]

Prosecutors also avoid knowledge about weaknesses in the testimony of cooperating witnesses deliberately, as well as the existence of *Brady* evidence that might discredit the testimony of cooperators. Professor Yaroshefsky's important study of cooperating witnesses,[120] based on extensive interviews with former federal prosecutors, describes the extent to which prosecutors succumb to the allure and manipulation of the cooperator. One former prosecutor described the relationship as "falling in love with your rat,"[121] which not only skews the prosecutor's ability to evaluate the cooperator's credibility objectively, but inhibits the prosecutor from searching for evidence that might discredit the witness. Such a mindset intentionally avoids probing into obvious fabrications and embellishments by the cooperating witnesses,[122] of searching for corroboration that would reasonably support the witness's story,[123] not inquiring about prior statements cooperators may have made to police investigators,[124] and accepting unhesitatingly the case agent's

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[117] *Id.*

[118] *See* Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997) (documenting accounts of widespread abuses by forensic scientific experts).

[119] *See* Gershman, *supra* note 117, at 27, 31.

[120] *See* Yaroshefsky, *supra* note 77.

[121] *Id.* at 944.

[122] *Id.* at 946–47 ("additional probing makes the case more complicated and sometimes more difficult to prevail so people ignore such facts"; "cooperator's testimony was so important to a case that the evaluation of his veracity was skewed through the lens of his utility to the government"; "the pressures and mindset of some prosecutors make it less likely that the government will carefully examine lies by its cooperators").

[123] *Id.* at 936, 938, 940 ("the black hole of corroboration is the time that cooperators and agents spend alone"; "some prosecutors become 'lazy and sloppy' in obtaining and evaluating corroboration"; "there were numerous instances where facts were not uncovered due to lack of investigation").

[124] *Id.* at 945-6, 958, 961 ("many people do not want to uncover facts that are inconsistent with their theory of the case"; "embellished testimony is the 'dirty little secret' of our system"; "the office lore is don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else").

opinions and recommendations about the credibility and accuracy of the witness.[125]

Thus, the ostrich-prosecutor, as Professor Yaroshefsky's study reveals, has an unduly simplistic attitude about the truth, an "obsession with exact facts," and is a poor intuitive judge of truth and deception.[126] By the same token, several commentators have described a prosecutorial mindset that embodies a kind of "macho-ostrich," characterized by a hardened view of justice,[127] an emphasis on putting bad people in jail,[128] and a "tunnel vision" approach to ascertaining the truth and the credibility of their witnesses.[129] This mindset, needless to say, makes it much less likely that a prosecutor will search for *Brady* evidence, and appreciate its value even if he finds it.

Prosecutors also are willfully blind to the unreliability of eyewitnesses. Given the many DNA exonerations, mostly attributable to erroneous eyewitness testimony, it is reasonable to expect that a prosecutor seeking to promote justice would carefully probe the accuracy of the eyewitness and search for any discrediting evidence. In fact, prosecutors are probably more adept than juries in evaluating the reliability of their eyewitnesses.[130] Prosecutors know more about the case, about the techniques of interviewing witnesses, and presumably are aware of the inherent dangers of eyewitness testimony. Nevertheless, cases are replete with examples of eyewitness testimony whose reliability defies logic, and whose testimony would seem unbelievable even to the most naive and

[125] *Id.* at 945 ("The relationship between the prosecutor and the agent who investigated the case has also resulted in assistants acting in a less than diligent fashion"; "if you are committed to getting the absolute truth, you often have tension with various agencies").

[126] *Id.* at 953–6 ("there is a perception that many assistants do not share the complex view of the nature of truth"; "there's often a linear attitude about the truth;" "prosecutors simply do not understand how memory works and the reality of truth"; "danger of imposing a lawyer's view of fact development upon a cooperator who does not share a lawyer's 'obsession with exact facts'").

[127] *See* George T. Felkenes, *The Prosecutor: A Look at Reality,* 7 SW. U. L. REV. 98, 109 (1975) (prosecutor's "working environment caus[es] him to view his job in terms of convictions rather than the broader achievement of justice"); Yaroshefsky, *supra* note 77, at 949 (describing prosecutors as having "law enforcement," "gung ho," and "true believer" mentality).

[128] *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct,* 23 CRIM. L. BULL. 550, 552 (1987) ("the prosecutor will almost always believe the defendant to be guilty").

[129] *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision,* 49 HOW. L.J. 475 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L. REV. 291; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science,* 47 WM. & MARY L. REV. 1587 (2006).

[130] *See, e.g.,* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt,* 16 J. LEGAL STUD. 395, 446 (1987) ("There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.").

inexperienced prosecutor.[131] For prosecutors to blindly accept the testimony of these witnesses because they appear to be confident, and refuse to engage in even the most superficial investigation of their background and reliability, makes it much more likely that innocent persons will be convicted.[132]

A prosecutor is also willfully blind to the existence of *Brady* evidence in places where a prosecutor is not deemed to have constructive knowledge, but where a search might reasonably yield exculpatory evidence. If *Brady* evidence is in the possession of a government agency that is not a part of the investigation or the "prosecution team," a prosecutor's *Brady* duty generally is limited to instances in which a prosecutor actually knows about the evidence.[133] Thus, even though it might be reasonable for a prosecutor to believe that *Brady* evidence exists, and even though the failure to search for it might encourage the perception that prosecutors willfully overlook or avoid their *Brady* obligations, prosecutors ordinarily do not search for such evidence.[134] Prosecutors claim that it would be an onerous burden to engage in an open-ended "fishing expedition," particularly given a prosecutor's heavy workload, daily crises, and trial preparation.[135] Prosecutors also claim that such evidence is available to the defense through a discovery request or a subpoena. Finally, prosecutors are aware that even if the evidence ultimately is discovered, the prosecutor will not be found to have suppressed the evidence because the evidence was not in the prosecutor's possession or control but, rather, was in the possession and control of an independent agency.[136] However, if a prosecutor is faced with a specific request for *Brady* evidence and knows or should know that the evidence exists, he cannot bury his head in the sand.

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[131] *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 343 n. 191 (2001) (studies documenting unreliability of eyewitness identifications).

[132] The growing number of DNA exonerations is probably the most powerful indicator of the questionable reliability of eyewitness identifications.

[133] *But see* Pennsylvania v. Ritchie, 480 U.S. 39, 57–60 (1987) (suggesting that *Brady* may impose a duty on prosecutors to examine files of other government agencies to determine if they contain exculpatory evidence); Lavallee v. Coplan, 374 F.3d 41, 45 (1st Cir. 2004) (noting "ambiguity about the relationship between *Ritchie* and *Brady*); Crivens v. Roth, 172 F.3d 991, 997 (7th Cir. 1997) (prosecutor required to conduct "diligent search" for evidence in possession of "some arm of the state").

[134] *See* Robert Hochman, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1687 (1996) ("*Brady* does not impose a general duty on the government to investigate.").

[135] *See* United States v. Risha, 445 F.3d 298, 304 (3d Cir. 2006) ("prosecutors are not required to undertake a 'fishing expedition' in other jurisdictions to discover impeachment evidence.'). *See also* ACHIEVING JUSTICE, *supra* note 83.

[136] *See* United States v. Pelullo, 399 F.3d 197, 218 (3d Cir. 2005) (prosecutor not charged with knowledge of relevant document in possession of federal welfare benefits agency that was not part of "prosecution team").

HIDE AND SEEK

A prosecutor also may avoid *Brady* disclosure by claiming that the defense knew of the existence of the evidence, or with reasonable diligence could have obtained the evidence. The *Brady* rule, as described in *United States v. Agurs*, applies to situations "[involving] the discovery, after trial, of evidence which had been known to the prosecution but unknown to the defense."[137] This description appears to focus on a defendant's actual knowledge of the evidence in determining whether evidence is available to a defendant for *Brady* purposes.[138] To permit a defendant who has actual knowledge of the existence of suppressed evidence later to claim a *Brady* violation based on the prosecutor's nondisclosure would enable a defendant to sandbag the prosecutor. Such a tactic, one court observed, "would allow [a defendant] to take a free ride during the trial and if he is not satisfied with the result he can always get a new trial."[139] In addition, a rule of disclosure that focuses on a defendant's actual knowledge strikes an appropriate adversarial balance that places reasonable obligations on a defendant and enforces a prosecutor's duty to seek justice.

However, courts have amplified this "exception" to a prosecutor's suppression of *Brady* evidence not just in situations where the defendant has actual knowledge of the *Brady* evidence, but also in situations where the defense could have been expected to discover the evidence through the exercise of reasonable diligence.[140] And the extension of the principle of defense knowledge has offered prosecutors another opportunity to engage in gamesmanship—i.e., to conceal important evidence that theoretically may be available to a defendant—and argue later, if the evidence ever comes to light, that the defendant, despite having no actual knowledge of the evidence, could easily have discovered the evidence with the exercise of reasonable diligence. The consequences of this gamesmanship are several. First, by shifting the focus away from his own duty to disclose hidden evidence to the defendant's duty to find it, prosecutors bring disrepute to themselves and disrespect for the

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[137] 427 U.S. 97, 103 (1976).

[138] *See* Boss v. Pierce, 263 F.3d 734, 743 (7th Cir. 2001) (the description in *Agurs* "suggests a focus of actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes.").

[139] Smith v. State, 541 S.W.2d 831, 838 (Tex. Crim. App. 1976).

[140] *See* United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982) ("Evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.").

system of justice.[141] Moreover, resolving questions of whether a defendant could have learned about the evidence with reasonable diligence requires courts to engage in difficult post hoc factual determinations of the extent to which evidence was available to a defendant, and whether the defendant reasonably should have known about it.

To be sure, where *Brady* evidence is readily accessible to a defendant by exercising reasonable diligence, it makes sense not to impose a search and disclose obligation on the prosecutor. Examples might include evidence contained in an open file that has been furnished to the defense; items that a defendant reasonably should know are contained in a public record and may be obtained through routine discovery or service of a subpoena;[142] or conversations between a defendant and other persons which the defendant reasonably should recall. However, although a prosecutor might be able to avoid disclosure by claiming that a defendant should have been aware of pertinent statements that he made to other persons, it is not reasonable for a prosecutor, as one court observed, "to hold a defendant accountable for every conversation he has ever had in his lifetime regardless of the surrounding or intervening circumstances."[143] Or, as another court put it, "it is untenable to suggest that, in order to obtain impeachment evidence on behalf of a client, a public defender is, in any way, obligated to check the total list of persons who have been served by the agency to ascertain whether a prospective witness was a former client."[144]

Moreover, since a defense attorney has the power to subpoena public records, a court may find that the attorney's failure to attempt to obtain a public document that is available and accessible exempts the prosecutor from non-compliance with *Brady*. However, merely because evidence theoretically may be available to a defendant does not necessarily mean that it is available for purposes of determining whether *Brady* applies. For example, a prosecutor's nondisclosure of an affidavit of a key government witness filed in court prior to her guilty plea is theoretically available to the defense by the simple expedient of requesting the information or serving a subpoena for the record. However, the failure of the prosecutor to disclose the affidavit

141 *See* Boss v. Pierce, 263 F.3d 734, 740, 743 (7th Cir. 2001) (prosecutor's "untenable" and "expansive" view of what evidence is available to the defense skews the "careful balance between maintaining an adversarial system of justice and enforcing the prosecution's obligation to seek justice before victory" and "would punish the defense for not obtaining evidence it had no reason to believe existed.").

142 United States v. Barham, 595 F.2d 231 (5th Cir. 1979).

143 Schledwitz v.United States, 169 F.3d 1003, 1013 (6th Cir. 1999).

144 United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991).

would constitute prosecutorial suppression of evidence if the defense had no reason to know of the existence of the public record.[145] Moreover, a defendant may have even less reason to know of the existence of the record if the prosecutor has already produced a large volume of other materials concerning the witness, including numerous publicly-available court documents and thereby may have lulled the defense into believing that they had received every pertinent item.[146]

Finally, the willingness of courts to accept a prosecutor's claim of defense knowledge as a way of excusing a *Brady* nondisclosure encourages further gamesmanship. For example, in *DiSimone v. Phillips*,[147] a murder case, the prosecutor concealed a statement from a third person admitting to having stabbed the deceased. The defense made three separate requests for *Brady* evidence, including a specific request for evidence that someone other than the defendant stabbed the victim. The prosecutor responded that no such evidence existed, and that the defense was engaging in a "fishing expedition."[148] When it was discovered that such a statement existed, and that the prosecutor had not disclosed it, the prosecutor argued that the defense knew about the statement by virtue of the specificity of its request.[149] Given that the defendant was on trial for a murder, had specifically asked for any statement of third-party culpability, and was deceived by the prosecutor into believe that no statement existed, it would not have been unreasonable for the prosecutor to represent to the trial court that such a statement existed but that it had no duty of disclosure in view of the fact that the defense probably knew about the statement. Moreover, it is patently unreasonable to suggest, as the prosecutor argued post-trial, that the defense was being disingenuous and was trying to sandbag the prosecutor. The prosecutor's conduct in *DiSimone* aptly illustrates one court's observation of *Brady* litigation: "[T]he game will go on, but justice will suffer."[150]

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[145] United States v. Payne, 63 F.3d 1200 (2d Cir. 1995) (defense had no reason to know that government witness's affidavit had been filed in court prior to her guilty plea); United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) (public record not reasonably available to defense when document not filed until day on which defense rested its case).

[146] United States v. Payne, 63 F.3d at 1209) ("A defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents").

[147] 461 F.3d 181 (2d Cir. 2006).

[148] *Id.* at 193.

[149] *Id.* at 197. The Second Circuit remanded the case to the district court to determine whether the defendant or his attorney knew of the undisclosed *Brady* evidence. On remand, the district court rejected the contention and based on the *Brady* violation vacated the conviction and dismissed the indictment.

[150] United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984).

DELAY AND CONQUER

Prosecutors in possession of *Brady* evidence who are inclined to disclose the evidence have a powerful incentive to delay the disclosure as long as possible. Prosecutors know that the judiciary's treatment of "suppression" does not require a prosecutor to make pre-trial disclosure, and thus allows a prosecutor considerable latitude to withhold the evidence prior to trial.[151] Indeed, courts generally review delayed disclosure to determine whether the defendant had a meaningful opportunity to make effective use of the evidence at trial in order to cross-examination prosecution witnesses and present the defense case.[152] Ethics codes require "timely disclosure," but do not explicitly require pre-trial disclosure.[153] Moreover, prosecutors are well aware that continuing to withhold favorable evidence may enhance the opportunity for a guilty plea and may also impair a defendant's pre-trial preparation. Thus, the timing of *Brady* disclosure provides a prosecutor with another opportunity to engage in litigation gamesmanship.

Prosecutors usually are aware of the existence of *Brady* evidence well before the date of trial. Moreover, an experienced prosecutor reasonably should know that some evidence is inherently *Brady* evidence (i.e., promises to witnesses, eyewitnesses who have identified a different person, a confession by a person other than the defendant, and scientific evidence that casts doubt on the prosecution's theory of the case). Furthermore, even if a prosecutor does not appreciate the significance to the accused of the evidence, a prosecutor who receives a specific defense request for *Brady* evidence in advance of trial that identifies the nature of the evidence sought is obviously alerted to the evidence and can make an informed decision on whether to disclose it. Assuming that a prosecutor is aware of the significance of the evidence to the defense, and that for different reasons it must be disclosed, a prosecutor strategically may wait as long as she can until the trial actually commences before making the disclosure.

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[151] *See* Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001) ("Disclosure prior to trial is not mandated.").

[152] Blake v. Kemp, 758 F.2d 523, 532 n 10 (11th Cir. 1985) ("In some instances [disclosure of *Brady* material during trial] may be sufficient. However . . . some [*Brady*] material must be disclosed earlier. This is because of the importance of some information to adequate trial preparation.").

[153] *See* MODEL RULES, *supra* note 2, R. 3.8(d) (requiring prosecutor to make "timely disclosure"); MODEL CODE, *supra* note 2, DR 7-103 (B) (requiring timely disclosure); ABA STANDARDS, *supra* note 2, Standard 3-3.11(a) (requiring disclosure "at the earliest feasible opportunity").

Most often a prosecutor's gamesmanship in delaying the disclosure will be successful because of the wide latitude afforded by the courts, particularly where the defense does not seek a continuance after receiving the evidence. There are risks, however, in this type of gamesmanship. Depending on the circumstances, belated disclosures may be found by a reviewing court to be the equivalent of suppression, especially if the court appreciates the harm that belated disclosures may inflict not only on the ability of a defendant to receive a fair trial but also on the defendant's ability to effectively prepare for trial. An example of prosecutorial gamesmanship in delaying disclosure of critical exculpatory evidence is *Leka v. Portuondo*,[154] in which the Second Circuit Court of Appeals found that the state prosecutor violated *Brady*, notwithstanding that the evidence was disclosed 3 days before the trial. In *Leka*, a murder case, two prosecution eyewitnesses identified the defendant as the shooter. Three other eyewitnesses, however, gave statements to the police that undermined the prosecution's theory, and one of these witnesses, an off-duty police officer, gave an account that essentially destroyed the prosecution's case.[155] The defense made a request for *Brady* evidence twenty-two months before trial.[156] During plea negotiations, the prosecutor told the defendant, falsely, that an off-duty police officer was a key witness who observed the shooting and could identify the defendant.[157] And when the defense first learned of the officer's identity at a hearing 3 days before trial, "the prosecution pressed its advantages to extend the delay" by taking successful steps to prevent the defense from interviewing this witness.[158]

The court found that the prosecutor's belated disclosure was "too little, too late."[159] While recognizing that pre-trial disclosure is not mandated, the court observed that the longer a prosecutor withholds evidence, and the closer to trial the disclosure is made, the less opportunity there is for effective use.[160] The court was sensitive to the harm to a defendant from delayed disclosure—i.e., the need to divert scare resources from more pressing initiatives and the inability to assimilate the new information into its case and throw exiting strategies into disarray.[161] "The opportunity for use under *Brady*," the court concluded, "is the opportunity for a responsible lawyer to use

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[154] 257 F.3d 89.
[155] *Id.* at 92–93, 98.
[156] *Id.* at 93.
[157] *Id.*
[158] *Id.* at 102.
[159] *Id.* at 100.
[160] *Leka*, 257 F.3d at 101.
[161] *Id.*

the information with some degree of calculation and forethought."[162] *Leka* is one of a handful of cases in which the prosecutor's gamesmanship backfired.

OBSTACLE COURSES, MAZES, AND SIMON SEZ

Prosecutorial resistance to post-conviction claims of innocence has been amply documented by courts and commentators.[163] The reasons for such resistance are not always clear or consistent, but in a test of a prosecutor's commitment to serving justice instead of victory, many prosecutors will fail. Prosecutorial resistance to persuasive claims of innocence finds an interesting parallel in prosecutorial resistance to post-conviction claims that *Brady* evidence has been wrongfully suppressed. Even in the most egregious instances of a prosecutor's unconstitutional and unethical suppression of *Brady* evidence, prosecutors, rather than acknowledging the misconduct and the resulting failure to accord the defendant a fair trial, often raise an obstacle course of hoops that a defendant must overcome before successfully litigating his meritorious *Brady* claim. This prosecutorial conduct is even more brazen in the way it reinforces the prosecutor's earlier misconduct in falsely and misleadingly representing to the court and defendant that no *Brady* evidence exists.

Thus, prosecutors have argued that notwithstanding the nondisclosure of *Brady* evidence, the defendant should be procedurally barred from litigating the *Brady* claim in a post-conviction proceeding in federal court because he did not exhaust his *Brady* claim by failing to submit the claim initially to a state court.[164] This argument assumes, of course, that the defendant was aware of the pertinent facts when he litigated his claim in the state court, and deliberately chose not to raise the *Brady* issue. However, if a prosecutor's concealment of *Brady* evidence was not known by the defendant during the state court proceedings, it would be disingenuous for a prosecutor to make such an argument. Indeed, as federal courts have consistently noted in rejecting such a prosecutorial gambit, "[w]e will not penalize [a defendant] for presenting an issue

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[162] *Id.* at 103.

[163] *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399.

[164] *Banks*, 540 U.S. at 690. *See* Crivens v. Roth, 172 F.3d 991, 995 (7th Cir. 1999) (Crivens failure to raise claim in state courts "resulted not from his own lack of attention or other fault, but rather because the state did not provide the [previously suppressed *Brady* evidence] until after the habeas petition was filed.").

to us that he was unable to present to the state courts because of the state's misconduct."[165]

Prosecutors similarly resist a defendant's post-conviction *Brady* claim by arguing that the defendant has not shown sufficient cause why he did not develop the claim in state court proceedings.[166] Once again, a defendant shows cause for his failure to develop the facts in a state court proceeding where the prosecutor's suppression of *Brady* evidence was the reason for the defendant's failure to raise the claim.[167] Thus, where the prosecution concealed *Brady* evidence from the defendant at his trial, and misleadingly represented that it had complied with *Brady* disclosure obligations, a defendant may demonstrate cause for failing to investigate the prosecutor's nondisclosure in state post-conviction proceedings. As the Supreme Court observed in *Banks v. Dretke*: "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."[168]

Moreover, prosecutors typically respond to a post-conviction *Brady* claim by arguing that even if a defendant has exhausted his claim in the state court, or notwithstanding sufficient cause for his failure to develop the facts in the state court, the defendant was not prejudiced by the prosecutor's nondisclosure. This claim dovetails with the requirement that in order to establish a *Brady* violation, a defendant must demonstrate that the evidence was material to guilt or punishment. A prosecutor's attempt to defeat a post-conviction *Brady* claim by arguing lack of prejudice simply duplicates the prosecutor's gamesmanship in concealing the evidence from the defendant in the first place. Interestingly, when *Brady* evidence is discovered post-trial and is the subject of the litigation, we often are able to discern from the prosecutor's argument that the evidence is not material to how the prosecutor gambled and "play[ed] the odds" originally in denying the defendant a fair trial.[169]

Finally, some prosecutors inject other procedural obstacles to a defendant's presumably meritorious post-conviction *Brady* claim, i.e., "You didn't say Simon Sez." Thus, prosecutors argue that the

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[165] *Crivens*, 172 F.3d at 995.

[166] *Banks*, 540 U.S. at 691–96.

[167] *See, e.g.*, *Banks*, 540 U.S. at 692; *Strickler*, 527 U.S. at 289; *Crivens*, 172 F.3d at 995–96.

[168] 540 U.S. at 695.

[169] *See Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (*Brady* materiality standard "invites a prosecutor to gamble, to play the odds, and to take a chance that the evidence will later turn out not to have been potentially dispositive."). For an interesting example of this type of gamesmanship, *see* DiSimone v. Phillips, 461 F.3d 181.

defendant did not use the correct nomenclature to describe the nondisclosure violation, i.e., that a *Brady* claim must be pleaded separately from a *Giglio* claim,[170] or that a defendant did not move to amend his petition after he learned during the post-conviction hearing the nature and extent of the prosecutor's violation.[171] And, to compound this gamesmanship to protect an unconstitutional conviction, some prosecutors in their arguments to an appellate court, even to the Supreme Court, continue to play word games by claiming, falsely, that they said things in the lower court that they did not say, and did not say certain things that they did say.[172]

AFTERTHOUGHTS

Prosecutorial gamesmanship in litigating *Brady v. Maryland* should come as no surprise. To a prosecutor, having to disclose exculpatory evidence to a defendant whom the prosecutor believes is guilty and which may enable that defendant to defeat the ends of justice is intolerable. Moreover, given a prosecutor's enormous discretion over *Brady* disclosure, the broad and malleable rules within which to exercise that discretion, and the likelihood that suppressed evidence will never be found, it is almost certain that prosecutors will routinely avoid compliance with *Brady*. To the extent that the literature finds pithy ways to catalogue prosecutors: "virtuous,"[173] "prudent,"[174] "good,"[175] "neutral,"[176] "ethical,"[177] "unique,"[178]

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[170] *See Banks*, 540 U.S. at 690, n. 11 (Court does not reach prosecutor's argument that *Brady* claim is distinct from a *Giglio* claim and must be pleaded separately because Banks qualifies for relief under *Brady*).

[171] *Id.* at 687 (prosecutor argued that when new and previously unknown *Brady* evidence came to light, Banks should have moved to amend or supplement his earlier petition that raised a different *Brady* claim, notwithstanding the prosecutor's failure to object to the new argument when it was made originally and by failing to object, impliedly consented pursuant to Federal Rule of Civil Procedure 15[b] to Banks' new claim).

[172] *See* Transcript of Oral Argument at 15, 16, Banks v. Dretke, 540 U.S. 668 (2004) (No. 02-8286) (lawyer for the state, Gena Bunn, falsely denies that a key government witness was an informant and in response to a question from the Court: "So the prosecution can lie and conceal and the prisoner still has the burden to –to discover the evidence? That's your position?" Ms. Bunn responded, "Yes, Your Honor.").

[173] *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988).

[174] *See* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001).

[175] *See* Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133 (2005); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

[176] *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

[177] *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987).

[178] *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

"minister of justice"[179]—I would add "gamesman" to the list to denote an official who revels in the combat of the courtroom, the "wide world of litigation"—and the sheer thrill of playing games with the evidence. And there is probably no greater thrill than to play games with the rules of discovery generally, and especially the disclosure rule of *Brady v. Maryland*, in order to thwart a defendant's ability to win, because the odds of not getting caught are stacked so heavily in the prosecutor's favor.

I have attempted to use the metaphor of games to describe the prosecutor's litigation tactics with respect to *Brady* disclosures. The schemes, tactics, and outright games are sometimes extreme in their brazenness. Occasionally, even a ghoulish quality, emerges, particularly in those cases in which a prosecutor's nondisclosure has sent an innocent man to the death chamber. Moreover, since there is virtually no accountability, liability, or punishment for *Brady* violations, prosecutors are encouraged to play the game with impunity. We are told by commentators that education,[180] self-awareness,[181] financial incentives,[182] increased "transparency,"[183] and an appreciation of their own "moral superiority,"[184] may make prosecutors more inclined to behave ethically. However, given the stark reality that emerges from studying the *Brady* cases, it is much more rational to conclude that prosecutors most often think about games to avoid compliance with *Brady*, because there is nothing tangible to stop them.

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[179] *See* MODEL RULES, *supra* note 2, R. 3.8, comment a (prosecutor has responsibility of "a minister of justice").

[180] *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996).

[181] *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 642 (1999) ("it may take a certain amount of inner strength (or strength of character) for an individual prosecutor . . . to comply with procedural norms").

[182] *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

[183] *See* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237.

[184] *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 450 (2002) (arguing that federal prosecutors have a "sense of moral superiority" and resist efforts to regulate their behavior because they "care about ethics issues and do not misbehave").

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PLEA BARGAINING IN THE DARK: THE DUTY TO DISCLOSE EXCULPATORY *BRADY* EVIDENCE DURING PLEA BARGAINING

*Michael Nasser Petegorsky**

Ninety-seven percent of federal convictions are the result of guilty pleas. Despite the criminal justice system's reliance on plea bargaining, the law regarding the prosecution's duty to disclose certain evidence during this stage of the judicial process is unsettled. The Supreme Court's decision in Brady v. Maryland *requires the prosecution to disclose evidence that establishes the defendant's factual innocence during a trial. Some courts apply this rule during plea bargaining and require the disclosure of material exculpatory evidence before the entry of a guilty plea. Other courts have held or suggested that the prosecution may suppress exculpatory evidence during plea bargaining, forcing the defendant to negotiate and determine whether to accept a plea offer or proceed to trial without it. Substantial disparities therefore exist in the bargaining power and decision-making ability of criminal defendants, depending on where they are charged.*

This Note addresses the divide in how courts approach Brady *challenges to guilty pleas. After analyzing the development of plea bargaining and the* Brady *rule, this Note concludes that a guilty plea is not valid if made without awareness of material exculpatory evidence possessed by the prosecution. To provide additional support for the recognition of pre–guilty plea exculpatory* Brady *rights, this Note presents a case study of two 2012 Supreme Court decisions establishing the right to effective assistance of counsel during plea bargaining, and argues that the same justifications for recognizing that right during plea bargaining apply to* Brady *as well.*

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* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2011, University of Pennsylvania. I am eternally grateful to Professor Ian Weinstein, without whose insight, direction, and knowledge this Note could not have been written. Many thanks as well to my family and friends, and to my wonderful girlfriend Sarah. For my mother, who showed me that the best way to achieve justice is through compassion.

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> "And it would be foolish to think that 'constitutional' rules governing *counsel*'s behavior will not be followed by rules governing the *prosecution*'s behavior in the plea-bargaining process that the Court today announces '*is* the criminal justice system.'"[1]

Introduction

A grocery store clerk is robbed at gunpoint on a Friday night, and two hours later police arrest twenty-four year old Chris, who lives nearby.[2] Chris is charged in the robbery, and two weeks before his trial is set to start, Chris and the prosecutor meet to discuss a guilty plea. Chris maintains his innocence, but the prosecutor tells Chris that she has video surveillance footage of the robbery showing a masked robber matching his medium build, and a search of his apartment revealed a drawer full of cash and a gun. The prosecutor says that if he agrees to plead guilty, she will reduce the charges and recommend only a one-year prison sentence. However, if Chris refuses to plead guilty, the prosecutor threatens to charge him with the highest degree of armed robbery, in addition to a slew of other charges. Furthermore, she says she will recommend the maximum sentence for every charge, totaling over twenty years in prison. Wishing to avoid the possibility of such a harsh sentence, Chris pleads guilty.

While in prison, Chris discovers that the police arrested another man five miles away from the grocery store on the night of the robbery for driving while intoxicated. In his car, this man had a mask matching the one in the surveillance video and a large amount of cash, with no explanation of where he got the money. Chris believes that this evidence casts doubt on his guilt, and would not have pled guilty had he known about it, so he files a petition for a writ of habeas corpus to have his guilty plea vacated. Whether or not Chris has the ability to challenge his plea, however, depends entirely on where his trial took place. In some jurisdictions, Chris could have his guilty plea vacated if the court found that the prosecution failed to disclose

1. Lafler v. Cooper, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting).
2. The facts described in this Introduction are hypothetical.

evidence establishing his factual innocence. In others, the prosecution has no such duty of disclosure, and Chris would be forced to serve his sentence, unable to challenge his plea. The evidence of the other man's arrest would have been disclosed at trial in any jurisdiction, but Chris waived his right to trial when he was confronted with the evidence against him and the threat of a severe prison sentence.

While a full criminal trial has long been considered the "gold standard of American justice,"[3] the criminal justice system is now primarily a system of pleas.[4] In 2009, 97 percent of federal convictions and 94 percent of state convictions were obtained through guilty pleas.[5] Despite that shift, some constitutional protections afforded to defendants at trial have not been applied during plea bargaining. One traditionally trial-based right that has not been extended to plea bargaining is *Brady* disclosure.[6] Under the *Brady* rule, the prosecution's failure to disclose at trial any exculpatory or impeachment evidence that is material to punishment or guilt constitutes a violation of the defendant's due process rights under the Fifth and Fourteenth Amendments.[7] The Supreme Court has yet to recognize a similar disclosure duty during plea negotiations.[8]

There is a circuit split on whether a defendant may raise a *Brady* violation to challenge a guilty plea for the failure to divulge material exculpatory evidence.[9] In 2002, the Supreme Court held in *United States v. Ruiz*[10] that a guilty plea could not be vacated due to the prosecution's failure to disclose *impeachment* evidence.[11] However, a dispute remains regarding whether a defendant may challenge a guilty plea for the prosecution's suppression of material *exculpatory* evidence.[12] Every subsequent circuit court decision regarding the duty to divulge exculpatory evidence during plea bargaining has been guided by each court's own interpretation of *Ruiz*.[13] These interpretations have led to opposing conclusions on whether the *Brady* rule applies to the disclosure of exculpatory evidence during plea bargaining.[14]

This Note seeks to resolve the circuit split as to whether a defendant may raise a post–guilty plea exculpatory *Brady* challenge. Part I introduces the *Brady* rule and outlines the current role of plea bargaining in the U.S.

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3. Lafler, at 1398.
4. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 151 (2012).
5. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).
6. *See* Samuel R. Wiseman, Brady*, Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 459 (2012).
7. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).
8. United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010).
9. Wiseman, *supra* note 6, at 458. This Note will refer to such a challenge as an "exculpatory *Brady* challenge."
10. 536 U.S. 622, 632 (2002).
11. United States v. Ruiz, 536 U.S. 622, 625 (2002).
12. *See* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 992 (2012).
13. *See infra* Part II.C.
14. *See* Wiseman, *supra* note 6, at 458.

federal court system. Part II details the circuit split regarding a defendant's ability to challenge a guilty plea for failure to disclose exculpatory evidence, and discusses the Supreme Court's decision in *Ruiz* regarding the prosecutor's pre-plea duty to divulge impeachment evidence. Part III presents an analogous case study of the Supreme Court's recent extension of constitutional protections to plea bargaining in the context of the right to effective assistance of counsel. In Part IV, this Note argues that the nondisclosure of exculpatory *Brady* evidence should automatically preclude a valid guilty plea. Additionally, Part IV illustrates why the same principles that motivated the Supreme Court to extend effective assistance of counsel rights to guilty plea defendants support the pre-plea recognition of *Brady*.

I. DEVELOPMENT OF THE *BRADY* RULE AND PLEA BARGAINING

The key to resolving the circuit split on the availability of a *Brady* challenge to contest a guilty plea is not a myopic focus on the evolution of *Brady* and its progeny. Rather, this question is best addressed by also examining the current role of plea bargaining in the U.S. legal system and the ramifications of allowing or barring post-plea *Brady* challenges. This part first introduces *Brady v. Maryland*[15] and the evolution of the *Brady* rule. It then discusses the process of plea bargaining and the function that process currently plays in the U.S. criminal justice system. This part concludes by presenting policy reasons for and against allowing post–guilty plea exculpatory *Brady* challenges.

A. The Brady *Rule*

In *Brady*, the Supreme Court held that the prosecution in a criminal trial has a duty to disclose evidence that is favorable to the defense and material to guilt or sentencing.[16] This rule was not a stark departure from earlier jurisprudence; rather, it was a natural step in defining the rights afforded to a criminal defendant.[17] *Brady* reflected an understanding that the role of the prosecutor is not purely adversarial, because 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."[18] In the eyes of the Supreme Court, the *Brady* rule helped perform the crucial function of ensuring that a criminal defendant was not deprived of life, liberty, or property, without due process of law.[19] The Supreme Court went on to define the contours of the *Brady* rule in a number of subsequent cases. These cases defined what kinds of

15. 373 U.S. 83 (1963).
16. *Id.* at 87.
17. *See* Adam M. Harris, Note, *Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the* Brady *Doctrine*, 28 CARDOZO L. REV. 931, 934–35 (2006).
18. Berger v. United States, 295 U.S. 78, 88 (1935).
19. *See Brady*, 373 U.S. at 87; *see also* U.S. CONST. amends. V, XIV.

evidence had to be disclosed, the standard of materiality, and when *Brady* claims may be raised.[20]

1. The Duty To Disclose: *Brady v. Maryland*

The *Brady* rule defines one aspect of the prosecution's evidentiary disclosure requirements during a criminal trial. The Supreme Court first established a prosecutor's constitutional obligations during discovery in *Mooney v. Holohan*, where the Court held that due process is violated if the government knowingly uses perjured testimony to obtain a conviction.[21] The duty pronounced in *Mooney* was further developed in *Napue v. Illinois*, where the Court overturned a conviction because the knowing use of perjured testimony may have affected the outcome of the trial.[22]

The government's discovery obligations coalesced into a distinct defendant's right in *Brady*,[23] where defendant John Brady and his companion Charles Boblit separately stood trial for the killing of a man during a robbery.[24] Before trial, Brady's attorney asked the prosecution to divulge Boblit's extrajudicial statements.[25] The prosecution provided Brady with some of the statements but withheld one in which Boblit admitted committing the actual homicide.[26] At trial, Brady's attorney conceded murder in the first degree and asked only that the jury return a verdict without a death sentence.[27] Both Brady and Boblit, however, were sentenced to death.[28]

The Supreme Court held that the government's failure to divulge Boblit's statement upon request violated Brady's right to due process under the Fourteenth Amendment.[29] The Court set out what became known as the *Brady* rule, which requires that the government provide the defendant any evidence at trial that is material to either guilt or punishment.[30] The holding was not intended to punish to society or the prosecutor for any misdeeds, even if the suppression of evidence was willful.[31] Rather, the holding in *Brady* came from the Court's belief that a defendant could not be justly deprived of his life, liberty, or property, without being presented with all material, exculpatory evidence held by the prosecution.[32] The Court further noted that society is served not only by the conviction of criminals

20. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).
21. Mooney v. Holohan, 294 U.S. 103, 112 (1935).
22. Napue v. Illinois, 360 U.S. 264, 272 (1959).
23. 373 U.S. 83 (1963).
24. *Id.* at 84.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 86–87.
30. *Id.* at 87; *see also* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 417 (2011).
31. *See Brady*, 373 U.S. at 87.
32. *See id.* at 87–88.

but also when trials are fair, and that "our system of the administration of justice suffers when any accused is treated unfairly."[33]

2. Development of the Rule

After *Brady*, the Supreme Court went on to define the contours of the prosecution's disclosure obligations in a number of decisions. While *Brady* was concerned with exculpatory evidence—information that the defense could use to prove the defendant's innocence—in *Giglio v. United States*,[34] the Court considered the suppression of evidence that went to the impeachment of witnesses against the defendant.[35]

The Court held in *Giglio* that where guilt or innocence may rest on the reliability of a witness, the suppression of evidence impugning that witness's credibility violates due process.[36] *Giglio* thus defined two types of material that must be disclosed under *Brady*: impeachment evidence and exculpatory evidence.[37] Impeachment evidence goes to the credibility of witnesses and may include evidence revealing that a witness has a bias or was offered leniency in exchange for testimony and cooperation.[38] Exculpatory evidence, on the other hand, establishes the factual innocence of the defendant, such as video footage of the crime or DNA left at the scene.[39] Some evidence may be both exculpatory and impeaching, such as inconsistent statements from a witness regarding the perpetrator of a crime.[40] Additionally, after *Giglio* the Supreme Court has traditionally treated exculpatory and impeachment evidence identically: the analysis of a *Brady* violation has been the same whether the undisclosed evidence was impeachment or exculpatory.[41] However, the equal treatment of impeachment and exculpatory evidence arguably changed after the Supreme Court's decision in *Ruiz*, which some courts have viewed as creating a distinction between the two in the plea bargaining context.[42]

The scope of the evidence required to be disclosed under *Brady*, and the situations in which it must be disclosed, has continued to expand after

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33. *Id.* at 87.

34. 405 U.S. 150 (1972).

35. *See id.* at 154; *see also* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1462 (2001).

36. *Giglio*, 405 U.S. at 154; *see also* Peter A. Joy & Kevin C. McMunigal, *Implicit Plea Agreements and Brady Disclosure*, 22 CRIM. JUST. 50 (2007) (discussing the scope of the Court's holding in *Giglio*).

37. *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 496 (2001).

38. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437–38 (2011).

39. Douglass, *supra* note 37, at 480.

40. Cassidy, *supra* note 38, at 1438.

41. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

42. *See infra* Part II.B.

Giglio. In *United States v. Agurs*,[43] the Supreme Court held that *Brady* material must be disclosed even in the absence of a specific request by the defendant.[44] *Agurs* noted a subtle shift in the concerns of the Court: while the Supreme Court in *Brady*'s predecessors was mainly concerned with misconduct or misrepresentation by prosecutors, the Court's concern in *Brady* was the injury to the defendant resulting from the nondisclosure of material exculpatory evidence.[45] With this focus, the question became how to determine materiality or when that injury violated due process. The Court in *Agurs* found that, under *Brady*, "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."[46] The Supreme Court held that the standard of materiality must reflect the Court's "overriding concern with the justice of the finding of guilt."[47] As guilt must be established beyond a reasonable doubt, the Court found that due process is violated if the undisclosed evidence creates a reasonable doubt that did not previously exist.[48]

The Supreme Court further developed this standard of materiality in *United States v. Bagley*,[49] where the Court held that 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[50] *Bagley*'s standard of materiality—which continues to be applied in the *Brady* analysis today—was not derived solely from the *Brady* line of cases.[51] Rather, the Court noted that this standard was used to determine whether due process was violated by the ineffective assistance of counsel in *Strickland v. Washington*.[52] The *Strickland* line of cases concerns the actions of defense counsel rather than those of the prosecutor, but continues to share this materiality standard with *Brady* and its progeny.[53]

B. The Practice of Plea Bargaining

Defendants at the plea bargaining stage of the judicial process have not traditionally been afforded the same constitutional protections as they receive at trial. This discrepancy has become progressively more

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43. 427 U.S. 97 (1976).
44. *See id.* at 110.
45. *Id.* at 104 n.10; *see also* Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty To Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1484 (2003).
46. *Agurs*, 427 U.S. at 104.
47. *Id.* at 112. The Court rejected the assertion that the standard of materiality should focus on the defendant's ability to prepare for trial, instead of on the importance of the evidence to the determination of guilt or punishment. *Id.* at 112 n.20.
48. *Id.* at 112–13.
49. 473 U.S. 667 (1985).
50. *Id.* at 682.
51. *See id.* at 681–82.
52. *See id.* at 682; *see also* Strickland v. Washington, 466 U.S. 668 (1984).
53. *See infra* notes 386–89, 419–21 and accompanying text.

problematic, as plea bargains have accounted for an ever-increasing percentage of the resolutions of criminal cases. This section describes the development of plea bargaining and outlines the current role that plea bargaining plays in the federal court system.[54]

1. The Plea Bargaining Process

While plea bargaining has long been a part of the criminal justice system, the Supreme Court only recognized it as a constitutional method of adjudicating criminal cases in the latter half of the twentieth century.[55] Despite the prior lack of constitutional grounding, plea bargaining has come to play a major role in the American judicial process.[56] Plea bargaining occurs before the start of the trial and usually takes the form of a series of offers and counteroffers between a prosecuting attorney and the defendant and his attorney.[57] There are two broad categories of plea negotiations, each of which generally entails concessions on the part of both the prosecution and the defendant: charge bargaining and sentence bargaining.[58] In charge bargaining, the defendant agrees to plead guilty in exchange for the dropping of some charges or the decrease in their severity.[59] In sentence bargaining, the prosecution agrees to recommend a lesser sentence in return for the guilty plea.[60] These categories are not mutually exclusive, and many plea agreements will contain elements of both.[61] In both types of negotiation, the exchange is essentially one in which the defendant waives his customary trial rights,[62] and the prosecution makes a recommendation to the judge.[63] However, the judge is not required to follow the recommendation of the prosecution and may decide not to accept a guilty plea.[64]

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54. The question whether plea bargaining is beneficial or detrimental to the U.S. judicial system is beyond the scope of this Note. For an argument that plea bargaining should be eliminated, see Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979 (1992). For a defense of plea bargaining, see Frank Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969 (1992).

55. CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 180 (4th ed. 2008).

56. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

57. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1036 (7th ed. 2004).

58. *Id.*

59. *Id.*; *see also* FED. R. CRIM. P. 11(c)(1)(A).

60. *See Frye*, 132 S. Ct. at 1407; *see also* FED. R. CRIM. P. 11(c)(1)(B)–(C).

61. *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 702–03 (2001).

62. These waived trial rights include the privilege against self-incrimination and the right to confront his accusers, present witnesses, and testify on his own behalf. *See* FED. R. CRIM. P. 11(b)(1).

63. *See* Colquitt, *supra* note 61, at 701–03; *see also* Lynch v. Overholser, 369 U.S. 705, 719 (1962).

64. *See* Colquitt, *supra* note 61, at 697.

Rule 11 of the Federal Rules of Criminal Procedure provides guidelines for the entry of a guilty plea.[65] Before a guilty plea is accepted, the defendant must appear in court, and the court must be sure that the defendant understands his rights and the consequences of entering a guilty plea.[66] Courts interpreting this section of Rule 11 have referred to this as the requirement that a guilty plea be entered "knowingly."[67] The court must also determine that a guilty plea was given voluntarily[68] and that there was a "factual basis" for the plea.[69] These determinations are made during a plea colloquy, where the court informs the defendant of his rights and the consequences of his plea and attempts to determine whether the defendant is acting knowingly and voluntarily.[70] If the requirements of Rule 11 are met, the court may accept a guilty plea.[71]

While Rule 11 provides the basic framework for guilty plea consideration in the courts, the Supreme Court has discussed and elaborated upon Rule 11's requirements in a number of cases reviewing the validity of guilty pleas. Rather than treating "knowing" and "voluntary" as two separate criteria, the Court generally treats them as one requirement, asking whether a guilty plea meets the "knowing and voluntary" standard.[72]

In addition to expanding on the knowing and voluntary requirement, the Supreme Court has also defined the context in which this requirement applies and other characteristics of the plea bargaining process. In *McCarthy v. United States*,[73] the Court held that if a court does not expressly confirm that a defendant's guilty plea is both knowing and voluntary, the plea is void.[74] For a guilty plea to be knowing and voluntary, the court must determine that the conduct admitted actually constitutes the offense charged.[75] A defendant must understand the nature of the crime of which he is accused and how that law relates to the factual occurrences to which he admits.[76] The Court also noted that, although plea bargaining itself is not constitutionally mandated, a finding that the guilty plea was

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65. FED. R. CRIM. P. 11.

66. *See* FED. R. CRIM. P. 11(b)(1).

67. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 248 (1969).

68. FED. R. CRIM. P. 11(b)(2).

69. FED. R. CRIM. P. 11(b)(3).

70. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 727 (2002).

71. FED. R. CRIM. P. 11(c)(3).

72. *See, e.g.*, Puckett v. United States, 556 U.S. 129, 136 (2009). The term "intelligent" is also sometimes part of the standard for validity of a guilty plea, either in place of "knowing" or as a third requirement. *See, e.g.*, Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005).

73. 394 U.S. 459 (1969).

74. *See id.* at 466–67.

75. *See id.* at 467.

76. *See id.* at 466–67. This rule was later expanded to require that a defendant understand the rights he waives by pleading guilty and be fully aware of the nature of the charges against him. Henderson v. Morgan, 426 U.S. 637, 644–45 (1976). In *Henderson*, the plea was found to be involuntary because the defendant was never informed that intent to cause death was an element of second-degree murder. *Id.* at 645–46.

"truly voluntary" *is* constitutionally required.[77] By pleading guilty, a defendant waives numerous constitutional rights;[78] for that waiver to be valid under the Due Process Clause, the guilty plea must be knowing and voluntary.[79]

In addition to establishing the constitutional requirement that a guilty plea be knowing and voluntary, the Court in *McCarthy* also held that an improperly entered guilty plea must be vacated, and the case remanded for new pleadings.[80] The Court reasoned that vacating and remanding was the only way to guarantee that a defendant is afforded due process and the procedural safeguards it entails.[81] Moreover, this rule prevents the waste of judicial resources on frivolous attacks of guilty plea convictions where the original record is inadequate.[82]

A few months after *McCarthy*, the Court took the knowing and voluntary requirement a step further in *Boykin v. Alabama*.[83] The Court held that because a guilty plea is effectively a waiver of multiple constitutional rights, such a waiver cannot be presumed from a silent record.[84] Rather, a defendant must make an affirmative showing that he understands the nature of the charges against him and the waiver that the guilty plea entails, and wishes to waive those constitutional rights.[85] If a guilty plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."[86]

While the system of plea bargaining in the United States has been met with criticism,[87] the Supreme Court affirmed the constitutionality of the practice in a later and unrelated *Brady* case, *Brady v. United States*.[88] The Court noted that plea bargaining has substantial benefits for both the defendant and the prosecution.[89] For the defendant, a guilty plea is an opportunity to receive a lesser punishment than he might receive after a full

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77. *McCarthy*, 394 U.S. at 466.

78. These rights include the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers. *Id.*

79. *See id.* ("For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

80. *See id.* at 469.

81. *Id.* at 472. The Court noted that a postconviction voluntariness hearing would be especially problematic in cases like the one at bar. *Id.* at 470–71. Here, the crime required a "knowing and willful" attempt to commit tax fraud. *Id.* at 470. At his sentencing hearing, the defendant stated that his acts were "neglectful" and "inadvertent," but also stated that he was pleading guilty with full understanding of the charges and of his own volition. *Id.* Thus, the record would have been insufficient to determine whether the plea was actually knowing and voluntary; pleading anew would be a more just and efficient remedy. *See id.* at 471.

82. *See id.* at 472.

83. 395 U.S. 238 (1969).

84. *Id.* at 243.

85. *See id.* at 242.

86. *Id.* at 243 n.5.

87. *See* SALTZBURG, *supra* note 57, at 1041.

88. 397 U.S. 742 (1970).

89. *See id.* at 752–53.

trial, and the costs and burdens of trial are eliminated.[90] The government benefits by achieving its goals of punishment and deterrence and from saving the judicial resources normally expended at trial.[91] In light of these benefits, the Court reaffirmed the holdings of *Boykin* and *McCarthy*, holding that a guilty plea is constitutionally valid only if it is knowing and voluntary.[92] However, the Court also held that a defendant does not need to have an accurate assessment of the prosecution's case in order for a plea to be knowing and voluntary.[93]

Rule 11 also sets the basic parameters for withdrawal of, or challenges to, a guilty plea.[94] A defendant may withdraw a guilty plea without justification before the court has accepted the plea.[95] Once the court has accepted the plea, however, withdrawal becomes more difficult. After the court has accepted the plea but before sentencing, a defendant may withdraw his plea if the court rejects the plea agreement or the defendant "can show a fair and just reason for requesting the withdrawal."[96] A guilty plea cannot be withdrawn after sentencing and may be set aside only by direct appeal or collateral attack, such as a petition for a writ of habeas corpus under 28 U.S.C. § 2255.[97] However, most guilty plea agreements include an express waiver of the right to appeal.[98]

Additionally, the Supreme Court has limited the challenges available under habeas review.[99] In *Tollett v. Henderson*,[100] the Court held that a guilty plea precludes habeas review of nonjurisdictional "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[101] However, in addition to jurisdictional challenges, a defendant who pleads guilty does not waive the right to attack the validity of the guilty plea itself, including challenges to the knowing and voluntary nature of the plea and claims of ineffective assistance of counsel.[102]

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90. *See id.*
91. *See id.*
92. *See id.* at 748.
93. *See id.* at 756–57.
94. FED. R. CRIM. P. 11(d)–(e).
95. FED. R. CRIM. P. 11(d)(1).
96. FED. R. CRIM. P. 11(d)(2)(B).
97. FED. R. CRIM. P. 11(e); *see also* 28 U.S.C. § 2255 (2006).
98. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From* Caveat Emptor *to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011).
99. *See* Douglass, *supra* note 37, at 465.
100. 411 U.S. 258 (1973).
101. *Id.* at 267.
102. *See* Douglass, *supra* note 37, at 516–17; *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2025–26 (2000).

2. The Current Role of Plea Bargaining

In 1990, 84 percent of all federal criminal cases prosecuted to conclusion were resolved by guilty plea.[103] By 2011, that number had risen to 97 percent.[104] One reason for this increase may be the specter of mandatory minimum sentences.[105] In the past, judges in federal court had the power to determine criminal sentences.[106] This meant that a prosecutor knew that she could not hold an excessive sentence over a defendant's head at the plea bargaining stage as motivation to avoid trial, because the ultimate power to sentence rested with the judge.[107] The discretion afforded to judges has dwindled, however, with the advent of the U.S. Sentencing Guidelines.[108] Now, judges are constrained by mandatory minimum sentences, and prosecutors have more power at the plea bargaining stage.[109] A prosecutor often has the ability to charge a defendant with a variety of crimes carrying longer or shorter sentences; a defendant may therefore be heavily motivated to accept a prosecutor's offer to plead guilty to a crime that does not carry a mandatory minimum, especially if the alternative charge carries a lengthy sentence.[110] In the era of mandatory minimum sentencing, the prosecutor's control over the charge amounts to control over a defendant's sentence.[111]

A second cause for the increase in guilty pleas may be the practice of overcharging.[112] To convince a defendant to plead guilty, a prosecutor might threaten to charge him with an offense carrying a harsher sentence should he decide to go to trial.[113] For example, in *Bordenkircher v. Hayes*,[114] the prosecutor told the defendant that if he did not plead guilty to the offense charged, which was punishable by two to ten years in prison, she would seek a new indictment under a state law that carried a mandatory life sentence.[115] Hayes pled not guilty and subsequently received a life sentence.[116] The Supreme Court held that the decision of what crime to charge was within the discretion of the prosecutor and that charging the defendant with a more severe crime did not constitute a violation of due process.[117] By sanctioning the practice of overcharging, the Court allowed

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103. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012, 10:30 PM), http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.
104. *Id.*
105. *See* SALTZBURG, *supra* note 57, at 1049.
106. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993).
107. *See id.*
108. *Id.*
109. *See id.*
110. *See id.*
111. *Id.*
112. *See* SALTZBURG, *supra* note 57, at 1051.
113. *See id.*
114. 434 U.S. 357 (1978).
115. *Id.* at 358.
116. *Id.* at 359.
117. *Id.* at 364–65.

prosecutors to use harsher sentences as leverage to obtain guilty pleas.[118] This technique has now become a common practice,[119] leading defendants to increasingly plead guilty, perhaps to avoid the risk of an extremely harsh sentence.[120] As the percentage of criminal cases being resolved by guilty plea continues to increase,[121] it becomes all the more necessary to establish proper procedures and safeguards to ensure that pleas are entered fairly and in a way that does not violate defendants' constitutional rights.[122]

C. Why Require Pre-plea Disclosure of Exculpatory Brady Evidence?

As discussed in Part II of this Note, the circuits are split as to whether the *Brady* rule applies to exculpatory evidence during plea bargaining.[123] This section first discusses various policy arguments put forth by criminal defense attorneys and legal commentators in favor of pre-plea *Brady* disclosure, and then presents some arguments against expanding *Brady*.

1. Policy Justifications for Allowing Exculpatory *Brady* Challenges to Guilty Pleas

Commentators have put forth a number of different justifications in pushing for the recognition of exculpatory *Brady* rights during plea bargaining.[124] First, some argue from a constitutional standpoint that guilty pleas are not truly knowing and voluntary without the knowledge of material exculpatory evidence.[125] These commentators argue that the decision to plead guilty rests substantially on the defendant's assessment of the strength of the prosecution's case, not on whether he actually committed the crime.[126] A plea therefore cannot be knowing and voluntary if it is made without knowledge of material exculpatory evidence.[127]

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118. Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1024, 1039 (2004).

119. *See* Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the* Lackey *Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 293 (2002).

120. *See* Ana Maria Gutiérrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 717 (2010).

121. *See* DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.22.2010, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Apr. 19, 2013).

122. *See* Gutiérrez, *supra* note 120, at 717–18; Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 395–96 (2007).

123. *See infra* Part II.

124. *See* Blank, *supra* note 102, at 2040. While the complete breadth of justifications for pre-plea *Brady* challenges is too vast to be addressed here, some key arguments are presented.

125. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 964 (1989); *see also* Blank, *supra* note 102, at 2040.

126. Douglass, *supra* note 37, at 466.

127. *See id.* at 466–68. The idea that *Brady* violations preclude knowing and voluntary pleas was highly influential in the Ninth Circuit's decision to allow pre-plea *Brady* challenges. *See infra* Part II.A.5.

Other commentators have advocated for a plea bargaining disclosure requirement based on a contract analysis. They argue that because a guilty plea agreement is essentially a contract, the doctrines of duress and mistake weigh in favor of pre-plea disclosure of exculpatory evidence.[128] General appeals to fairness motivate the desire for *Brady* disclosure during plea bargaining as well: if the true goal of the criminal process is justice, then a prosecutor's suppression of exculpatory evidence to coerce a defendant to plead guilty directly contravenes that goal.[129] Moreover, as *Brady* disclosures are required at trial, fairness dictates that the same requirements apply during plea bargaining.[130]

Perhaps the most salient argument that commentators have raised in favor of requiring the pre-plea disclosure of material exculpatory evidence is the fear that, without such a requirement, innocent defendants are compelled to plead guilty.[131] While some argue that innocent defendants will not plead guilty, the reality is that when faced with the alternative possibilities of a life sentence or a few years in prison, an innocent defendant might plead guilty to minimize that risk if he is unaware that the prosecution possesses exculpatory evidence.[132] Moreover, prosecutors are more likely to suppress exculpatory evidence when they have a weak case—when the defendant is most likely to be innocent—because they would rather secure even a minimal conviction than lose the case altogether.[133] Thus, the coercive effect of withholding exculpatory evidence is at its apex when the defendant is innocent.[134]

Brady disclosure levels the playing field between the prosecutor and the defendant: by forcing disclosure of exculpatory evidence, a prosecutor cannot bluff her way to a conviction by misrepresenting the strength of the government's case.[135] Bluffing, mandatory minimum sentencing, and the practice of overcharging all act to compel innocent defendants to plead guilty, as defendants seek to minimize the risk of a lengthy sentence.[136] Prosecutors, on the other hand, seek to maximize the number of convictions but are less concerned with the length of the sentence imposed.[137] When disclosure is required, defendants are less susceptible to coercion, as they have accurate information about the strength of the prosecution's case and

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128. Blank, *supra* note 102, at 2041; *see* Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1609 (1981). *See generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1926 (1992).

129. *See* Douglass, *supra* note 37, at 441–42.

130. *See* McMunigal, *supra* note 125, at 1010.

131. *See id.* at 963–64 (referring to the problem of innocent defendants pleading guilty as "accuracy" in pleading); *see also* Douglass, *supra* note 37, at 441.

132. *See* Douglass, *supra* note 37, at 448.

133. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1152 (2008).

134. *See* Douglass, *supra* note 37, at 449.

135. *See* Blank, *supra* note 102, at 2072.

136. *See* Douglass, *supra* note 37, at 448–49; *see also* McMunigal, *supra* note 125, at 989.

137. Bowers, *supra* note 133, at 1128.

the relative risk of going to trial.[138] One goal of the criminal justice system is to protect innocent people from being punished; by requiring pre-plea *Brady* disclosure, the risk of innocent defendants pleading guilty is substantially abated.[139]

2. Arguments Against Applying *Brady* During Plea Bargaining

Scholarly argument against requiring disclosure of material exculpatory evidence prior to a guilty plea has been minimal.[140] Some have argued that few innocent people are actually accused of crimes and that those who are will never actually plead guilty.[141] Moreover, for guilty defendants, the disclosure of exculpatory evidence allows them to bargain for a lesser sentence than they actually deserve under the law.[142] Others argue that while substantial information should be disclosed prior to a guilty plea, *Brady*'s narrow materiality standard provides too minimal a protection.[143] Additionally, there is a fear that if exculpatory evidence is required to be disclosed prosecutors will soon have to turn over their entire case to the defendant, thus negating the efficiency and expediency provided by plea bargaining.[144] As is evident from the circuit court decisions holding that pre-plea *Brady* disclosure is not required, however, these policy arguments against disclosure give way to more substantial constitutional and precedential obstacles.[145]

II. *BRADY* CHALLENGES TO GUILTY PLEAS: THE CIRCUIT SPLIT

Part II of this Note discusses the circuit split regarding the use of the *Brady* rule to challenge a guilty plea for the failure to divulge exculpatory evidence. The Supreme Court resolved one aspect of this split in *Ruiz*, where the Court held that a defendant could not raise a *Brady* violation where the prosecution failed to disclose *impeachment* evidence prior to the entry of a guilty plea.[146] The Court did not, however, speak directly on the failure to divulge *exculpatory* evidence prior to a guilty plea.[147] Every subsequent circuit court decision on the issue of exculpatory *Brady* challenges to guilty pleas has been substantially based on the court's

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138. McMunigal, *supra* note 125, at 968–73.
139. *See id.* at 965–67.
140. *See* Douglass, *supra* note 37, at 442.
141. *See* McMunigal, *supra* note 125, at 964.
142. *See* Douglass, *supra* note 37, at 489.
143. *See id.* at 442. However, Douglass notes that "even a limited rule of disclosure may be better than none." *Id.* at 443.
144. *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1394 (1991); *see also* United States v. Ruiz, 536 U.S. 622, 632 (2002).
145. *See infra* Part II.
146. *See id.* at 625.
147. *See id.*

interpretation of *Ruiz*'s holding.[148] However, these interpretations have differed greatly, creating a new circuit split. To resolve this split, the meaning of *Ruiz* must be understood not only in the context of the *Brady* rule, but in the larger picture of what rights are afforded to a criminal defendant at different stages of the judicial process.

A. *The Pre-*Ruiz *Split*

Before *Ruiz*, the Second, Sixth, Eighth, Ninth, and Tenth Circuits held that a defendant may raise a *Brady* challenge to a guilty plea. However, the reasoning supporting these decisions varied: some courts have found that *Brady* violations render guilty pleas unknowing and involuntary,[149] while others found that suppression of *Brady* material constitutes an exception to the "knowing and voluntary" rule for the validity of a guilty plea.[150] Conversely, the Fifth Circuit held that a guilty plea precludes a *Brady* challenge, and the Eighth Circuit later went against its earlier decision and held the same.[151] While the Supreme Court answered some questions raised by this split in *Ruiz*, others remain unanswered: *Ruiz* addressed only the question of impeachment *Brady* material, which until then had been viewed as equivalent to exculpatory material for purposes of *Brady* challenges.[152] This section chronologically details the circuit split before *Ruiz*, and the principles underlying the different circuit's positions on *Brady* challenges to guilty pleas.

1. The Sixth Circuit Allows a Post-plea *Brady* Challenge

In *Campbell v. Marshall*, the Sixth Circuit became the first court to decide whether a defendant may raise a *Brady* challenge to a guilty plea.[153] The Sixth Circuit held that a *Brady* violation could potentially negate the voluntary and knowing character of a guilty plea.[154] However, the court found that a *Brady* violation was just one part of the analysis of a guilty plea's validity and was not always sufficient on its own to preclude a plea's knowing and voluntary nature.[155] In addition to suppression of *Brady* material, the court also looked at the factual basis for the plea, the

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148. *See, e.g.*, United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009); McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

149. *See, e.g.*, United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994).

150. *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1320–21 (2d Cir. 1988).

151. *See infra* Part II.A.2, A.5. The Eighth Circuit contradicted itself, first allowing post-plea *Brady* challenges and then holding the opposite shortly after.

152. *See* Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 981 (2008). Before *Ruiz*, the circuit courts' disposition of *Brady* questions during plea bargaining did not depend on whether the evidence in question went to impeachment of witnesses or the defendant's factual innocence. *See id.*

153. 769 F.2d 314 (6th Cir. 1985).

154. *See id.* at 318–24; *see also* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 10 (2002).

155. *Campbell*, 769 F.2d at 321–24. The court ruled that the pre-plea suppression of *Brady* material was not a per se constitutional violation. *See id.* at 322.

procedures used by the court in accepting the plea, and the effectiveness of Campbell's attorney.[156]

Under this totality-of-the-circumstances approach, the Sixth Circuit ultimately held that the prosecutor's improprieties did not invalidate the defendant's guilty plea.[157] Still, the Sixth Circuit reached the merits of the post-plea *Brady* claim, and suggested that under other circumstances, the failure to divulge material exculpatory evidence could render a guilty plea invalid.[158] Under this approach, even if the court were to find that the Supreme Court's guilty plea jurisprudence precluded post-plea *Brady* claims by name, the suppression of material exculpatory evidence could still be a factor that renders a plea unknowing and involuntary.

2. Contradiction in the Eighth Circuit

In two opinions separated by only one year, the Eighth Circuit first decided a defendant's *Brady* challenge to his guilty plea on the merits, then later held that a guilty plea waived the defendant's right to assert a *Brady* claim.[159]

a. White v. United States

In the first Eighth Circuit case to address this issue, *White v. United States*,[160] the court expressly adopted the Sixth Circuit's framework from *Campbell*, holding that a defendant in a federal habeas corpus proceeding could attack the knowing and voluntary nature of his guilty plea based on the suppression of material evidence.[161] The court quoted *Campbell* for the proposition that "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent."[162] The court therefore permitted collateral attacks on guilty pleas based on the failure to disclose exculpatory *Brady* evidence.[163]

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156. *See id.* at 321–22.

157. *See id.* at 324; *see also* Lain, *supra* note 154, at 10.

158. *See Campbell*, 769 F.2d at 324; *see also* Douglass, *supra* note 37, at 517.

159. *See id.* at 6.

160. 858 F.2d 416 (8th Cir. 1988). The *Brady* material in this case was *impeachment* evidence, rather than *exculpatory*, as it went to the credibility of the key witness against the defendant. *See id*. at 423. Though White's claim could not have been heard after *Ruiz*, *see infra* note 241 and accompanying text, the Eighth Circuit's reasoning was nearly identical to the Sixth Circuit's reasoning in *Campbell*, which concerned *exculpatory Brady* material. *See infra* Part II.A.1.

161. *See White*, 858 F.2d at 421–22.

162. *Id.* at 422.

163. *See id.*; *see also* 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).

Following the Sixth Circuit's lead, the Eighth Circuit analyzed the validity of White's plea under a totality-of-the-circumstances approach.[164] Like the Sixth Circuit in *Campbell*, the court sought to determine whether White's knowledge of the withheld information would have "affected his decision to forego trial."[165] The Eighth Circuit found that the undisclosed *Brady* material would not have been controlling in White's decision whether to plead guilty or proceed to trial.[166] Additionally, the court held that the benefit conferred to White by pleading guilty weighed in favor of the finding that he would have pled guilty even with the suppressed evidence.[167] As White had previously stated at his plea hearing that it was in his "best interest to terminate all of the litigation as quickly as possible," the court found it unlikely that knowledge of the suppressed material would have changed his decision.[168] Despite the ruling against White, this case appeared to establish in the Eighth Circuit a defendant's ability to raise a *Brady* claim to challenge a guilty plea for nondisclosure of exculpatory evidence.[169]

b. Smith v. United States

The Eighth Circuit quickly changed course in *Smith v. United States*, decided less than one year after *White*.[170] In a very brief opinion, the court declined to reach the merits of Smith's claim, holding that by pleading guilty Smith had waived all challenges "except those related to jurisdiction."[171] The court made no mention of its previous precedent in *White* or of the *Brady* rule.[172] By declining to reach the merits of Smith's *Brady* challenge to his guilty plea, the Eighth Circuit split from the Sixth (and from its previous holding in *White*).

3. The Second Circuit's Approach: Suppression of Material Evidence As Official Misconduct

In *Miller v. Angliker*, the Second Circuit joined the Sixth in allowing a defendant to challenge the validity of a guilty plea for the failure of the prosecution to disclose material exculpatory evidence, but on a different legal theory.[173] The court found that a guilty plea is valid if it is both

164. *White*, 858 F.2d at 422.
165. *Id.* at 424.
166. *Id.*
167. *See id.*
168. *Id.*
169. *See* Lain, *supra* note 154, at 6 n.23.
170. 876 F.2d 655 (8th Cir. 1989).
171. *Id.* at 657.
172. *See id.*
173. 848 F.2d 1312 (2d Cir. 1988). This case actually involved a plea of not guilty by reason of insanity. *Id.* at 1319. However, the Second Circuit decided that in determining whether Miller could raise a Brady challenge, it would treat his plea of not guilty by reason of insanity like a guilty plea. *Id.* The court reasoned that both pleas waived certain rights normally held by the defendant at trial, including the right to argue that he did not commit

intelligent and voluntary.[174] However, the court found that this test only applies so long as there is no "misrepresentation or other impermissible conduct by state agents."[175] The court proceeded to note that a defendant's decision whether or not to plead guilty rested heavily on a determination of the strength of the prosecution's case against him, and the availability of exculpatory evidence.[176] The Second Circuit concluded that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."[177] Applying the materiality standard from *Bagley* and *Strickland*, the court found that there was a reasonable probability that, but for the suppression of the file, Miller would not have taken the plea agreement, and would instead have gone to trial.[178] Based on that probability, the suppression of the file violated Miller's due process rights under *Brady*.[179]

Under the Second Circuit's analysis, the prosecution's suppression of material *Brady* evidence, while not causing the plea to be unintelligent or involuntary, nevertheless renders it constitutionally invalid due to "misrepresentation or other impermissible conduct by state agents."[180] This holding stands in contrast to the Sixth Circuit's approach in *Campbell*.[181] Both courts reached the merits of the defendants' *Brady* claims, but the Second Circuit viewed *Brady* violations as an exception to the rule that a guilty plea must be knowing and voluntary, whereas the Sixth Circuit viewed *Brady* violations as having the potential to preclude a knowing and voluntary plea.[182] While this rule has been consistently applied in the Second Circuit,[183] other circuits have identified a different basis for permitting *Brady* challenges to guilty pleas in similar situations.

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the alleged acts, the right to challenge the validity of his confession, and the right to introduce any other evidence to cast doubt on his commission of the alleged acts. *Id.*

174. *See id.* at 1320 (citing Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969)).

175. *Id.* (quoting Brady v. United States, 397 U.S. 742 (1970)).

176. *See id.*

177. *Id.*

178. *See id.* at 1322–24. The Second Circuit noted that the standard for materiality applied to *Brady* claims was the same as for claims of ineffective assistance of counsel. *See id.* at 1322. The court held that, in order to show prejudice and invalidate his guilty plea, Miller had to show that there was a "reasonable probability that but for the withholding of the information [he] would not have entered the recommended plea but would have insisted on going to a full trial . . . ." *Id.*

179. *Id.*

180. *Id.* at 1320 (quoting Brady v. United States, 397 U.S. 742, 757 (1970)).

181. *See supra* Part II.A.1.

182. *See* Douglass, *supra* note 37, at 467 n.125. *Compare Miller*, 848 F.2d at 1320, *with* Campbell v. Marshall, 769 F.2d 314, 318–22 (6th Cir. 1985).

183. *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992).

4. The Tenth Circuit's Approach: Suppression of *Brady* Material May Preclude a Knowing and Voluntary Guilty Plea

While the Tenth Circuit joined the Second and Sixth Circuits in allowing a defendant to raise a *Brady* challenge to a guilty plea, it supported its holding with different reasoning. The court first addressed the question in *United States v. Wright*,[184] where the Tenth Circuit stated that a defendant who enters a knowing and voluntary guilty plea "waives all non-jurisdictional challenges to his conviction."[185] This language closely mirrors the Eighth Circuit's language in *Smith*, which held that a guilty plea precluded *Brady* challenges.[186] However, rather than foreclosing upon Wright's ability to raise a *Brady* challenge, the Tenth Circuit held that Wright *could* challenge his conviction by asserting that he did not enter his plea intelligently or voluntarily due to the claimed *Brady* violation.[187] The court noted that a defendant who pleads guilty may still challenge that plea as being the "product of prosecutorial threats, misrepresentations, or improper promises," which go directly to the knowing and voluntary nature of the plea.[188] According to the Tenth Circuit, failure to divulge *Brady* material is a form of "misrepresentation" with the potential to render a "guilty plea a constitutionally inadequate basis for imprisonment."[189]

Whereas the Second Circuit in *Miller* found that official misconduct—the government's failure to turn over *Brady* evidence—was an exception to the "voluntary and intelligent" test for the validity of a guilty plea, the Tenth Circuit reasoned that such misconduct can undercut the intelligent or voluntary nature of the plea.[190] In essence, the court found that a defendant may be incapable of entering a truly voluntary guilty plea if he is unaware of material evidence in his favor that weakens the prosecution's case against him.[191] The court also reasoned that allowing *Brady* challenges to guilty pleas was justified by "the importance to the integrity of our criminal justice system that guilty pleas be knowing and intelligent."[192]

In discussing materiality, the Tenth Circuit held that *Brady* evidence was 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."[193] A "reasonable probability" was a probability "sufficient to undermine confidence in the outcome."[194] The court ultimately held that

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184. 43 F.3d 491 (10th Cir. 1994).
185. *Id.* at 494.
186. *See supra* note 171 and accompanying text.
187. *See Wright*, 43 F.3d at 494.
188. *Id.* at 495 (internal quotation marks omitted).
189. *Id.* at 497 (quoting Blackledge v. Allison, 431 U.S. 63, 75 (1977)). Notably, the Tenth Circuit found that a *Brady* violation can render a guilty plea unknowing and involuntary only "under certain limited circumstances." *Id.* at 496.
190. *See id.* at 495; *see also* Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988).
191. *See Wright*, 43 F.3d at 496; *see also* Lain, *supra* note 154, at 12.
192. *Wright*, 43 F.3d at 496.
193. *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).
194. *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

Wright's plea was valid, finding that the prosecution's failure to disclose immunity agreements offered to witnesses was not material to guilt or punishment.[195] While the court did not find in Wright's favor, the decision solidified the Tenth Circuit's rule allowing a defendant to challenge a guilty plea based on a *Brady* violation.[196]

5. The Ninth Circuit's Per Se Rule

In *Sanchez v. United States*, the Ninth Circuit adopted an even more expansive view of a defendant's *Brady* rights during plea bargaining.[197] The Ninth Circuit began by discussing whether a defendant may raise a *Brady* claim to vacate a guilty plea, noting that the Second, Sixth, and Eighth Circuits had already answered in the affirmative.[198] The Ninth Circuit likewise allowed post-plea *Brady* challenges, finding that a guilty plea cannot be knowing and voluntary if made without knowledge of material evidence suppressed by the prosecution.[199] However, rather than following the Sixth Circuit's method of considering the totality of the circumstances in determining whether a guilty plea was valid, the Ninth Circuit held that a *Brady* violation automatically renders a plea unknowing and involuntary.[200] The court found that such a rule makes sense because "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.'"[201]

The court also noted that prohibiting defendants from asserting *Brady* claims to challenge guilty pleas would tempt prosecutors to "deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[202] While the court appeared to believe it was following the other circuits, it failed to note that the Second Circuit had not found that a *Brady* violation prevented a plea from being knowing and voluntary, but had instead found that a *Brady* violation constitutes official misconduct that negates an otherwise knowing and voluntary plea.[203]

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195. *See id.* at 497.
196. *See id.*
197. 50 F.3d 1448 (9th Cir. 1995).
198. *See id.* at 1453.
199. *See id.*
200. *See id.* ("A waiver cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." (internal quotation marks omitted)); *see also* Lain, *supra* note 154, at 8.
201. *Sanchez*, 50 F.3d at 1453 (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)).
202. *Id.*
203. *Compare id.* ("Three circuits have held that a defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material."), *with* Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) ("[W]e conclude that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."). The court also adopted the same standard of materiality as the Second Circuit in *Miller*, finding that *Brady* evidence is material only when there is a reasonable probability that the defendant would not have pleaded guilty had he received the undisclosed information. *See Sanchez*, 50 F.3d at 1453.

While the Ninth Circuit did not ultimately find that the government's nondisclosure of evidence violated *Brady*, the test established by this court was the most defendant-friendly to date.[204] Whereas the Sixth Circuit viewed *Brady* violations as having the *potential* to invalidate a guilty plea under a totality-of-the-circumstances approach,[205] the Ninth Circuit effectively adopted a "per se" rule whereby a *Brady* violation *automatically* precludes a knowing and voluntary plea.[206]

6. The Fifth Circuit Dissents

In *Matthew v. Johnson*,[207] the Fifth Circuit was the first circuit court to lay down a full, detailed opinion holding that a defendant could *not* challenge the validity of a guilty plea due to a *Brady* violation. In considering whether or not to proceed to the merits of Matthew's *Brady* claim, the Fifth Circuit first noted that the Second, Sixth, Eighth, Ninth, and Tenth Circuits had generally held that a defendant could assert a *Brady* violation to challenge his guilty plea.[208] The court, however, also cited *Smith* and two district court cases holding that *Brady* violations may not be asserted after a guilty plea.[209]

The court proceeded to find that the government's duty under *Brady* to disclose material exculpatory evidence is based on the Due Process Clause and "exists to ensure that the accused receives a fair *trial*."[210] The court continued to emphasize the language in *Brady* that discussed the impact of withholding evidence on the trial itself, and found that the inclusion of impeachment evidence in the *Brady* rule by *Giglio* was also justified by the potential detriment to the jury's determination of guilt.[211] Thus the court framed the *Brady* rule not as one that promoted fairness and protected defendants through the criminal justice process,[212] but rather as a rule to ensure proper determinations of guilt at trial.[213]

The Fifth Circuit also found that the Supreme Court's materiality standard in *Brady* cases demonstrated that the rule was properly confined to the trial setting.[214] The court found, citing *Bagley*, that a prosecutor was only required to disclose evidence that was favorable to the defense and, if suppressed, would deprive the defendant of a fair *trial*.[215] This is a different reading of *Bagley's* materiality standard than that of the Tenth

204. *See* John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W. RES. L. REV. 581, 585 (2007).
205. Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985).
206. *See Sanchez*, 50 F.3d at 1453; *see also* Blank, *supra* note 102, at 2039.
207. 201 F.3d 353 (5th Cir. 2000).
208. *Id.* at 358.
209. *Id.*
210. *Id.* at 360 (emphasis added).
211. *See id.*
212. *See supra* notes 129–30 and accompanying text.
213. *See Matthew*, 201 F.3d at 360–61.
214. *See id.* at 361.
215. *Id.*

Circuit and other courts that cite *Bagley* as holding that 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."[216] Nonetheless, the Fifth Circuit found *Brady* to be purely a trial right, and "where no trial is to occur, there may be no constitutional violation."[217] By pleading guilty or nolo contendere, the defendant waived not only his right to trial but also the right to assert constitutional violations of trial rights.[218]

In prohibiting Matthew from raising a *Brady* challenge to invalidate his plea, the Fifth Circuit also distinguished the cases allowing such challenges in other circuits.[219] Notably, the court found the Second Circuit's holding—that a violation occurs if a defendant would have pled differently had he received the undisclosed information—to be unsupported by Supreme Court jurisprudence.[220] The court found that such an argument was foreclosed by the Supreme Court's decision in *Brady v. United States*, where the Court rejected the argument that because the defendant would not have pled guilty but for the possibility of receiving the death penalty at trial, his plea was invalid as an involuntary act.[221] The Fifth Circuit found that while some circuits had held that a guilty plea was not knowing or voluntary if the defendant was not provided with material exculpatory evidence, the Supreme Court said otherwise.[222] In *McMann v. Richardson*[223] the Court recognized that the decision to plead guilty is inherently made without complete or accurate information, and in *Brady v. United States*[224] the Court held that incorrect assessments of the strength of the government's case did not preclude a knowing and voluntary plea.[225] Thus, the Fifth Circuit held that *Brady* was purely a trial right, and to extend it to plea bargaining would go against the Supreme Court's established precedents.[226]

B. United States v. Ruiz

Two years after *Matthew*, in *United States v. Ruiz*, the Supreme Court decided its first case directly on the question whether a *Brady* violation invalidates a guilty plea.[227] Defendant Angela Ruiz was arrested in California for importing marijuana from Mexico into the United States.[228] Ruiz was offered a "fast track" plea deal, whereby she would waive

216. *See* United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994); *see also* Douglass, *supra* note 37, at 470–71.
217. *Matthew*, 201 F.3d at 361.
218. *Id.* at 362.
219. *Id.* at 362–63.
220. *See id.* at 363.
221. *Id.* at 366 (citing Brady v. United States, 397 U.S. 742, 750 (1970)).
222. *Id.* at 368.
223. 397 U.S. 759, 769 (1970).
224. 397 U.S. 742, 757 (1970).
225. *See Matthew*, 201 F.3d at 368.
226. *See id.*
227. United States v. Ruiz, 536 U.S. 622 (2002).
228. *Id.* at 625; *see also* United States v. Ruiz, 241 F.3d 1157, 1160 (9th Cir. 2001).

indictment, trial, and appeal in exchange for the government's recommendation to the sentencing judge of a two-level reduction from the otherwise applicable U.S. Sentencing Guidelines sentence.[229] The "fast track" deal specified that "any [known] information establishing the factual innocence of the defendant"[230] has been disclosed to the defendant and required the defendant to "waiv[e] the right to receive impeachment information relating to any informants or other witnesses."[231] Ruiz declined the offer and was indicted for unlawful drug possession.[232]

After the indictment, and in the absence of any subsequent plea agreement, Ruiz pled guilty.[233] Ruiz asked the sentencing judge to grant her the same two-level reduction she would have received under the plea deal, but the government opposed the request and the district court imposed the standard Guideline sentence.[234] Ruiz appealed her sentence to the Ninth Circuit, which vacated the district court's sentence.[235] The government sought certiorari, and the Supreme Court granted the petition.[236]

Writing for the majority, Justice Breyer framed the question as whether federal prosecutors must disclose material *impeachment* evidence before entering into a plea agreement with a criminal defendant.[237] Citing *Brady*, the Court located this right both in the Fifth Amendment's Due Process Clause and the Sixth Amendment's "fair trial" guarantee.[238] The Court found that due to the gravity of waiving one's constitutional trial rights by pleading guilty, the Constitution required that a guilty plea be entered knowingly and voluntarily, and with "sufficient awareness of the relevant circumstances and likely consequences."[239] The Court noted that the Ninth Circuit had essentially held that a guilty plea is not voluntary unless it is made with full knowledge of the material impeachment evidence possessed by the prosecution.[240] The Supreme Court disagreed, holding that the Constitution does not require the disclosure of impeachment information before the entry of a guilty plea.[241]

In support of this holding, the Court first found that impeachment information, while special in relation to the fairness of the trial, was not

229. *Ruiz*, 536 U.S. at 625. In this case, that meant a reduction from an eighteen-to-twenty-four month range to a twelve-to-eighteen month range. *Id.*

230. In other words, exculpatory *Brady* material.

231. *Id.* (alterations in original) (internal quotation marks omitted). This clause refers to impeachment *Brady* material, included in the *Brady* rule by *Giglio*. *See supra* notes 36–40 and accompanying text.

232. *Ruiz*, 536 U.S. at 625.

233. *Id.* at 625–26.

234. *Id.* at 626.

235. *Id.*

236. *Id.*

237. *See id.* at 625.

238. *Id.* at 628 (citing Brady v. United States, 397 U.S. 742, 748 (1970)).

239. *Id.* at 629 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

240. *Id.*

241. *See id.*

significant to whether a guilty plea was knowing and voluntary.[242] Noting that the Constitution does not confer a general right to criminal discovery, the Court found that a plea is ordinarily considered valid if the defendant "fully understands the nature of the right [he waives] and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."[243] The Constitution does not require that the government disclose all useful information to the defendant.[244] The Court found that impeachment evidence was not "critical information of which the defendant must always be aware prior to pleading guilty," due to the inconsistent way in which it tends to help a defendant.[245]

Affirming the Fifth Circuit's holding in *Matthew*,[246] the Supreme Court held that the Constitution does not require that a defendant have complete knowledge of all relevant circumstances before entering a guilty plea.[247] The Court also found that the due process considerations underlying the *Brady* rule did not support a rule requiring the disclosure of impeachment material before pleading guilty.[248] The added value of such a rule to the defendant would be limited, as impeachment information is rarely crucial.[249] Moreover, the Court found little reason to believe that innocent individuals would plead guilty in the absence of impeachment evidence because the government was required to disclose "any information establishing the factual innocence of the defendant" under the "fast track" plea bargain, and the defendant was still protected by Rule 11.[250] The Court appeared to assume that innocent defendants were very unlikely to plead guilty.[251]

The Supreme Court also found that a constitutional rule requiring disclosure of impeachment information prior to a guilty plea could interfere with the "[g]overnment's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice."[252] The Court agreed with the government's warning that such a rule would disrupt investigations and potentially expose witnesses to harm.[253] Such a requirement would also force the government

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242. *Id.*

243. *Id.* (emphasis in original); *see also* Bibas, *supra* note 98, at 1133–34 (discussing the Supreme Court's understanding of the voluntariness requirement in *Ruiz*).

244. *Ruiz*, 536 U.S. at 629.

245. *Id.* at 630.

246. *See* Matthew v. Johnson, 201 F.3d 353, 368 (5th Cir. 2000) ("The Court has explicitly recognized that the decision whether to plead guilty or go to trial is one made under circumstances of incomplete, and often inaccurate, information.").

247. *Ruiz*, 536 U.S. at 633.

248. *See id.* at 631.

249. *See id.* at 630–32.

250. *Id.* at 631; *see also* FED. R. CRIM. P. 11.

251. Bibas, *supra* note 98, at 1133. At oral argument, Justice Scalia went so far as to suggest that "our system never permits or encourages innocent defendants to plead guilty." *Id.* at 1134 (quoting Transcript of Oral Argument at 12, *Ruiz*, 536 U.S. 622 (No. 01-595)).

252. *Ruiz*, 536 U.S. at 631.

253. *Id.* at 631–32.

to expend more time, energy, and manpower on preparation before plea bargaining, thereby erasing the benefits to judicial expediency which plea bargaining normally offers.[254] In the alternative, the Court feared that the Ninth Circuit's rule would result in more cases being sent to trial.[255] In addition to not being in the best interests of the justice system, the Court held that such a change was not justified by the minimal benefit bestowed by requiring disclosure of impeachment evidence.[256] The Court therefore held that the Constitution did not require the government to disclose impeachment evidence before the entry of a guilty plea.[257]

C. Judicial Interpretation of Ruiz*: The New Circuit Split*

While the Supreme Court was quite clear in striking down a rule requiring the pre-plea disclosure of *impeachment* evidence, it was not clear from the holding what *Ruiz* meant for *exculpatory* evidence.[258] Prior to *Ruiz*, courts treated exculpatory and impeachment evidence as "constitutionally indistinguishable."[259] While some—including the Seventh and Tenth Circuits—have viewed *Ruiz* as suggesting that the *Brady* rule *would* apply to exculpatory evidence prior to the entry of a plea,[260] others—including the Second, Fourth, and Fifth Circuits—have understood *Ruiz* to imply a broader rule that the government has no duty to disclose any *Brady* material during plea negotiations.[261] This section outlines the cases following *Ruiz* that address whether the prosecution must disclose material exculpatory evidence prior to the entry of a guilty plea.

1. Circuits That Find *Ruiz* Suggests That Failure To Disclose Material Exculpatory Evidence Violates Due Process

The first two circuit courts to address this question after *Ruiz* both held that exculpatory evidence, unlike impeachment evidence, had to be disclosed prior to the entry of a guilty plea. This section discusses these cases and their interpretation of *Ruiz*.

254. *See id.* at 632.
255. *See id.*
256. *See id.*
257. *Id.* at 633.
258. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 273 (2006).
259. Natapoff, *supra* note 152, at 981.
260. *See, e.g.*, Langer, *supra* note 258, at 273 n.200 (collecting cases); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 654 (2007) ("In response to the Supreme Court's decision in *Ruiz*, the American College of Trial Lawyers proposed modifying Federal Rule of Criminal Procedure 11 to impose a duty to disclose exculpatory information in the guilty plea context.").
261. *See infra* Part II.C.2.

a. The Seventh Circuit

The Seventh Circuit was the first to address the application of *Brady* to plea bargaining after *Ruiz* in *McCann v. Mangialardi*.[262] In discussing McCann's *Brady* claim, the court noted that the Supreme Court had not yet addressed whether disclosure of material exculpatory evidence was required outside the trial context.[263] The court viewed *Ruiz* as drawing a major distinction between impeachment information—which was "special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary*"[264]—and exculpatory evidence, which was at issue in *McCann*.[265] Because of this distinction, the Seventh Circuit found that the question whether a guilty plea can be voluntary[266] when it is made without knowledge of material exculpatory evidence was not directly answered by *Ruiz*.[267]

The Seventh Circuit held that *Ruiz* "strongly suggests" that the government is required to disclose material exculpatory information prior to a guilty plea.[268] The court found that the Supreme Court's reasoning for *not* requiring disclosure of impeachment information was that such impeachment information was unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty."[269] Additionally, the disclosure of impeachment information was not required in *Ruiz* because the plea agreement already specified that the government would provide material exculpatory evidence.[270] The Seventh Circuit held that this language created a distinction between impeachment and exculpatory evidence, and therefore indicated that the Supreme Court *would* find a due process violation if the government withheld material exculpatory evidence prior to the entry of a guilty plea.[271]

Ultimately, however, the Seventh Circuit found that it did not have to actually resolve the issue, because McCann had not presented evidence to show that Mangialardi actually new about the cocaine being planted in his car.[272] Still, the Seventh Circuit set the foundation for interpretation of *Ruiz* and pre-plea *Brady* requirements.

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262. 337 F.3d 782 (7th Cir. 2003).
263. *See id.* at 787.
264. *Id.* (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)).
265. *See id.* In *McCann*, the exculpatory evidence consisted of the defendant's alleged knowledge that the cocaine found in the plaintiff's car was planted there. *Id.* at 784.
266. Voluntary was defined by the Supreme Court in *Ruiz* and by the Seventh Circuit here as "knowing, intelligent, and sufficiently aware." *Ruiz*, 536 U.S. at 629; *McCann*, 337 F.3d at 787 (internal quotation marks omitted).
267. *McCann*, 337 F.3d at 787.
268. *Id.*
269. *Id.* (quoting *Ruiz*, 536 U.S. at 630) (emphasis omitted).
270. *Id.*
271. *Id.* at 788.
272. *Id.*

b. The Tenth Circuit

Ten years after its decision in *United States v. Wright*,[273] the Tenth Circuit once again addressed the viability of post–guilty plea *Brady* challenges in *United States v. Ohiri*.[274] While the district court had held that Ohiri could not establish a *Brady* violation prior to the entry of his guilty plea, the Tenth Circuit disagreed.[275] The district court relied on *Ruiz*, which it viewed as holding that "the government is not required to produce all *Brady* material when a defendant pleads guilty."[276] The Tenth Circuit, however, found that *Ruiz* did not absolve the government of its disclosure responsibilities in this case.[277]

The court first highlighted the Supreme Court's statement that "'impeachment evidence is special in relation to the *fairness of a trial*,' not in respect to whether a *plea is voluntary*."[278] Like the Seventh Circuit in *McCann*,[279] the Tenth Circuit used this passage to draw a distinction between impeachment and exculpatory evidence: exculpatory evidence is "'critical information of which the defendant must always be aware prior to pleading guilty,'"[280] while impeachment evidence is not.[281] Moreover, the Tenth Circuit found that the duty to disclose exculpatory evidence prior to a guilty plea was supported by the Supreme Court's statement that Ruiz's constitutional *Brady* rights were protected by the plea agreement's stipulation that she would receive all material exculpatory evidence.[282]

The Tenth Circuit also found that *Ruiz* was distinguishable from the case at bar in two ways.[283] First, the withheld evidence in this case was exculpatory, whereas the evidence in *Ruiz* was impeachment evidence.[284] Second, the court found a significant difference between the "fast track" plea in *Ruiz*, which was offered before an indictment, and the plea agreement offered to Ohiri on the same day as jury selection.[285] The Tenth Circuit understood the Supreme Court's holding in *Ruiz* as being relatively narrow: that there was no due process violation in requiring a defendant to waive the disclosure of impeachment evidence *before* indictment.[286] This did not, however, imply that the government could withhold material exculpatory evidence if the defendant accepts a last-minute plea deal.[287]

273. 43 F.3d 491 (10th Cir. 1994).
274. 133 F. App'x 555 (10th Cir. 2005).
275. *See id.* at 562.
276. *Id.* at 561.
277. *Id.* at 562.
278. *Id.* (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)).
279. *See supra* notes 264–65 and accompanying text.
280. *Ohiri*, 133 F. App'x at 562 (quoting United States v. Ruiz, 536 U.S. 622, 630 (2002)).
281. *See id.*
282. *Id.* (citing United States v. Ruiz, 536 U.S. 622, 631 (2002)).
283. *See id.*
284. *Id.*
285. *Id.*
286. *See id.*
287. *See id.*

The Tenth Circuit cited *McCann* as holding the same, and also as understanding *Ruiz* to suggest that exculpatory evidence must be disclosed prior to a guilty plea.[288] The court therefore held that post–guilty plea *Brady* challenges for suppression of exculpatory evidence were permitted after *Ruiz*.[289]

2. Circuits That Find *Ruiz* Precludes All *Brady* Challenges to Guilty Pleas

In *United States v. Conroy*, the Fifth Circuit once again disagreed with the other circuits, mirroring the split that existed before *Ruiz*.[290] One year later in *United States v. Moussaoui*,[291] the Fourth Circuit indicated that it might follow suit, but its holding was not an outright endorsement of *Conroy*. The Second Circuit also suggested in dictum, in *Friedman v. Rehal*,[292] that it might reverse course from *Miller* and its progeny. This section discusses these three cases and the circuit split as it currently exists.

a. The Fifth Circuit

Nine years after its decision in *Matthew v. Johnson*,[293] the Fifth Circuit once again held that a guilty plea precludes a *Brady* challenge in *Conroy*.[294] The court declined to reach the merits of Conroy's *Brady* claim, finding that it was precluded by *Ruiz* and *Matthew*.[295] First, the court reviewed its holding in *Matthew*, where it found that the *Brady* rule was only intended to ensure that the defendant received a fair *trial*, and that it did not apply when an individual waived his trial rights.[296] In addition, the court cited a number of Fifth Circuit decisions following *Matthew* that also found that a guilty plea waives the right to claim a *Brady* violation.[297]

In further support of its holding, the Fifth Circuit found that the Supreme Court in *Ruiz* had declined to extend *Brady* rights to guilty pleas.[298] The Fifth Circuit did not see *Ruiz* as creating (or even implying) a distinction between impeachment and exculpatory evidence, but rather as precluding all post–guilty plea *Brady* claims.[299] Accordingly, the Fifth Circuit held that Conroy's *Brady* claim was precluded under *Ruiz* and *Matthew*, and that

288. *See id.*; *see also* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).
289. *See Ohiri*, 133 F. App'x at 561–62.
290. 567 F.3d 174 (5th Cir. 2009).
291. 591 F.3d 263 (4th Cir. 2010).
292. 618 F.3d 142 (2d Cir. 2010).
293. *See supra* Part II.A.6.
294. 567 F.3d 174 (5th Cir. 2009).
295. *Id.* at 178–79; *see also supra* Part II.A.6.
296. *See Conroy*, 567 F.3d at 178; *see also* Part II.A.6.
297. *See Conroy*, 567 F.3d at 178 (citing United States v. Santa Cruz, 297 F. App'x 300 (5th Cir. 2008); United States v. Alvarez-Ocanegra, 180 F. App'x 535 (5th Cir. 2006); Orman v. Cain, 228 F.3d 616 (5th Cir. 2000)).
298. *Conroy*, 567 F.3d at 179.
299. *See id.*

a defendant may not challenge a guilty plea for the suppression of impeachment *or* exculpatory evidence.[300]

b. The Fourth Circuit

The Fourth Circuit's first substantial discussion of post-plea *Brady* challenges after *Ruiz* occurred in *Moussaoui*.[301] While the court ultimately found that it did not have to decide the *Brady* issue, a few points in dictum suggest that the Fourth Circuit would side with the Fifth in finding that *Ruiz* precluded all *Brady* challenges to guilty pleas.[302] First, the court held that *Brady* was purely a trial right, existing to "preserve the fairness of a trial verdict."[303] The court found that when a defendant pleads guilty, the concerns of maintaining a fair trial and not convicting an innocent defendant are "almost completely eliminated because his guilt is admitted."[304]

The Fourth Circuit also acknowledged that *Ruiz* did not directly address the question of whether a defendant may challenge his guilty plea for suppression of *exculpatory* evidence.[305] However, the court noted that the Supreme Court had recognized in *Ruiz* and previous cases that due process did not require the disclosure of all useful information prior to a guilty plea and that pleas may be valid despite inaccurate knowledge of the strength of the government's case.[306] Furthermore, the court cited with approval a previous Fourth Circuit case decided shortly after *Ruiz*, holding that "the prosecutor's failure to disclose information potentially relevant as mitigation evidence" prior to the entry of a guilty plea, did not invalidate the plea.[307] Thus, the Fourth Circuit's decision appears to be in line with the Fifth Circuit's holding in *Conroy*, finding that *Ruiz* confined *Brady* to the trial setting.[308]

c. The Second Circuit

The Second Circuit's decision in *Miller*,[309] allowing a post-plea *Brady* challenge for the suppression of exculpatory evidence, was followed by a number of Second Circuit cases allowing both impeachment and

300. *See id.*
301. 591 F.3d 263 (4th Cir. 2010).
302. *See* Wiseman, *supra* note 12, at 994.
303. *Moussaoui*, 591 F.3d at 285 (citing United States v. Ruiz, 536 U.S. 622, 628 (2002); Brady v. Maryland, 373 U.S. 83, 87 (1963)).
304. *Id.* at 285.
305. *Id.* at 286.
306. *Id.*
307. *Id.* (citing Jones v. Cooper, 311 F.3d 306, 315 n.5 (4th Cir. 2002)); *see also* Wiseman, *supra* note 12, at 994.
308. *See* Cassidy, *supra* note 38, at 1444 n.67.
309. 848 F.2d 1312 (2d Cir. 1988).

exculpatory *Brady* challenges to guilty pleas.[310] The Second Circuit had a chance to revisit this issue after *Ruiz* in *Friedman*, and although the court did not fully reverse its course,[311] it suggested that it interpreted *Ruiz* as precluding all post-plea *Brady* challenges.[312]

In *Friedman*, the Second Circuit viewed *Ruiz* as reaffirming the precedent from *Brady* that a defendant is entitled to information that is necessary to ensure a knowing and voluntary guilty plea.[313] The court understood *Ruiz* to hold that because impeachment information is relevant only to the fairness of the trial, and not to the voluntariness of the plea, the failure to disclose such information prior to a guilty plea does not violate due process.[314]

The Second Circuit found that the undisclosed evidence in this case was impeachment evidence and therefore not subject to disclosure requirements after *Ruiz*.[315] However, the court noted that even if the suppressed evidence had been exculpatory, Friedman's challenge would still be precluded by *Ruiz*.[316] While the court found that *Ruiz* did not expressly overrule *Miller*,[317] the Second Circuit held that, because the Supreme Court "has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial," the holding in *Ruiz* likely applied to both impeachment and exculpatory evidence.[318] Furthermore, the court found that the reasoning underlying *Ruiz* supported such a ruling.[319]

The circuit courts are thus split as to whether *Ruiz* permits post–guilty plea exculpatory *Brady* challenges.[320] On one side, the Seventh and Tenth Circuits view *Ruiz* as creating a distinction between impeachment and exculpatory evidence, requiring the disclosure of the latter, but not the former, before a defendant enters a guilty plea.[321] On the other side, the Fifth Circuit is cautiously joined by the Second and Fourth Circuits in understanding *Ruiz* to preclude all pre–guilty plea *Brady* claims.[322] To resolve this split and fully define the disclosure rights of defendants during plea bargaining, the Supreme Court will have to address the specific

310. *See, e.g.*, United States v. Avellino, 136 F.3d 249 (2d Cir. 1998); Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992).

311. The court did not actually decide the issue, as the defendant's challenge was untimely. Friedman v. Rehal 618 F.3d 142, 152 (2d Cir. 2010).

312. *See id.* at 154; *see also* Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1039 (2011).

313. *Friedman*, 618 F.3d at 153; *see also supra* notes 87–93 and accompanying text.

314. *See id.* (citing United States v. Ruiz, 563 U.S. 622, 629 (2002)).

315. *Id.* at 153–54.

316. *Id.*

317. *See id.*

318. *Id.* at 154 (citing United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 153–54 (1972)).

319. *Id.*; *see also* Wiseman, *supra* note 12, at 993–94.

320. *See* Wiseman, *supra* note 6, at 458.

321. *See supra* Part II.C.1.

322. *See supra* Part II.C.2.

question whether the failure to disclose material exculpatory evidence prior to a guilty plea violates *Brady*.

III. AN ANALOGOUS CASE STUDY: EXTENSION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL TO PLEA BARGAINING

In addressing the question of whether *Brady* applies to the disclosure of exculpatory evidence during plea bargaining, a useful comparison may be drawn to the right to effective assistance of counsel. The two rights are doctrinally linked.[323] While *Brady* concerns whether the prosecutor's actions violate a defendant's due process rights,[324] the right to effective assistance of counsel provides a minimum standard of representation for the defendant's attorney.[325] The Supreme Court has frequently noted that the same standard of materiality applies to reviews of both claims.[326] Additionally, like *Brady*, the right to effective assistance was traditionally considered purely a trial right, as it was rooted in the Sixth Amendment right to a fair trial.[327] While numerous courts have held that *Brady* should not be extended to plea bargaining *because* it is a trial right,[328] the Supreme Court recently recognized the right to effective assistance of counsel as applying during plea bargaining as well as trial. In two companion cases decided in 2012, the Court held that a defendant may challenge a conviction where his attorney's deficient assistance caused him to reject a plea agreement and receive a harsher sentence at trial.[329] This part presents a case study of how and why the constitutional right to effective assistance of counsel—a right whose history and application share many similarities with *Brady* rights—was expanded into the plea bargaining arena.

A. The Right to Effective Assistance of Counsel

The right to effective assistance of counsel is based in the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his

323. *See* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1183 n.109 (2012).

324. *See supra* note 32 and accompanying text.

325. *See* Bibas, *supra* note 98, at 1143–44.

326. *See supra* notes 51–53 and accompanying text.

327. *See* United States v. Ash, 413 U.S. 300, 309–10 (1973) ("This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial . . . . Later developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself."); *see also* Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 968–69 (2005) ("[T]he collateral process is usually the sole means by which a convicted person can enforce fundamental fair-trial rights, for example, to the effective assistance of counsel . . . ."); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1238 (2002).

328. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010); Matthew v. Johnson, 201 F.3d 353, 361 (5th Cir. 2000).

329. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

defence."[330] While the Sixth Amendment provides only for the basic right to counsel, the idea that representation has to be more than nominal did not appear until 1932 in *Powell v. Alabama*.[331] In *Powell*, the Supreme Court held that even though the trial court had attempted to designate counsel to the defendants, that attempt was either so half-hearted or so close to the start of the trial that it "amount[ed] to a denial of effective and substantial aid in that regard."[332] *Powell* thus set forth the idea that the right to counsel requires some threshold level of effectiveness.[333] However, the Court did not define exactly what such representation actually entails.[334]

The Supreme Court set the standard for overturning a conviction based on ineffective assistance of counsel over fifty years later in *Strickland v. Washington*.[335] The Court held that the right to counsel is the right to *effective* assistance of counsel, and established a two-part test for determining when that right is violated.[336] First, the defendant must show that his attorney's performance fell below an objective standard of reasonableness.[337] Second, the defendant must show that his attorney's substandard assistance caused him prejudice.[338] To demonstrate prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors.[339] As noted in *Bagley*, this test for prejudice was based on the "test for materiality of exculpatory information not disclosed to the defense by the prosecution" in adjudicating *Brady* claims.[340] Where representation is deficient and prejudice is shown, the Court held that a conviction must be overturned, as the attorney's ineffective assistance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[341]

Although the holding was based primarily on the Sixth Amendment, the language used by the Court was not limited to the trial context. Washington's challenge was not to his attorney's actions at trial, but rather at the sentencing proceeding.[342] The Court stated that the role of counsel was not only to promote a just *trial*, but to ensure the "ability of the *adversarial system* to produce just results."[343] Ultimately, the question that

330. U.S. CONST. amend. VI.
331. 287 U.S. 45 (1932); *see also* SALTZBURG, *supra* note 57, at 1301.
332. *Powell*, 287 U.S. at 53.
333. *See id.*
334. *See id.*
335. 466 U.S. 668 (1984).
336. *See id.* at 686–87.
337. *See id.* at 687.
338. *See id.*
339. *See id.* at 694. Note that the Court did not confine the test to whether the outcome of the *trial* would have been different, but rather whether the outcome of the *proceeding* would change.
340. *Id.*
341. *Id.* at 686.
342. *See id.* at 686–87.
343. *Id.* at 685 (emphasis added).

the *Strickland* test sought to answer was whether "the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable."[344] This question left open the possibility that the right to effective assistance of counsel could be expanded to other stages of the judicial process.

The Supreme Court first considered the use of the two-part *Strickland* test in the context of a guilty plea in *Hill v. Lockhart*, where defendant William Hill argued that his attorney's incorrect legal advice rendered his guilty plea involuntary.[345] The Supreme Court held that the *Strickland* test applies to ineffective assistance of counsel challenges to guilty pleas.[346] The Court's holding was essentially a mixture of the tests set forth in *Boykin* and *Strickland*.[347] First, the Court cited *Boykin* for the proposition that a guilty plea is only valid when it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[348] Where a defendant pleads guilty on the advice of counsel, he must to show that the advice of his attorney was not "within the range of competence demanded of attorneys in criminal cases" in order to render his plea involuntary.[349]

The Court held that this test for determining whether a plea was truly voluntary was not only compatible with the two-part test set forth in *Strickland*, but was supported by the same justifications.[350] To ensure the proper administration of justice and prevent innocent defendants from being convicted, errors that affect the outcome of a judicial proceeding must have a remedy.[351] To invalidate a guilty plea on the basis of ineffective assistance of counsel, a defendant must therefore show first that his attorney's advice fell below an objectively reasonable standard, and second, that there is a reasonable probability that he would not have pled guilty absent the errors of his attorney.[352] As Hill did not allege that he would have pled not guilty having received different advice, the Court found that he was not prejudiced by his attorney's error.[353]

B. The Conflict: Whether or Not To Fully Extend the Right to Effective Assistance of Counsel to Plea Bargaining

Hill allowed a defendant to vacate a guilty plea where the ineffective assistance of counsel led him to accept a plea bargain and forgo trial, but it

344. *Id.* at 687.
345. 474 U.S. 52, 53–56 (1985). Hill's attorney told him that he would be eligible for parole under the guilty plea agreement much earlier than was actually the case. *Id.* at 55.
346. *Id.* at 58.
347. *See id.* at 56–60.
348. *Id.* at 56 (internal quotation marks omitted).
349. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).
350. *See id.* at 57.
351. *See id.* at 57–58; *see also* Strickland v. Washington, 466 U.S. 668, 693–96 (1984); Boykin v. Alabama, 395 U.S. 238, 242 (1969) .
352. *See Hill*, 474 U.S. at 57–60.
353. *Id.* at 60.

did not address what recourse, if any, was available to a defendant whose attorney's deficient performance caused him to *reject* a plea bargain and proceed to trial.[354] Courts generally took one of three different approaches to this problem: no remedy, specific performance of the plea bargain, or retrial.[355]

The courts that provided no remedy for a defendant whose attorney's deficient performance caused him to reject a plea agreement generally found that such a defendant suffered no prejudice.[356] These courts held that prejudice occurs where some error deprives a defendant of some substantive or procedural right, but as there is no constitutional right to plea bargain,[357] there was no prejudice in rejecting a plea and standing trial.[358] Courts found that this holding was further supported by the fact that the right to effective assistance of counsel was "grounded in the constitutional right to receive a fair trial."[359] This reason for denying post-plea ineffective assistance challenges to rejected guilty pleas mirrors the reason often put forth for denying post-plea *Brady* challenges: both were considered by some courts to be purely trial rights.[360] Finally, courts declining to allow ineffective assistance challenges where the defendant rejected a plea agreement found that it would be extremely difficult to determine the soundness of the attorney's representation, whether the defendant actually would have pled differently, and whether the court would have accepted the plea.[361]

Where courts found that the decision to reject a plea agreement *did* cause prejudice, that prejudice consisted of receiving a higher sentence at trial than he would have received under the guilty plea agreement.[362] One remedy used by courts to cure this prejudice was the reinstatement of the original plea offer.[363] For example, in *United States v. Blaylock*, the Ninth Circuit found prejudice where the defendant would have received a less severe sentence had he gone to trial.[364] The court held that in determining the proper remedy, a court should "put the defendant back in the position he

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354. *See* Bibas, *supra* note 98, at 1140.

355. David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1535–36 (2011).

356. *See, e.g.*, State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000); State v. Taccetta, 975 A.2d 928, 935–37 (N.J. 2009).

357. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

358. Perez, *supra* note 355, at 1540–41.

359. *See, e.g.*, State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007).

360. *See supra* note 217 and accompanying text.

361. Perez, *supra* note 355, at 1542–43; *see also, e.g.*, Rasmussen v. State, 658 S.W.2d 867, 868 (Ark. 1983) (finding no remedy because the defendant did not allege that she would have accepted the plea but for her attorney's ineffective assistance or that she would now accept the plea agreement); *In re* Alvernaz, 830 P.2d 747, 756–57 (Cal. 1992) (discussing the difficulty in determining whether a defendant would have accepted the plea bargain offer had she received effective assistance of counsel).

362. *See* Perez, *supra* note 355, at 1553.

363. *See* United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

364. *See id.*

would have been in if the Sixth Amendment violation had not occurred."[365] The court found that in many cases a new trial would not cure the harm, and held that in such cases the original plea must be reoffered.[366] However, not all courts proceeded identically in reinstating the original plea. While some directed the government to reoffer the plea agreement and allow the defendant to decide whether or not to accept, others mandated that the defendant accept the original plea agreement and directed the trial court to sentence the defendant accordingly.[367]

The second remedy offered by courts finding prejudice is the granting of a new trial.[368] These courts also found prejudice where a defendant received a harsher sentence at trial than he would have if he had accepted the plea offer, and the decision to reject the offer was the result of deficient assistance of counsel.[369] However, these courts held that reoffering the original plea agreement was not a proper remedy. In *Julian v. Bartley*, the Seventh Circuit found that specific performance was inappropriate because the state was not responsible for the Sixth Amendment violation, and the defendant had never accepted the terms of the original offer.[370] Instead, the judge ordered a new trial, and the court acknowledged that the state could choose to propose a plea agreement if it wished.[371]

From these three approaches to cases where the ineffective assistance of counsel leads to the rejection of a plea agreement, two crucial questions remained: First, does receiving a harsher sentence after a fair trial constitute prejudice to the defendant? Second, if so, what is the proper remedy? The Supreme Court answered these questions in *Lafler v. Cooper*[372] and *Missouri v. Frye.*[373]

C. *Resolution:* Lafler v. Cooper *and* Missouri v. Frye

This section outlines and discusses two companion Supreme Court cases decided in 2012 that fully extended the right to effective assistance of counsel to defendants during plea bargaining.

1. *Lafler v. Cooper*

The Supreme Court's recent decisions in *Lafler* and *Fry* address the other side of the *Hill* coin: situations where defense counsel's errors caused a

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365. *Id.*
366. *Id.* (finding such a remedy permissible under *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984), and *Santobello v. New York*, 404 U.S. 257, 263 (1971)).
367. Perez, *supra* note 355, at 1548.
368. Tara Harrison, Note, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1202.
369. *See, e.g.*, Julian v. Bartley, 495 F.3d 487, 500 (7th Cir. 2007); Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989).
370. *See Julian*, 495 F.3d at 500.
371. *Id.*
372. 132 S. Ct. 1376 (2012).
373. 132 S. Ct. 1399 (2012).

defendant *not* to enter a guilty plea.[374] In these two 5–4 decisions decided on the same day, the Court solidified the right to effective assistance of counsel during plea bargaining.[375]

In *Lafler*, the question taken up by the Supreme Court was whether Cooper's attorney's incorrect legal statements regarding the prosecution's ability to prove its case during plea bargaining, which led him to reject a favorable plea agreement and proceed to trial, deprived him of effective assistance of counsel.[376] Although the petitioner and the Solicitor General argued that the Sixth Amendment protects only the defendant's right to a fair *trial*, the Court disagreed.[377] Rather, the defendant was entitled to the effective assistance of counsel at all "critical stages of a criminal proceeding."[378] The Court had already held in previous cases that plea negotiation was a critical stage.[379] The guarantee of this constitutional right at all critical stages of a criminal proceeding is necessary to ensure the fair administration of the judicial process because defendants "cannot be presumed to make critical decisions without counsel's advice."[380]

The Court, citing *Hill*, applied the *Strickland* test to Cooper's claim.[381] This test is properly applied to plea bargaining because the question at the heart of the *Strickland* inquiry is whether the attorney's errors "so undermined the proper functioning of the adversarial process that it failed to produce a reliably just result."[382] Thus the concern was with justice and fairness not solely at trial, but throughout the entire judicial process, including the plea bargaining stage that preceded it.[383] The Court found that an otherwise fair trial does not remedy errors that occur during plea bargaining.[384] Both sides agreed that the advice of Cooper's counsel was deficient under the first *Strickland* prong; the problem was how to determine prejudice under the second prong.[385]

The Court held that to show prejudice, Cooper had to show that the outcome of the plea process would have been different had he received sound legal advice.[386] In *Hill*, that meant only that the defendant had to

374. *See Lafler*, 132 S. Ct. at 1383–84; *Frye*, 123 S. Ct. at 1408.
375. *See Lafler*, 132 S. Ct. at 1383–84; *Frye*, 132 S. Ct. at 1408.
376. *See Lafler*, 132 S. Ct. at 1383–84. Cooper was charged with numerous felonies and misdemeanors after repeatedly shooting a woman. *Id*. at 1383. The prosecution made two offers to dismiss some of the charges and to recommend a lower sentence if he pleaded guilty. *Id.* Cooper refused both offers and was subsequently convicted on all counts and sentenced to a mandatory minimum of 185 to 360 months imprisonment. *Id.*
377. *See id.* at 1385.
378. *Id.*
379. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).
380. *Lafler*, 132 S. Ct. at 1385.
381. *Id.* at 1384–85; *see also* Hill v. Lockhart, 474 U.S. 52, 59 (1985).
382. *Lafler*, 132 S. Ct. at 1393 (citations omitted).
383. *Id.* at 1388.
384. *Id.* at 1386.
385. *See id.* at 1385.
386. *Id.*

show that he would not have pled guilty without the error of his attorney.[387] In this case, however, the Court held that Cooper must show three things: first, a reasonable probability that, but for the advice of his counsel, he would have entered a guilty plea; second, that the court would have accepted his terms; and third, that the conviction or sentence imposed would have been more favorable than what was actually decided.[388] The Court held that Cooper was prejudiced by his attorney's advice not to accept the plea offer, as he received a sentence more than three times as harsh as he would have had he pled guilty, and the case was remanded with an order that the state reoffer the plea agreement.[389]

In further support of its holding that the *Strickland* test applied to the rejection of a guilty plea agreement, the Court noted that even though a defendant has no constitutional right to plea bargain, a defendant still retains his constitutional rights when the prosecution decides to engage in such negotiations: "When [the government] opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[390] The effective assistance of counsel is a constitutional right afforded to criminal defendants, and when a prosecutor decides to bring a defendant to the plea bargaining table—a critical stage of the judicial process—the defendant's constitutional rights come with him.[391]

Justice Scalia wrote the dissent, joined by Justice Thomas, and Chief Justice Roberts in all but part IV.[392] Justice Scalia lamented what he viewed as the newly "constitutionalized" plea bargaining process, fearing that the Court would soon attempt to govern not only the behavior of defense attorneys but also the prosecution during plea bargaining.[393] He found it problematic that Cooper's alleged injury was having to stand trial.[394]

Justice Scalia took no issue with the characterization of the entry of a guilty plea as a "critical stage" of the judicial process during which a defendant must be afforded the right to effective assistance of counsel.[395] However, he limited that characterization to the *acceptance* of a guilty plea; he would not require the effective assistance of counsel before a defendant rejects a plea bargain and proceeds to trial.[396] Perhaps more importantly, Justice Scalia viewed the right to effective assistance of counsel as existing only to ensure a fair trial.[397] Thus, there can be no Sixth Amendment

387. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985).
388. *Lafler*, 132 S. Ct. at 1385.
389. *Id.* at 1391.
390. *Id.* at 1387 (internal quotation marks omitted).
391. *See id.*
392. *Id.* at 1391 (Scalia, J., dissenting).
393. *See id.* at 1391–92.
394. *See id.*
395. *See id.*
396. *See id.* at 1393.
397. *See id.*

violation where the prejudice complained of is having to stand trial, even where the sentence is higher than would have been imposed under the plea agreement.[398] According to Justice Scalia, Cooper was not deprived of a fair process by being forced to stand trial.[399]

2. *Missouri v. Frye*

The Court addressed a similar, but not identical, question in *Frye*.[400] Whereas *Lafler* involved a defendant's rejection of a favorable plea offer on the advice of counsel, *Frye* involved the defendant's attorney's failure to inform him of a plea offer, and the defendant's acceptance of a subsequent offer on less favorable terms.[401] The Supreme Court held that defense counsel has a duty to inform the defendant of potentially favorable plea offers made by the prosecution.[402] By failing to do so in this case, Frye's attorney deprived him of his constitutional right to effective assistance of counsel.[403] The Court began its decision with a discussion of *Hill* and *Padilla v. Kentucky*.[404] First, the Court reiterated the proposition from *Hill* that ineffective assistance of counsel claims for errors during plea bargaining are governed by the *Strickland* test.[405] Second, the Court noted that plea bargaining is a "critical phase" of the judicial process, and that the constitutional protections of the Sixth Amendment apply even in that pretrial context.[406] Moreover, the Court stated that a "knowing and voluntary" guilty plea does not supersede mistakes by a defendant's attorney.[407]

While the Court acknowledged the state's argument that this presented a different situation from *Hill* and *Padilla* because those cases concerned a defendant who had *accepted* a guilty plea agreement, the Court did not find that difference sufficient to overcome the need for constitutional protection during plea bargaining.[408] As in *Lafler*, the Court found that a defendant is entitled to effective assistance of counsel at all "critical stages" of a criminal proceeding.[409] The Court understood "critical stages" to include the entry of a guilty plea.[410]

The State urged that a defendant should not be allowed to vacate a guilty plea due to ineffective assistance of counsel for a number of reasons.[411]

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398. *See id.* at 1393–94.
399. *Id.* at 1395.
400. 132 S. Ct. 1399 (2012).
401. *Id.* at 1404.
402. *Id.* at 1408.
403. *See id.*
404. *See id.* at 1405; *see also* Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Hill v. Lockhart, 474 U.S. 52, 57 (1985).
405. *Frye*, 132 S. Ct. at 1405–06.
406. *Id.* at 1406 (quoting *Padilla*, 130 S. Ct. at 1486).
407. *Id.*
408. *See id.* at 1406–08.
409. *See id.* at 1405 (internal quotation marks omitted).
410. *Id.*
411. *Id.* at 1407.

Most importantly, the State argued that there is no constitutionally guaranteed right to accept a guilty plea offer, and that the plea bargaining process is so amorphous and lacking in clear standards or timelines that the prosecution would have little notice of problems or capacity to intervene.[412] While the Court found that these were tenable arguments, they were outweighed by the "simple reality" that 97 percent of federal convictions were obtained through guilty pleas.[413] Due to the importance of plea bargaining to the judicial process, the Court reasoned that defense counsel had responsibilities that must be met in order to ensure the fair administration of justice.[414] Moreover, the Court found that because the criminal justice system is now "for the most part a system of pleas, not a system of trials," the guarantee of a fair trial was insufficient to cure pretrial errors.[415] To deny defendants the effective assistance of counsel at plea bargaining would be to deny them effective representation "at the only stage when legal aid and advice would help him."[416] To provide the effective assistance guaranteed by the Sixth Amendment, the Court held that defense counsel had a duty to communicate formal guilty plea offers to the defendant.[417] Frye's attorney's failure to do so therefore rendered his performance deficient.[418]

As in *Lafler*, the Supreme Court applied the same standard of materiality for ineffective assistance of counsel claims as is used to review *Brady* claims: the defendant must show a "reasonable probability [that he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel."[419] In this case, Frye had to prove a reasonable probability that the end result of his criminal proceedings would have been more favorable, whether by a plea to a lesser charge against him or a less harsh sentence.[420] As Frye's attorney failed to communicate the plea offer, the Supreme Court remanded the case to apply the appropriate *Strickland* test and to determine if Frye was prejudiced by that failure.[421]

Justice Scalia once again dissented, joined by Chief Justice Roberts and Justices Thomas and Alito.[422] Although Justice Scalia found the cases to be substantially similar, he found that the justifications for his dissent in *Lafler* were even more present in *Frye*, where the fairness of the process and the conviction were established by the defendant's admission of guilt.[423]

412. *Id.*
413. *See id.*; *see also* Bibas, *supra* note 4, at 154.
414. *Frye*, 132 S. Ct. at 1407.
415. *Id.*
416. *Id.* at 1408 (citation omitted).
417. *Id.*
418. *Id.*
419. *Id.* at 1409.
420. *See id.*
421. *Id.* at 1410–11.
422. *Id.* at 1412.
423. *See id.* (Scalia, J., dissenting).

Justice Scalia found that, as there is no constitutional right to plea bargain, Frye was not deprived of any substantive or procedural right by his attorney's failure to inform him of the plea offer.[424] There was no question that this failure rendered the attorney's performance deficient; however, as the deficiency did not deprive Frye of his "constitutional right to a fair trial," there was no prejudice and no need for remedy.[425] The dissent also took issue with the difficulty of defining what constitutes adequate representation during plea bargaining, finding it disconcerting that an attorney's "personal style" might violate the Sixth Amendment.[426]

Finally, the dissent disagreed with the Court's analysis of potential prejudice to the defendant.[427] Justice Scalia found it absurd to engage in "retrospective crystal-ball gazing" to determine whether the defendant would have accepted the earlier plea bargain, whether the prosecution would have withdrawn it, and whether the court would have accepted it.[428] He admitted that plea bargaining should be regulated, but found that the Sixth Amendment was not the proper means to do so.[429]

3. The Response to *Lafler* and *Frye*

The Supreme Court's decisions in *Lafler* and *Frye* were viewed by commentators as both logical and inevitable, the objections of Justice Scalia and the other dissenters notwithstanding.[430] While the dissent took a formalist, historical approach to the question, the majority's approach was more functional and contemporary, focusing on the fact that plea bargaining now dominates the criminal justice system.[431] Having acknowledged the importance of plea bargaining as a critical stage in the judicial process, the Court would have been hard-pressed to deny constitutional protections to defendants at that stage. The right to effective assistance of counsel could not be confined to the trial context; to hold otherwise would be to grant that right to only the 3 percent of federal defendants that actually go to trial.[432] Another important ruling from *Lafler* and *Frye* is that an otherwise fair trial does not cure the constitutional errors that came before.[433] Indeed,

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424. *See id.*
425. *See id.*; *see also* Bibas, *supra* note 4, at 157–58.
426. *See Frye*, 132 S. Ct. at 1412–13 (internal quotation mark omitted).
427. *Id.* at 1413.
428. *Id.*
429. *See id.* at 1413–14.
430. *See generally* Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler:-no-big-deal/; *see also* Darryl K. Brown, Lafler*,* Frye *and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G REP. 131 (2012).
431. Bibas, *supra* note 4, at 151.
432. Lynch, *supra* note 430, at 40.
433. *See* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 204 (2012).

prejudice may be found where a heavier sentence is imposed than would have occurred had the defendant accepted the earlier plea.[434]

Finally, while Justice Scalia found that the Court's decisions constituted a radical departure from established jurisprudence,[435] others viewed the decisions as simply applying the standards already established in *Strickland*.[436] *Strickland* had a goal of promoting a just *result*, and this goal applies equally to convictions and sentences, even for guilty defendants.[437] In this sense, *Lafler* and *Frye* were relatively straightforward cases: both defendants were prejudiced by receiving longer sentences due to unquestionably deficient assistance of counsel during plea bargaining, which is a critical stage of the judicial process.[438] Under the *Strickland* standard, the Sixth Amendment required that their sentences be vacated and remanded.[439]

IV. RECOGNIZING THE RIGHT: THE SUPREME COURT SHOULD PERMIT EXCULPATORY *BRADY* CHALLENGES TO GUILTY PLEAS

The Supreme Court should resolve the circuit split that currently exists by allowing a criminal defendant to challenge a guilty plea for the failure to disclose exculpatory *Brady* material. To settle this conflict, the Court should look not only to the prevailing logic among the circuit courts and its previous holding in *Ruiz* but also to its own recent decisions in *Lafler* and *Frye* that considered a question with very similar constitutional underpinnings in the context of plea bargaining. Part IV.A of this Note shows that *Ruiz* allows exculpatory *Brady* challenges to guilty pleas. Part IV.B argues that courts considering these challenges should follow the Ninth Circuit's holding that a pre-plea *Brady* violation automatically precludes a knowing and voluntary guilty plea. Part IV.C concludes by asserting that the same practical and jurisprudential reasoning that justified recognizing the pre-plea right to effective assistance of counsel also applies to *Brady* violations.

A. Ruiz *Suggests That Material Exculpatory Evidence Must Be Disclosed Prior to a Guilty Plea*

Despite the Supreme Court's focus on impeachment evidence in *Ruiz*, the holding suggests that a defendant may raise a post-plea *Brady* challenge for the failure to disclose material *exculpatory* evidence.[440] First, contrary to the Second Circuit's understanding in *Friedman*, the holding in *Ruiz* did not

434. Bibas, *supra* note 4, at 155. This was the case in *Lafler*, where his sentence after trial was over three times longer than what was offered during plea bargaining. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012).
435. *Lafler*, 132 S. Ct. at 1398.
436. *See* Bibas, *supra* note 4, at 160.
437. *See id.*
438. *See* Lynch, *supra* note 430, at 39–40.
439. Bibas, *supra* note 4, at 151.
440. *See supra* Part II.B.

apply equally to impeachment and exculpatory evidence.[441] The Second Circuit properly found that, prior to *Ruiz*, the Supreme Court treated exculpatory and impeachment identically for purposes of *Brady* disclosure.[442] However, the conclusion it drew from that fact was erroneous: if the Court had wished to proscribe all post-plea *Brady* challenges, it could have easily done so by issuing its holding in general *Brady* terms. Instead, the language used throughout the opinion, and specifically in the holding, was explicitly in terms of impeachment evidence: "These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant."[443] Thus, at the very least it can be said that *Ruiz* declined to address post–guilty plea exculpatory *Brady* challenges; but it does not follow from the language of the opinion that *Ruiz* precludes all post-plea *Brady* claims.

Rather than being neutral, the Supreme Court's holding in *Ruiz* actually suggests that exculpatory *Brady* challenges are permitted for the very reasons that *impeachment* challenges are not.[444] First, while courts proscribing *Brady* challenges to guilty pleas typically repeated the refrain that *Brady* was purely a "trial right,"[445] the Supreme Court declined to do so. Furthermore, the Seventh and Tenth Circuits were correct in understanding the Supreme Court in *Ruiz* to draw a significant distinction between impeachment and exculpatory evidence: whereas impeachment evidence is only important in relation to the fairness of the trial, and therefore does not have to be disclosed before a guilty plea, exculpatory evidence may be determinative of the constitutional validity of a guilty plea.[446] The Supreme Court found that impeachment evidence is unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty."[447] What, then, would constitute such "critical information"? As noted by the Seventh and Tenth Circuits, the answer implied by the Supreme Court is exculpatory evidence: a defendant's waiver of his constitutional rights through a guilty plea cannot be truly knowing and voluntary if he is unaware of evidence possessed by the prosecution that establishes his factual innocence.[448]

Additional justification for understanding *Ruiz* as allowing exculpatory *Brady* challenges to guilty pleas is found in the Supreme Court's discussion of the "fast track" plea agreement's stipulations. One of the key reasons behind the Court's holding that the "fast track" agreement did not violate due process was the fact that the agreement explicitly required the

441. *See supra* notes 317–19 and accompanying text.
442. *See supra* note 318 and accompanying text.
443. United States v. Ruiz, 536 U.S. 622, 633 (2002) (emphasis added).
444. *See supra* Part II.C.1.
445. *See supra* notes 217–18, 226 and accompanying text.
446. *See supra* notes 269–71, 278–82 and accompanying text.
447. *Ruiz*, 536 U.S. at 630.
448. *See supra* notes 271, 279–81 and accompanying text.

government to disclose material exculpatory evidence.[449] The Court found that this disclosure of exculpatory evidence ensured that innocent defendants would not plead guilty, and held that the suppression of impeachment evidence does not violate due process so long as exculpatory evidence is divulged.[450] By emphasizing the value of the exculpatory evidence disclosure requirement, the Supreme Court further underscored the distinction between impeachment and exculpatory evidence and indicated that the failure to disclose material exculpatory evidence violates a defendant's due process rights.[451]

B. The Failure To Disclose Material Exculpatory Evidence Precludes a Knowing and Voluntary Guilty Plea

Accepting that *Ruiz* allows *Brady* challenges for the failure to disclose material exculpatory evidence prior to a guilty plea, the question then becomes how to determine whether that failure renders a plea invalid. From the circuits that have allowed post–guilty plea *Brady* challenges, four methods of inquiry have emerged: (1) the Second Circuit's official misconduct approach, in which a *Brady* violation may invalidate an otherwise knowing and voluntary plea;[452] (2) the Tenth Circuit's misrepresentation approach, under which a *Brady* violation constitutes government misconduct that may preclude a knowing and voluntary guilty plea;[453] (3) the Sixth and Eighth Circuits' totality-of-the-circumstances approach, whereby a *Brady* violation is one of many factors that may negate the knowing and voluntary nature of a guilty plea;[454] and (4) the Ninth Circuit's per se approach, finding that a *Brady* violation automatically renders a guilty plea unknowing and involuntary.[455] Of these four, the Ninth Circuit's approach provides the most workable standard, and is the most closely aligned with the Supreme Court's guilty plea jurisprudence.

The Second Circuit's misconduct approach misses the mark by choosing not to consider a *Brady* violation in relation to the knowing and voluntary nature of the plea.[456] The court laudably noted that a defendant's decision to plead guilty is highly dependent on his determination of the strength of the prosecution's case and the existence of exculpatory information.[457] However, by phrasing its test in terms of government misconduct, the Second Circuit leaves open the question of what exactly constitutes official misconduct. It is unclear whether misconduct occurs only when a prosecutor suppresses information specifically requested, or also where a

449. *See supra* notes 250, 270, 282 and accompanying text.
450. *See supra* note 250 and accompanying text.
451. *See supra* notes 250, 271, 284 and accompanying text.
452. *See supra* Part II.A.3.
453. *See supra* Part II.A.4.
454. *See supra* Part II.A.1–2.
455. *See supra* Part II.A.5.
456. *See supra* notes 173–79 and accompanying text.
457. *See supra* note 176 and accompanying text.

prosecutor fails to divulge evidence in the absence of a specific request.[458] Disclosure is required in both situations under *Agurs*.[459] Additionally, this test fails to address the central question of a guilty plea's validity—its knowing and voluntary nature.[460] While the later *Brady—Brady v. United States*—did mention misconduct as a concern for the validity of guilty pleas,[461] subsequent Supreme Court jurisprudence has been almost exclusively concerned with the knowing and voluntary standard.[462]

The Tenth Circuit's approach is similar to the Second Circuit's in that it views *Brady* violations as official misconduct or misrepresentation.[463] However, this standard fits better with established guilty plea jurisprudence because it asks whether that official misconduct precludes a knowing and voluntary plea.[464] Still, this approach falls short of a proper standard because it finds that a *Brady* violation renders a guilty plea unknowing and involuntary only under certain circumstances.[465] A *Brady* violation is a violation of due process, and the Tenth Circuit recognized that *Brady* violations may occur during plea bargaining; it stands to reason that no plea which was entered through a violation of the defendant's due process rights should retain its validity.[466]

The totality-of-the-circumstances approach adopted by the Sixth and Eighth Circuits is attractive because it engenders careful consideration of whether a guilty plea was truly knowing and voluntary.[467] Additionally, this approach would survive an interpretation of *Ruiz* that precludes all post-plea *Brady* challenges, because even if the suppression of material exculpatory evidence is not couched in terms of *Brady*, it is still one of the circumstances taken into account in determining the validity of the plea.[468] However, the totality-of-the-circumstances approach affords too little protection to defendants, as a *Brady* violation may still be insufficient to render a plea unknowing and involuntary.[469] Like the Tenth Circuit's approach, this approach does not comport with the *Brady* materiality standard. Due process is violated where there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed;[470] under the totality-of-the-circumstances test, a court could find that a *Brady* violation occurred but still find that the guilty plea was knowing and voluntary because of additional factors surrounding the entry

458. Lain, *supra* note 154, at 13–14.
459. *See supra* note 44 and accompanying text.
460. *See supra* notes 73–79 and accompanying text.
461. *See* Brady v. United States, 397 U.S. 742, 755 (1970).
462. *See supra* notes 239–45 and accompanying text.
463. *See supra* notes 188–89 and accompanying text.
464. *See supra* notes 190–91 and accompanying text.
465. *See supra* note 189 and accompanying text.
466. *See supra* notes 7, 187–89 and accompanying text.
467. *See supra* Part II.A.1–2.
468. *See supra* notes 157–59 and accompanying text.
469. *See supra* note 155 and accompanying text.
470. *See supra* note 50 and accompanying text.

of the plea.[471] This gray area makes the totality-of-the-circumstances approach somewhat unworkable, and gives courts insufficient guidance on how to determine whether a plea was actually valid.

The Ninth Circuit's per se approach is the best application of the *Brady* rule to plea bargaining.[472] Under this structure, if the court finds that the prosecution fails to disclose material exculpatory evidence prior to the entry of a guilty plea, the plea is automatically rendered unknowing and involuntary.[473] The standard of materiality is imported from *Bagley*: a *Brady* violation renders a plea invalid if there is a reasonable probability that the result of the plea negotiations would have been more favorable had the defendant received the undisclosed evidence.[474] Unlike the Second Circuit's approach, this standard addresses the central question of constitutionality for a guilty plea: whether it was truly knowing and voluntary.[475] Moreover, there is no gray area where *Brady* is violated but the plea is still considered knowing and voluntary. Due process is violated where material exculpatory evidence is withheld, and any plea entered without knowledge of that evidence is not truly knowing and voluntary.[476]

The Ninth Circuit's approach is not without its problems. The Supreme Court has held that a valid guilty plea does not require that a defendant have a perfect assessment of the strength of the prosecution's case.[477] However, the per se approach does not seek to provide a defendant with a complete understanding of the case against him. Rather, it requires only that the prosecution turn over any exculpatory evidence that is material to the decision to plead guilty.[478] The government therefore does not have to disclose immaterial evidence or impeachment evidence, so there is no fear that the prosecution will have to turn over its "entire file" to the defendant.[479]

Moreover, while some additional judicial resources may be expended by defendants choosing to go to trial after learning of exculpatory evidence rather than pleading guilty,[480] this expenditure is justified by both the criminal justice system's interest in providing a fair and nonduplicitous plea bargaining system and the benefits this rule would confer upon defendants.[481] Moreover, it would not require the government to expend resources digging for exculpatory evidence; it would only require the disclosure of evidence it already possessed. Given the extremely high

471. *See supra* notes 153–56 and accompanying text.
472. *See supra* Part II.A.5.
473. *See supra* notes 200–01 and accompanying text.
474. *See supra* note 50 and accompanying text.
475. *See supra* notes 199–200 and accompanying text.
476. *See supra* notes 200–01, 206 and accompanying text.
477. *See supra* note 93 and accompanying text.
478. *See supra* note 203 and accompanying text.
479. *See supra* note 144 and accompanying text.
480. This was one of the Court's fears in *Ruiz*. *See supra* notes 254–56 and accompanying text.
481. *See supra* notes 128–39 and accompanying text.

percentage of cases ending in guilty pleas[482] and the importance of exculpatory evidence in the decision to plead guilty,[483] disclosure of material exculpatory evidence is necessary to ensure fair and just plea bargaining.

As recognized by the Ninth Circuit, the per se approach is justified by substantial policy considerations.[484] First, the defendant's appraisal of the prosecution's case is crucial to an informed decision on how to plead.[485] When discussing the knowing and voluntary requirement for a valid guilty plea, the Supreme Court has repeatedly emphasized that the defendant must have "sufficient awareness of the relevant circumstances and likely consequences" of his guilty plea.[486] This does not mean that the defendant must be aware of every piece of evidence, or every argument the prosecution intends to make; but it cannot be said that a defendant has sufficient awareness of the relevant circumstances if he pleads guilty to a crime without knowing that the prosecution possesses evidence establishing his factual innocence.

Second, a rule to the contrary would incentivize prosecutors to withhold material exculpatory evidence in order to compel a defendant to plead guilty.[487] Prosecutors are incentivized to obtain convictions,[488] and as a prosecutor knows that her chances of securing a conviction will decrease at trial because she will have to disclose exculpatory evidence, she will be motivated to conceal that evidence in order to obtain a conviction through plea bargaining.[489]

Third, it is naïve for courts and commentators to assume that innocent defendants will not plead guilty.[490] Overcharging and mandatory minimum sentencing create an overwhelming pressure on defendants to plead guilty.[491] In addition to the risk of harsher punishment, there are other costs incurred by a defendant who goes to trial, including attorney's fees, time, stress and emotional harm, and the ignominy of having to publicly stand trial.[492] The pressure to plead guilty is strong for both minor and major offenses. For a minor offense, pleading guilty may be a way to avoid jail time; for a major crime, it might allow a defendant to avoid the death penalty. While Rule 11 and jurisprudential safeguards theoretically prevent innocent defendants from pleading guilty,[493] the reality is that a guilty plea is a rational choice for many innocent defendants.

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482. *See supra* note 5 and accompanying text.
483. *See supra* notes 126–27, 176 and accompanying text.
484. *See supra* notes 201–02 and accompanying text.
485. *See supra* notes 126–27, 176 and accompanying text.
486. *See supra* note 239 and accompanying text.
487. *See supra* note 202 and accompanying text.
488. *See supra* note 137 and accompanying text.
489. *See supra* notes 133–34 and accompanying text.
490. *See supra* note 251 and accompanying text.
491. *See supra* notes 105–22 and accompanying text.
492. *See* Bowers, *supra* note 133, at 1132–34.
493. *See supra* Part I.B.1.

When considering *Brady* challenges to guilty pleas, a court should therefore proceed as follows. First, the court must determine whether the undisclosed evidence can be considered exculpatory.[494] Second, the court must determine if the evidence is material by asking if there is a reasonable probability that the result of plea bargaining would have been different had the evidence been disclosed.[495] If such a probability exists, the guilty plea is not knowing and voluntary, and is therefore invalid.

C. The Logic of Lafler *and* Frye *Supports the Recognition of Exculpatory* Brady *Rights During Plea Bargaining*

Courts and commentators have frequently noted the link between the right to effective assistance of counsel and *Brady* rights.[496] They are two sides of the same coin—concerning whether the actions of defense counsel or the prosecution during the judicial process violate the defendant's constitutional rights.[497] In addition, violations of both rights are asserted by defendants to challenge their convictions;[498] they share the same standard of materiality, asking whether there is a reasonable probability that the result of the proceeding would have been different absent the deficient representation or suppression of evidence;[499] and both were traditionally considered to be purely trial rights.[500] Given the link between these two rights, it is unsurprising that much of the logic that supported the extension of the right to ineffective assistance of counsel to plea bargaining also applies to the question of pre-plea *Brady* disclosure.

First, *Lafler* and *Frye* suggest that the assertion that *Brady* is a "trial right" will not preclude it from being applied during plea bargaining. Effective assistance of counsel was traditionally considered a right that ensured only a fair *trial*,[501] but in *Lafler* and *Frye* the Supreme Court expressly rejected that argument.[502] Instead, the Court found that guaranteeing the right to effective assistance of counsel at all "critical stages of the criminal proceeding" was necessary for the fair administration of justice.[503] The chief concern of the Supreme Court in both *Lafler* and *Bagley* was ensuring a fair judicial process that results in just outcomes, not solely ensuring fair trials.[504] This concern necessitates pre-plea disclosure of exculpatory *Brady* evidence, because just as a defendant "cannot be presumed to make critical decisions without counsel's advice,"[505] neither

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494. *See supra* notes 444–51 and accompanying text.
495. *See supra* notes 50, 178, 193–94 and accompanying text.
496. *See supra* notes 323–29 and accompanying text.
497. *See supra* notes 30–32, 416 and accompanying text.
498. *See supra* notes 30–33, 411–18 and accompanying text.
499. *See supra* notes 50–53 and accompanying text.
500. *See supra* notes 217, 303–04, 327 and accompanying text.
501. *See supra* notes 327, 397 and accompanying text.
502. *See supra* note 377 and accompanying text.
503. *See supra* notes 378–80 and accompanying text.
504. *See supra* notes 50, 380 and accompanying text.
505. *See supra* note 380 and accompanying text.

can he be presumed to make an informed decision to plead guilty without material exculpatory evidence.[506] As the Court has recognized that plea bargaining is a critical stage of the judicial process,[507] and as it has suggested that exculpatory evidence is crucial to decision making at that stage,[508] it is evident after *Lafler* and *Frye* that *Brady*'s traditional existence as a trial right will not preclude the recognition of exculpatory *Brady* rights during plea bargaining.

Second, the Court's recognition of the prevalence of plea bargaining—roughly 97 percent of federal criminal convictions—supports the establishment of pre-plea exculpatory *Brady* rights.[509] The Court in *Frye* acknowledged the State's arguments that there is no constitutional right to plea bargaining, and that the right to effective assistance of counsel would be difficult to apply during plea bargaining.[510] However, the Court found that these arguments were outweighed by the importance of plea bargaining to the criminal process: the right to effective assistance of counsel is guaranteed by the Constitution, and it cannot be ignored during plea bargaining, which now represents virtually the entire criminal justice system.[511] So too with *Brady*: as the vast majority of criminal proceedings are resolved by guilty pleas, denying defendants' *Brady* rights during plea bargaining would be to deny those rights at the only stage when they could actually be of use.[512] The importance of plea bargaining therefore outweighs concerns of judicial efficiency and resource expenditure that accompany a pre-plea exculpatory disclosure requirement.[513] Like the right to effective assistance of counsel, exculpatory *Brady* rights are guaranteed by the Constitution, and should not be afforded only to the tiny fraction of defendants who proceed to trial.

Third, *Lafler* and *Frye* shoot down the argument that exculpatory *Brady* rights should not be afforded during plea bargaining because there is no constitutional right to plea bargain.[514] The Supreme Court held in no uncertain terms that, while the prosecution is not constitutionally required to engage in plea bargaining, it is required to abide by the Constitution's protections for defendants if it chooses to do so.[515] If prosecutors do not wish to turn over exculpatory evidence, expend resources on pre-plea discovery, or risk giving away too much of their case, then they can abstain from plea bargaining. But as the Court found in *Lafler*, once the government begins to enter into highly discretionary negotiations that will ultimately affect the defendant's freedom, it is bound to respect the

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506. *See supra* notes 126–27, 176, 201 and accompanying text.
507. *See supra* notes 378–80 and accompanying text.
508. *See supra* notes 446–51 and accompanying text.
509. *See supra* note 413 and accompanying text.
510. *See supra* notes 412–13 and accompanying text.
511. *See supra* notes 413–18 and accompanying text.
512. *See supra* notes 415–16 and accompanying text.
513. *See supra* note 144 and accompanying text.
514. *See supra* notes 390–91 and accompanying text.
515. *See supra* notes 390–91 and accompanying text.

defendant's constitutional right to the disclosure of material exculpatory evidence.[516]

Fourth, the standard of materiality that is used to review both *Brady* and ineffective assistance of counsel claims suggests that defendants should be able to assert post-plea exculpatory *Brady* claims. In *Lafler* and *Frye*, the Supreme Court continued to apply the standard from *Bagley*, holding that a conviction must be vacated if there is a reasonable probability that, but for his attorney's errors, the result of the proceeding—in this case, plea bargaining—would have been more favorable to the defendant.[517] From this standard, it is evident that a guilty plea does not waive claims of constitutional deficiencies that materially affect a defendant's decision whether to plead guilty. Like deficient advice from an attorney, the suppression of material exculpatory evidence during plea bargaining impedes a defendant's rational decision making and precludes a knowing and voluntary plea.[518] Therefore, just as a guilty plea or a conviction must be vacated where the ineffective assistance of counsel materially affects the defendant's decision to plead guilty, the same should be true where the prosecution's suppression of exculpatory evidence materially affects that decision.

Finally, Justice Scalia's criticism that having to stand trial cannot constitute prejudice will not apply to post-plea *Brady* claims, because the suppression of material exculpatory evidence will rarely, if ever, lead to the *rejection* of a plea offer.[519] When a defendant is deprived of exculpatory evidence, he views the government's case as being stronger than it actually is, and is therefore compelled to accept a seemingly favorable plea offer to avoid trial.[520] It is difficult to envision a situation in which the suppression of evidence establishing a defendant's factual innocence would lead him to prefer trial over a plea to a lesser charge or sentence. Pre-plea exculpatory *Brady* violations impel defendants to plead guilty, thereby depriving them of the "gold standard of American justice": a full criminal trial.[521] Such violations cause substantial prejudice, especially when they lead innocent defendants to plead guilty; but this prejudice can be avoided by requiring the pre-plea disclosure of material exculpatory evidence. Thus, while Justice Scalia bemoaned the "constitutionalization" of plea bargaining,[522] allowing exculpatory *Brady* challenges to guilty pleas is necessary to protect the constitutional rights of defendants and preserve the legitimacy of today's plea-based criminal justice system.

516. *See supra* notes 390–91 and accompanying text.
517. *See supra* notes 50–53, 386–91, 419–21 and accompanying text.
518. *See supra* notes 125–27, 131–34, 199–201 and accompanying text.
519. *See supra* notes 384–99 and accompanying text.
520. *See supra* notes 135–39 and accompanying text.
521. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).
522. Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting).

CONCLUSION

Given the importance of the rights at stake, the Supreme Court should address the viability of post-guilty plea exculpatory *Brady* claims. Almost all criminal convictions are the result of guilty pleas, and yet while some defendants are provided with evidence establishing their factual innocence before they enter a plea, others must plea bargain without the benefit of that evidence. The Supreme Court recently made substantial progress in protecting defendants' constitutional rights by recognizing the right to effective assistance of counsel during plea bargaining. In the interests of fairness, accurate convictions, and a just criminal process, the Supreme Court should continue that trend by requiring the disclosure of exculpatory *Brady* evidence during plea bargaining and holding that the failure to do so renders a guilty plea invalid.

MAY 16 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Robert Pizarro & Juan Rivera,

Defendants.

17-cr-151 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

In response to the Defendants' motion to dismiss the Indictment, the Government writes that "[a]n adjournment is the appropriate remedy for the Government's error, as it will allow the defendants to engage in any necessary investigative steps with respect to the new information recently disclosed by the Government." Dkt. No. 125. Similarly, the Defendants argue that if the Court were to deny their motion to dismiss, "Defense counsel have no option but to seek an adjournment in order to provide effective assistance of counsel."

In light of the parties' representations, the Court will not proceed with jury selection tomorrow, May 17, 2018. Instead, the Court will hold a conference starting at **9:30 A.M.** in **Courtroom 906** to hear argument on the Defendants' motion to dismiss the Indictment and, in the event the Court denies that motion, to take up potential schedules for adjournment.

The Court reminds the parties that, as discussed on May 7, 2018, it is available to proceed to trial on June 11, 2018 or to select a jury on August 9, 2018 and commence trial on August 13, 2018 (not sitting from August 23-27). To the extent the parties seek trial dates beyond those options, they may propose other dates. The parties are ordered to confer prior to the conference, and to have a proposal ready in the event the Court denies the motion to dismiss.

The Court respectfully orders the attendance of Lisa Zornberg, Chief of the Criminal Division at the United States Attorney's Office, at tomorrow's conference.

The Government should be prepared to discuss whether, at the time it opposed Defendants' prior motion to dismiss/adjourn on May 6, 2018, any Assistant United States Attorneys were aware of the existence of the materials that have been disclosed to the Defense since May 7, 2018. The Government should also be prepared to support its contention that time should be excluded under the Speedy Trial Act in the case of an adjournment in light of what has transpired.

Additionally, the Court sees no basis for maintaining the Government's letter in opposition to Defendants' motion under seal. In the absence of further justification provided to the Court by **6:00 P.M.** this evening, the Government must publicly docket its letter by that time.

Finally, as Defendants note their "limited manpower" to investigate the recent disclosures, *see* Dkt. No. 125 at 15, n.10, the Court is prepared to entertain any requests Defendants may wish to make with respect to additional resources, including additional lawyers or investigators. The Court will likely grant any reasonable requests.

SO ORDERED.

Dated: May 16, 2018
New York, New York

ALISON J. NATHAN
United States District Judge

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A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery

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A MATERIAL CHANGE TO *BRADY*: RETHINKING *BRADY V. MARYLAND*, MATERIALITY, AND CRIMINAL DISCOVERY

RILEY E. CLAFTON*

How we think about the trial process, and the assumptions and beliefs we bring to bear on that process, shape how litigation is structured. This Comment demonstrates why materiality, and the theory of juridical proof informing that standard of materiality, must be redefined for Brady v. Maryland *doctrine and criminal process. First, the Comment delineates the theory of explanationism—the revolutionary paradigm shift unfolding in the theory of legal proof. Explanationism conceptualizes juridical proof as a process in which the factfinder weighs the competing explanations offered by the parties against the evidence and the applicable burden of proof. Applying explanationism to criminal process demonstrates that explanationism not only is the more accurate account of juridical proof, but also better frames the criminal discovery process and ensures due process of law. The next section applies explanationism to* Brady *doctrine to show that the Supreme Court has tip-toed towards a more explanatory view of* Brady v. Maryland *but also faltered and lapsed back into a probabilistic inquiry at critical junctures. As a result, the efficacy of* Brady *is diminished where it is undermined by probabilistic theory or language. As a result, the doctrine should embrace explanationism more wholly. Under explanationism, materiality is determined by assessing whether the suppressed evidence could have been used by the defendant to influence the factfinder when presenting her case. To illustrate this argument and its importance in real-world outcomes, this Comment takes state and federal courts of Texas as a*

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case study. In Texas, probabilistic definitions of materiality have thwarted both Brady *doctrine and legislative criminal discovery reform. The case study demonstrates the material consequences for not rethinking materiality. Changing our understanding of materiality is critical to protecting the right to due process of law in our courthouses and state legislatures.*

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INTRODUCTION

"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."

- Justice David H. Souter[1]

How we think about juridical proof and the trial process, and the assumptions and beliefs we bring to bear on that process, shape how litigation is structured. For most of common law's history, a probabilistic understanding of juridical proof has dominated; we have viewed trials as a

[1] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

process by which factfinders determine the likelihood that each individual element of a claim is met and decide on an outcome accordingly.[2] However, this theory has proven largely insufficient, particularly because it does not account for how factfinders actually reason and come to verdicts.[3] Instead, explanationism—the theory that factfinders decide cases by weighing the parties' competing explanations against each other and the applicable standard of proof—is the best current understanding of juridical proof.[4] But because probabilistic thinking has implicitly guided American jurisprudence for decades, many evidentiary issues and assumptions must be examined anew.[5]

It is especially important to reexamine *Brady v. Maryland* for its role in a criminal defendant's right to evidence held by the State and its pervasive influence on the American approach to criminal discovery.[6] Since *Brady*,

[2] *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 388 (1827) ("If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence . . . ."); Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. OF EVIDENCE & PROOF 5, 6 (2019); Stephen E. Feinberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 772 (1986) (writing to "advocate the use of the Bayesian method as the normative approach to general legal principles, an approach that should stem, we claim, from probabilistic considerations"); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292 (2013) ("The law of evidence rests primarily on theories of knowledge that purport to give an account of accuracy in other-than-narrative terms. Versions of probability analysis pervade the rules of evidence themselves . . . ."); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 746–47 (2012) (conceiving of the burden of proof in probabilistic terms).

[3] Other limitations include probabilism's inability to explain litigants' behavior, and its challenges in articulating the standard for proof beyond a reasonable doubt. *See generally* Allen & Pardo, *supra* note 2.

[4] *See generally* Ronald J. Allen & Michael S. Pardo, *Clarifying Relative Plausibility: A Rejoinder*, 23 INT'L J. EVIDENCE & PROOF 205 (2019); Sean P. Sullivan, *Challenges for Comparative Fact-Finding*, 23 INT'L J. EVIDENCE & PROOF 100 (2019) ("So much recent work points in the same direction—that persuasion is the product of purely comparative assessments of factual propositions—that those unable to perceive this shift could only be those who refuse to see."); Michele Taruffo, *Some Remarks About Relative Plausibility*, 23 INT'L J. EVIDENCE & PROOF 128 (2019) (agreeing with the central tenants of the theory but noting normative issues).

[5] *See infra* Section I. Because probabilistic thinking underlies most common law and statutory conceptions of evidence, but probabilistic thinking is disconnected from how jurors reason and trials function, a revisiting of these doctrines is necessary for the normative goals of the legal system to be carried out.

[6] *See infra* note 163; *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1536 (2010) ("As a matter of federal constitutional law, prosecutors are not even compelled to furnish the defendant with

evidence in criminal cases has been evaluated in terms of materiality—to give a criminal defendant due process of law, all "favorable" evidence possessed by the prosecutor that is "material to guilt or punishment" must be disclosed to the defendant.[7] As *Brady* doctrine has evolved, materiality has come to serve both as a threshold standard and as a necessary element to prove harm.[8] Evidence is assessed for its materiality to the case at the point of disclosure, and on appeal or collateral review withheld evidence must be sufficiently *material*—such that its suppression caused enough harm to result in a cognizable *Brady* claim.[9] Criminal defendants are not entitled (at least, constitutionally) to any evidence that is not material.[10] As a corollary, courts find no harm to a criminal defendant when evidence that is not "material" goes undisclosed.[11]

Brady doctrine, like other evidentiary concepts, has been infused with probabilistic thinking.[12] Even in recent conceptualizations of *Brady*, probabilistic thinking continues to inform materiality, as "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have

the names of prosecution witnesses prior to trial, much less disclose all of the police investigative information.").

[7] *Brady*, 373 U.S. at 87. Defining materiality is an enterprise the Court has struggled with for the past fifty years.

[8] *See infra* Section II; Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422–27 (2010) (discussing how materiality serves two key functions: the prosecutor determines what evidence must be turned over by assessing its materiality, and the materiality of withheld evidence must be proven to successfully show a *Brady* violation).

[9] *See infra* Section II for a more robust discussion; *see also* Jones, *supra* note 8, at 422–27 (explaining how qualifying evidence can be both exculpatory evidence and impeachment evidence); Stephanos Bibas, *The Story of* Brady v. Maryland: *From Adversarial Gamesmanship Toward The Search for Innocence?*, 77 FACULTY SCHOLARSHIP AT PENN LAW 1, 12 (2005), https://scholarship.law.upenn.edu/faculty_scholarship/77/ [https://perma.cc/E9SH-6TW3] (explaining that *Brady* actions are vital as a vehicle for enforcing rights because "the only enforcement mechanism is retrospective.").

[10] *See, e.g.*, United States v. Agurs, 427 U.S. 97, 104 (1976) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

[11] United States v. Bagley, 473 U.S. 667, 678 (1985) (holding that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material").

[12] Banks v. Dretke, 540 U.S. 668, 699 (2004) ("In short, [the defendant] must show a 'reasonable probability of a different result.'") (citing *Bagley*, 473 U.S. at 678); *Bagley*, 473 U.S. at 682.

been different."[13] However, as this Comment argues, a closer examination of *Brady* doctrine and its evolution shows that there has been a "two steps forward, one step back" movement towards the embrace of a more explanatory account of materiality, without the Supreme Court ever saying so.[14] The development of an explanatory lens to assess materiality must be realized more fully because a more accurate definition of what evidence is "material" is critical to fulfilling the promise of *Brady* and the right to due process of law.[15] When a defendant is prevented from presenting her explanation to the jury, she is denied a fair trial and due process of law.[16] And although *Brady* doctrine has evolved substantially, particularly since *Kyles v. Whitley*,[17] there remain substantial shortcomings and the need for a more explanatory account of materiality.[18] The materiality standard has substantially restricted the prosecutorial disclosure duty[19] by tightly limiting what must be disclosed and setting an inaccurately high bar for what evidence is sufficiently material to merit any remedy.[20]

This Comment argues that the theory of explanationism demonstrates the need for legislatures and courts, both state and federal, to reconsider how

[13] Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (quoting Cone v. Bell, 556 U.S. 449, 469–470 (2009)).

[14] *See infra* Section II.

[15] *See infra* Section II.

[16] *See infra* Section II; *see also Brady*, 373 U.S. at 86.

[17] 514 U.S. 419 (1995).

[18] *See infra* Section II.

[19] *See* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 645–46 (2013) (explaining that while some lower courts read *Brady* and its progeny to suggest that all favorable evidence should be disclosed, but a conviction is only to be overturned if the evidence is material, most lower courts and the Department of Justice read the opinions to hold that favorable evidence can be withheld as long as it is not material).

[20] There are, of course, other issues with *Brady* doctrine. For a discussion of these shortcomings, see, e.g., United States v. Ruiz, 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."); Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 807–808 (2015); Bibas, *supra* note 9, at 129; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, WIS. L. REV. 399, 425 n.134 (2006) (noting that the suppression of material evidence is a significant cause of wrongful convictions, and that "suppression [] of exculpatory evidence was found in 43 percent of the exonerations where prosecutorial misconduct was a factor leading to the wrongful conviction"); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Jenia I. Turner, *Plea Bargaining*, 3 REFORMING CRIM. JUST. 73, 77 (2017).

they determine what evidence is "material" to criminal discovery.[21] Not only is this undertaking important theoretically, but the real-world consequences are also substantial. The American adversarial system is predicated on requiring the State to meet its burden to ensure due process of law and the accuracy of verdicts.[22] If that system is not structured to accomplish those goals, the entire system becomes irrational.[23] Theoretical and empirical studies of juridical proof have shown that the probabilistic assumptions that underlie *Brady* law and many of our criminal discovery statutes do not align with how the proof process is actually structured and operates in practice.[24] This disjunction between what is deemed material by law and what is material to a defense in reality undermines a defendant's right to a fair trial—a right that Americans have jealously guarded since 1791.[25]

This Comment first proceeds by delineating explanationism as a theory, its advantages over the probabilistic conception of juridical proof, and the role explanationism can play in better conceptualizing the trial process. The

[21] I acknowledge that broadening the definition of materiality would be infeasible without also reconsidering the remedy for a *Brady* violation, as a violation results in a new trial. *See Brady*, 373 U.S. at 90–91. This Comment focuses purely on fashioning an accurate definition of materiality, leaving the question of remedy and the proper allocation of review between district and appellate courts—as well as state and federal—open for future inquiry.

[22] *In re* Winship, 397 U.S. 358, 362 (1970) ("Mr. Justice Frankfurter stated that '[i]t is the duty of the Government to establish guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'' In a similar vein, the Court said in *Brinegar v. United States* that '[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.'") (citations omitted); Michael S. Pardo, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 NW. U. L. REV. 399 (2000) ("The trial has developed into a condition of a decent society, and we cannot overemphasize its importance. Given the trial's importance and its goal of accurate fact-finding, it follows that a primary focus of the legal community should be an inquiry into the nature of accurate fact-finding."); Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299, 313 (tracing the doctrine of proof beyond a reasonable doubt to Aristotle).

[23] *See generally* Ronald J. Allen, *Reasoning and its Foundation: Some Responses*, 1 INT'L J. EVIDENCE & PROOF 343 (1997) ("At the core of a society dedicated to civil peace through the rule of law must be found rational decision making. Rational decision making—deliberate, disinterested, informed, open-minded—forms the bedrock of a just society, and without it the phrase 'rule of law' loses its meaning entirely.").

[24] *See infra* Sections I, II.

[25] U.S. CONST. amend. VI.

next section applies explanationism to *Brady* doctrine to show that the Court has tip-toed towards a more explanatory view of *Brady* but also faltered and lapsed back into probabilistic inquiry at critical junctures. As a result, this Comment argues, *Brady* doctrine is diminished in efficacy where it is undermined by probabilistic language and theory, and *Brady* doctrine should embrace explanationism more wholly. To illustrate this argument and its importance in real-world outcomes, this Comment takes state and federal courts in Texas as a case study.[26] In Texas, probabilistic definitions of materiality have thwarted both *Brady* and legislative criminal discovery reform. The case study demonstrates the material consequences of not rethinking materiality. Changing our conception of materiality is critical to protecting the right to a fair trial in courthouses and state legislatures.

I. EXPLANATIONISM: EXPLAINING TRIALS

A. PROBABILISM AND ITS LIMITATIONS

The litigation process is structured, at its core, by theories of juridical proof. From the specifics of the Federal Rules of Evidence to the overarching burdens of proof, our entire trial system is laden with assumptions and beliefs about how human minds draw inferences and how best to determine truth.[27] These assumptions inform how legal procedure is crafted in an attempt to regulate that inferential process.[28] Because these assumptions structure our rules, and our rules then structure how we decide real-world outcomes, it is pivotal to be clear and accurate about how we conceptualize trials. Failure to do so can inadvertently sabotage the values which our justice system was built to uphold—even those as essential as just outcomes and equality before the law. In criminal cases, when evidentiary issues are decided using faulty assumptions, our criminal convictions are cast into doubt.

[26] While examples abound among the circuits, *see infra* note 164, the Fifth Circuit and Texas have been chosen for their pivotal role in the development of *Brady* law and the state's recent discovery reforms, respectively.

[27] Pardo, *supra* note 22, at 410 ("The theorizing of juridical proof and evidence cuts to the heart of our entire legal system, with implications that intertwine with our very concept of a just society under the Rule of Law."); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1498 (2001) ("The rules of evidence . . . structure the epistemic process by which jurors arrive at beliefs about disputed matters of fact at trials.").

[28] Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1454 (2010) ("Understanding how the procedural devices relate to the proof process is integral to understanding the standards for each procedural device in light of the underlying normative goals and procedural values . . . .").

For most of Anglo-American history, it has largely been assumed that juridical proof should be thought about within a probabilistic framework.[29] But scholarly attention to the subject[30] has made it increasingly clear that a probabilistic account of juridical proof is not only inaccurate, but also misleading.[31] At first blush, probabilism appears to fold naturally into our goal for the legal system—to reconstruct how the world was at the time in question and to decide under those conditions whether or not to impose liability. In reality, the theory's limitations render it more harmful than helpful.[32] In comparison, the explanatory account[33] of juridical proof provides an overarching explanation of how factfinders reason with evidence and ultimately arrive at conclusions.[34] In doing so, the explanatory framework better aligns with human cognitive processes and the policy goals driving evidentiary doctrine.[35]

[29] *See supra* note 2 and accompanying text; *see also* Ronald J. Allen, *The Nature of Juridical Proof: Probability as a Tool in Plausible Reasoning*, 21 INT'L J. OF EVIDENCE & PROOF 133, 134 (2017) ("One of the crowning achievements of Enlightenment thought, the Constitution of the United States of America, uses probability language in its Fourth Amendment, adopted in 1791 essentially as part of the political bargain to adopt the Constitution itself in 1789, which reads that 'no warrants shall issue but upon probable cause.'"); Pardo, *supra* note 22, at 411 ("In recent years, most of the literature discussing fact-finding has focused on the use of mathematical probability theories as analytical tools to resolve legal problems of relevancy and evidence."); Waldman, *supra* note 22 at 311 (discussing how the first modern treatment of evidence, by Baron Gilbert in the late seventeenth and early eighteenth century, analyzed "[w]hat is the evidence that ought to be offered to the Jury and by what rules of Probability ought it to be weighed and considered").

[30] *See generally* Allen & Pardo, *supra* note 2; Allen & Pardo, *supra* note 4; Pardo, *supra* note 22, at 400 ("Two recent developments raise these concerns for our understanding of legal evidence. First, empirical work in psychology suggests that jurors reason holistically in the form of narratives. The second attack on the conventional view comes from within its own ranks, in the analytical evidence scholarship of Ronald Allen.").

[31] For the seminal work on the topic, see Allen & Pardo, *supra* note 2. For the purposes of this inquiry, I summarize Professors Allen and Pardo's assessment of the competing conceptualizations of juridical proof, as well as why the strengths of explanationism make this theory the best current conception of juridical proof. I acknowledge the debate is ongoing and hope that this inquiry into materiality provides more evidence of the utility of the explanatory account.

[32] *See generally* Pardo, *supra* note 21.

[33] This is also referred to as explanationism and relative plausibility.

[34] I do not argue that probabilistic thinking is no longer a dominant epistemology in evidence, but that explanationism provides a more powerful lens and has been gaining traction in the legal field since developed by Professor Allen. For more information about the contours of the current debate, see generally Allen & Pardo, *supra* note 4.

[35] Pardo, *supra* note 22, at 416 ("Experimental psychology provides compelling evidence that relative plausibility, not Bayesianism, provides the overarching explanatory model of the proof process. Specifically, the findings of Pennington and Hastie support the notion that the

Lacking a scientific process by which to divine truth, the legal system instead employs procedural tools to arrive at conclusions. These "decision rules" are what the legal system refers to as "burdens of proof": a preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.[36] The applicable burden of proof establishes the burden of persuasion.[37] The burden of persuasion is the threshold a plaintiff must meet to win her case, and the threshold below which the system will not impose a judgment against a defendant.[38] These standards are established with policy goals operating in the background—to obtain accurate results, tempered by pre-established allocations of the risk of error between the parties.[39] In criminal cases, the burden of proof beyond a reasonable doubt allocates the risk of error away from the criminal defendant, placing the burden instead on the State.[40] This allocation reflects the longstanding belief that a false positive—the erroneous condemnation of a criminal defendant—is far worse than a false negative.[41]

How, then, does a party meet her burden of proof? The probabilistic account of evidence views the standards of proof as probabilities between zero and one, where certain falsity is zero and certain truth is one.[42] The preponderance of the evidence standard would require a probability greater than 0.5 that each element of a claim is met, while the beyond a reasonable doubt standard would require the prosecution to prove the probability of each element to some high probability, around 0.9 or greater.[43] The theory looks at how probable each individual element is, finding that the element is not proven when the probability of its satisfaction merely meets or falls beneath

elemental reasoning required by a Bayesian model and the conventional view conflict with the reasoning processes of legal fact finders.").

[36] Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 558 (2013).

[37] Allen & Pardo, *supra* note 2, at 9.

[38] *Id.* at 9–10.

[39] *Id.* at 10.

[40] *Id.*

[41] *Id.* at 17. A false negative is the failure to convict a guilty person, while a false positive is the wrongful conviction of an innocent person. The standard of beyond a reasonable doubt is meant to prioritize the prevention of false positives. *See In re* Winship, 397 U.S. 358, 372 (1970).

[42] Allen & Pardo, *supra* note 2, at 11.

[43] *Id.*

the requisite threshold.[44] To win her case, a plaintiff must prove that the likelihood of each element exceeds the burden of persuasion.[45]

While this theory seems at first compelling,[46] it is largely inadequate. Through their scholarship, Professors Ronald Allen and Michael Pardo identify many of the insufficiencies of the probabilistic framework, including the "conjunction problem" and the difficulty of assigning numbers to probabilities in the absence of empirical data.[47] Most significant for the purposes of this Comment, probabilism does not fit with how jurors or judges reason.[48] Cognitive evaluation shows that when factfinders decide outcomes, they assess evidence holistically; reasoning is not done in an element-by-element fashion.[49] Factfinders think in terms of story and explanation, creating narrative structures to evaluate evidence and cases in an integrated fashion.[50] In fact, jury instructions requiring assessment by the individual

[44] *Id.*

[45] *Id.* at 9.

[46] The theory appears to provide clarity and precision to vague legal standards, give a formal framework, and to intuitively mirror our policy judgments regarding risk of error. *Id.* at 10–14; *see also* Pardo, *supra* note 22, at 413–14 (citing PROBABILITY AND INFERENCE IN THE LAW OF EVIDENCE: THE USES AND LIMITS OF BAYESIANISM (Peter Tillers & Eric D. Green eds., 1988)).

[47] Allen & Pardo, *supra* note 2, at 14.

[48] And in the absence of another method by which to search for truth, factfinders are tasked with the duty to determine outcomes.

[49] *Id.* at 17–18. *See generally* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Dan Simon, *Thin Empirics*, 23 INT'L J. EVIDENCE & PROOF 82, 85 (2019) ("In other words, the cognitive process boils down to transforming states of conflict-laden complexity into states of coherence, a process that can be captured by the framework of *coherence-based* reasoning. The lopsided representations in states of coherence are what provide the network with its stability and, crucially, they enable fact-finders to reach discrete judgments with sufficient resolve and confidence. Indeed, high levels of confidence in the chosen decision, despite the difficulty of the task and the equibalance of the options, are one of the central and persistent findings in this line of research.").

[50] Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1597 (2012) (studying jury deliberations and finding, among other issues, "structural errors arising from the piecemeal construction of jury instructions"); Deanna Kuhn et al., *How Well Do Jurors Reason?*, 5 PSYCHOL. SCI. 289, 293 (1994) (conducting studies on juror reasoning, and finding that "[t]he present results are consistent with Pennington and Hastie's (1993) claim that story construction is a central component of juror decision making. At the same time, the results indicate significant individual variation in the manner in which people approach the juror task . . . In addition, the variation has implications for task outcome."); Pennington & Hastie, *supra* note 49, at 519–520 (studying the cognitive processes employed by jurors, and finding that jurors construct stories to evaluate cases: "[i]n this research, two key results were established that were necessary conditions for pursuit of the Story Model as a viable theory of

elements have been shown to confuse jurors.[51] The individual legal elements may guide the substance of the law, but an individualized assessment of each element in isolation is not how factfinders reason.[52] Scholars and legislators often think about factfinders' cognitive processes in terms of probability,[53] but this view is inaccurate.[54]

The other significant issue with the probabilistic conception is the theory's failure to adopt a comparative framework. The likelihood of an element being proven is not assessed in a vacuum but rather in a comparative context. One party's ability to compellingly prove her case *inherently depends* on how compelling her opponent is.[55] For example, say a defendant is on trial for possession of drugs with intent to distribute in a school zone. If the prosecutor presents evidence that the defendant was arrested with the statutorily prescribed quantity of drugs in her jacket pocket on the school yard, and the defendant refused to testify and puts on no other evidence, surely it seems likely that the prosecutor has shown that the elements of the crime are met. But just as surely, if the defendant testifies that when she was arrested, her significant other asked her to hold onto his jacket while he went into the school to pick up his younger sibling, the satisfaction of certain

decision making in the juror context. First, the evidence structures constructed by jurors had story structure (not other plausible structures) and verdict structures looked like feature lists. Second, jurors who chose different verdicts had constructed different stories. Thus, decisions covaried with story structures, but not with verdict representations or story classification processes.").

[51] Joel Lieberman & Bruce Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L., 589, 593–94 (1997) (discussing a study of jurors in which "only 39% of the elements contained in the instructions were understood," but "54% of the instructions were understood" when examined holistically).

[52] Pardo, *supra* note 22, at 402 ("Empirical research confirms that fact finders process evidence holistically in the form of theories or stories. Professors Bennett and Feldman advance the notion that evidence evaluation involves a choice between competing narratives. Professors Pennington and Hastie offer 'a scientific description of the mind of the juror,' which provides compelling empirical evidence to support this proposition . . . Pennington and Hastie posit the Story Model to explain the cognitive processes of jurors. The Story Model postulates that jurors impose a narrative story organization on trial information and that the story a juror constructs determines that juror's ultimate decision at trial. Trial advocacy scholarship and the courts both embrace this view.") (citations omitted).

[53] Pennington & Hastie, *supra* note 49, at 519–20 ("Probably the most unified descriptions of the juror's thought processes are mathematical models based on . . . variants of traditional probability theory, and other algebraic models.").

[54] I do not argue that statistical probability does not have a role within trials; instead I argue that probability is not the right lens for the overarching theory. *See, e.g.*, Allen, *supra* note 29, at 134.

[55] Allen & Pardo, *supra* note 2, at 13–15, 18.

elements of the crime becomes substantially less probable. In all cases, there is an inherently comparative aspect, requiring the factfinder not only to look at each party's case in isolation, but also to weigh both parties' cases against each other.

Finally, in conventional probabilistic thinking, unknown facts are skewed towards the defendant. Even when a civil plaintiff proves her case to a probability of 0.4 and the defendant to 0.2, the plaintiff still loses, despite having a much more likely case.[56] This is not equality before the law. A non-decision is still a decision impacting the substantive rights of the parties involved. Where there are unknowns, the unknowns should not favor one side over the other. Rather than requiring the plaintiff to reach some magic probability, explanationism asks jurors to evaluate the parties' cases against each other so that unknowns do not favor either side *a priori*.[57]

B. EXPLANATIONISM EXPLAINS JURIDICAL PROOF

Explanationism, or relative plausibility, is the alternative to a probabilistic account of proof.[58] Under an explanatory account of juridical proof, the factfinder does not calculate the probability that each element of a cause of action is satisfied.[59] Instead, the factfinder weighs the parties' explanations of the evidence and comparatively reasons to decide whether the plaintiff's or prosecutor's explanations can satisfy the requisite burden of proof.[60] In a standard civil case, this would be demonstration by a

[56] *Id.* at 14.

[57] *Id.* ("Dividing or ignoring the unknown (which amounts to the same thing), on the other hand, is consistent with both stated goals regarding accuracy and the risk of error.").

[58] *See generally id.*; Amalia Amaya, *The Explanationist Revolution in Evidence Law*, 23 INT'L J. EVIDENCE & PROOF 60, 61 (2019) ("Indeed, a fundamental change is involved in the shift from probabilism to explanationism. The change, as I will argue later, in conceptual structure, values and tools is so deep as to be appropriately described, as Allen and Pardo claim, as analogous to a scientific revolution."); Taruffo, *supra* note 4, at 131 ("In other words: the trier of fact has to determine, on the basis of the available evidence, if a narrative has been duly proven (according with the applicable standards of proof). If the evidence does not offer any sufficient proof for any of the narratives, then the case will be decided applying the rules concerning the burden of proof.").

[59] Allen & Pardo, *supra* note 2, at 12, 15–16.

[60] *Id.* 17–18. While the theory of explanationism has only been developed in the past few decades, the idea of "weighing the evidence" is rooted in a long history. John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1594 (2015) ("Speaking of the 'preponderance of the evidence' or the 'balance of probabilities' relies on an ancient metaphor comparing the process of judgment to weighing on a set of scales. The Egyptians depicted the weighing of a dead person's heart to determine its worthiness, and Homer and Virgil described the divine use of scales when a hero's fate was,

preponderance of the evidence—a selection of the plaintiff's explanation as superior to that of the defendant.[61] In a criminal case, the prosecution must prove guilt beyond a reasonable doubt.[62] To satisfy her burden of proof, the prosecution must advance a compelling explanation of guilt, such that the defendant is unable to offer any plausible explanation of innocence; if the defendant is able to articulate a plausible explanation of her innocence, even if less plausible than that of the prosecution, the case results in acquittal.[63]

Under explanationism, factfinders weigh the parties' competing explanations against each other and against the burden of proof.[64] To obtain a verdict, a plaintiff or prosecutor must offer an explanation that not only better explains the evidence and events of the case,[65] but also contains the claim's legal elements; if not, the defense's explanation prevails.[66] And conversely, where an affirmative defense is advanced, the defendant's

literally, in the balance . . . [B]y the Renaissance, the scales of justice were an iconographical commonplace, as they have remained.").

[61] Allen & Pardo, *supra* note 2, at 18–19; Leubsdorf, *supra* note 60, at 1612–19 (discussing the evolution of the preponderance of the evidence standard).

[62] *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by *proof* beyond a reasonable doubt dates at least from our early years as a Nation.").

[63] Allen & Pardo, *supra* note 2, at 29. As Professors Allen and Pardo address, scholars point out that the defendant has no obligation to present any case at all and may "stand mute." *Id.* at 22. While this is formalistically true, in practice a defendant cannot expect to do so and win, under any theory. *Id.*

[64] *Id.* at 15–16; Amaya, *supra* note 58, at 62 ("The explanationist turn in evidence law may be profitably described as a Hacking-type of revolution in which a new inferential method, i.e. explanatory inference, has brought in a new approach to the kind of knowledge that we may achieve in the context of legal fact-finding (explanatory knowledge), a novel language (abductive logic rather than probability calculus) and a distinctive approach to the establishment of the truth-value of novel candidates for truth (e.g. explanations instead of probability statements)."); Pardo, *supra* note 22, at 415–22; Sullivan, *supra* note 4, at 101 ("At every level of research, from the flightily formal to the grittily empirical, an unyielding shift in understanding is taking place: moving progressively away from absolutist or propositional concepts of what it means to find a fact, and progressively toward comparative definitions of facts as the most plausible (least rejected) alternative among the possibilities in consideration.").

[65] Allen & Stein, *supra* note 36, at 568 ("To win the plausibility contest, evidence that a party relies upon must unfold a narrative that makes sense to a natural reasoner: a layperson. There is no algorithm for 'plausibility;' the variables that inform judgments of plausibility are all the things that convince people that some story may be true, including coherence, consistency, coverage of the evidence, completeness, causal articulation, simplicity, and consilience (understood as the breadth of the explanation).").

[66] Allen & Pardo, *supra* note 2, at 16.

explanation must embrace the claim's elements to be successful.[67] In a criminal case, not only must the prosecutor's explanation be better than that of the defense, but the prosecutor must also prove that there is *no plausible alternative* explanation for the crime other than the defendant's guilt.[68] Such a requirement maps onto the requirement that guilt be proven beyond a reasonable doubt. Thus, the parties are incentivized to give the best explanation they can under the time, evidentiary, and resource constraints of the litigation—recognizing that factfinders evaluate their claims using their natural cognitive reasoning.[69]

As Professors Allen and Pardo explain, the explanatory account is more accurate and conceptually clear than a probability-based account of proof.[70] The theory avoids the need to assign abstract probabilities to isolated legal elements and splits evenly the weight of the unknown evidence between the parties.[71] Explanationism is derived from how people reason with evidence and properly frames litigation as a comparative exercise. Factfinders look to the competing narratives offered by the parties, considering the evidence as well as its gaps and incoherence, and evaluate the parties' explanations against the applicable burden of proof.[72] In this way, explanationism takes evidentiary assessment out of a theoretical vacuum and grounds it in reality. Relative plausibility also maps onto our legal system's rules. The rules of evidence are generally constructed to give parties the ability to admit the majority of the evidence which they seek to admit, giving litigants a wide latitude to construct their narratives.[73]

[67] *Id.* at 18 ("An explanation is selected based on the explanatory threshold, and that explanation is assessed in order to determine whether it includes the elements or not.").

[68] *Id.* at 16.

[69] *Id.* at 18–19. This is not to suggest that a party cannot plead in the alternative or present multiple theories of liability (or innocence); to the contrary, explanationism simply holds that the parties will strategically choose their best explanation(s). "This may involve one story, a disjunctive explanation composed of two (or more) possibilities, or the entire range of possibilities that support their case." *Id.* at 25. The only limitations, under explanationism, will be the party's own strategic choices that it makes based on the evidence available, admissibility, the underlying substantive law, and what she believes will be most persuasive.

[70] *Id.* at 15–19.

[71] *Id.* at 17.

[72] *See generally id.*

[73] Allen & Leiter, *supra* note 27, at 1535–36 ("Apart from the constitutional exclusionary rules whose purpose is to vindicate rights, there are only two general exclusionary rules: relevancy and hearsay. Relevancy exclusions do keep information from juries, but only that information that no person could reasonably rely upon or whose 'danger of unfair prejudice, confusion of the issues, or misleading the jury' substantially outweighs its probative value . . . . The hearsay rule keeps only the rankest and least reliable form of evidence from

Despite the advantages of the explanatory account, the legal system is slow to change, and probabilism bubbles beneath the surface. For decades, probabilistic thinking has undermined the promise that the Supreme Court made in *Brady v. Maryland*.[74] Explanationism shows the need for a different account of materiality among courts and legislators. The probabilistic framework currently undergirding *Brady*, by misconstruing juridical proof, undermines American criminal process.

II. EXPLANATIONISM EXPLAINS *BRADY V. MARYLAND*

In 1963, the Supreme Court decided *Brady v. Maryland*, and in a sweeping five-page majority declared, "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."[75] In the aftermath, defendant John Leo Brady was granted a new hearing, and his death sentence was ultimately commuted to life imprisonment.[76] For the past fifty years, it has been a bedrock of constitutional criminal process that *Brady* requires prosecutors to turn over to criminal defendants evidence that "tends to negate their guilt or reduce their punishment."[77] In other words, *Brady* mandates limited discovery instead of trial by ambush.[78]

With a defendant's right to exculpatory evidence unequivocally established, the battle shifted to the doctrine's framework and standards.[79] Subsequent cases slowly but surely led the way to modern *Brady* doctrine.[80]

the factfinder, which is quite consistent with the relative plausibility theory and its veritistic implications.") (citations omitted); Allen & Stein, *supra* note 36, at 569.

[74] *See infra* Section II.

[75] 373 U.S. 83, 87–88 (1963).

[76] Emily Langer, *E. Clinton Bamberger Jr., Lawyer Who Won 'Brady Rule' for Criminal Defendants, Dies at 90*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/national/e-clinton-bamberger-jr-lawyer-who-won-brady-rule-for-criminal-defendants-dies-at-90/2017/02/17/97eb75dc-f461-11e6-8d72-263470bf0401story.html [https://perma.cc/PPZ4-C7UA].

[77] Bibas, *supra* note 9, at 1.

[78] The persistent refusal to grant criminal discovery and the gamesmanship in the adversary system dates back to the 18th century. Jerry E. Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. & CRIMINOLOGY 11 (1970).

[79] Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 35 (2004).

[80] Strickler v. Greene, 527 U.S. 263, 280–81 (1999) ("We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence . . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the

Each development of *Brady* merits a dedicated inquiry, but for this Comment one issue stands above the rest: in order for the suppression of evidence to constitute a *Brady* violation, the evidence must be *material*.[81] As will be demonstrated, the standard for determining what evidence qualifies as material has been undermined by probabilism, thereby increasing room for error and the violation of defendants' rights.

Initially, the Court premised its materiality decisions almost exclusively on probabilistic logic.[82] As the doctrine evolved, the Court began hinting that lower courts needed to shift to a more explanatory account of materiality, without overruling the probabilistic holdings.[83] In the process, the Court at times contradicted itself, marching two steps forward and one step back.[84]

A. EARLY *BRADY* AND PROBABILISM

In *United States v. Bagley*, the Court observed that impeachment evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal."[85] In doing so, it endorsed a holistic assessment of the evidence, parenthetically noting that "[t]he 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."[86] The Court implicitly recognized that a defendant's explanation at trial, to be complete, needed more details of the story, and that the loss of such details could be the difference between guilt and acquittal.[87]

prosecutor' . . . 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.") (citations omitted).

[81] United States v. Bagley, 473 U.S. 667, 674 (1985).

[82] *Id*. at 682; Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) ("[E]vidence 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.") (citations omitted).

[83] *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 681–88 (2004); Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[84] Smith v. Cain, 565 U.S. 73, 75 (2012) ("We have explained that 'evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence . . . .'") (citations omitted).

[85] *Bagley*, 473 U.S. at 676 (citations omitted). Such language shows acknowledgement of the holistic nature of evidence.

[86] *Id.*

[87] *See also* Old Chief v. United States, 519 U.S. 172, 187 (1997) ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains

Material evidence did not need to be exonerating evidence, but instead had to include important story-telling context.[88] A small difference could change the entire outcome of a case.

Despite the importance of "subtle factors," the Court crafted a test for materiality that hinged on probability.[89] Justice Blackmun emphasized that "[t]he 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."[90] For the first time, proving materiality required a showing that the evidence would have changed the *outcome of the trial*.[91] Yet Justice Blackmun simultaneously admonished courts to look at the totality of the circumstances and remember "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."[92] Given the complex narrative structures humans use to determine facts,[93] this requirement seems to require a court to do the impossible.

In his dissent, Justice Marshall immediately noted the problems with this standard, arguing for an approach that closely resembles the modern explanatory perspective.[94] Justice Marshall noted that "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."[95] Like the explanatory account, Justice Marshall's dissent acknowledged the holistic nature of evidentiary evaluation and the complications of human cognition. Justice Marshall argued that a deprivation of information from the defense was a deprivation from the trier of fact, undermining the reliability of verdicts.[96] As the explanatory account holds, guilt is found by comparing each party's account, something which cannot be done when the defense is missing components of its explanation.

momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.").

[88] *See infra* Section I.

[89] *Bagley*, 473 U.S. at 682 (Marshall, J., dissenting).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 683.

[93] *See supra* note 48.

[94] *See Bagley*, 473 U.S. at 685 (Marshall, J., dissenting).

[95] *Id.* at 693.

[96] *Id.*

As a second matter, the dissent emphasized that the majority's materiality test asks the prosecution to divine—before the trial ever occurs—what evidence *could* impact the outcome.[97] Justice Marshall found such a request almost impossible, particularly given that the prosecutor has no way of knowing the defendant's case.[98] The prosecutor is required to zealously serve victims and the community, and this diminishes her ability to see evidence from the perspective of the defense and increases the likelihood that she will dismiss or overlook favorable evidence.[99] The State meets its burden by developing its explanation of the case for the trier of fact,[100] so the prosecutor cannot make the case of the defendant any more than the defendant can make the case of the State.

The *Bagley* debates highlight the superiority of explanationism. For a judge assessing a *Brady* violation or a prosecutor determining what evidence to turn over, it is unrealistic to pretend to know how some counterfactual trial might unfold. Each individual juror's reasoning process is highly variable, and those variations directly impact outcomes.[101] Individual variation is compounded when one factfinder sits on a jury with other factfinders who contribute their different backgrounds, prior assumptions, knowledge, and perceptions to the group's reasoning dynamics.[102] Any individual can employ highly variable cognitive processing on a case-by-case basis, so there

[97] *Id.* at 699–700 (Marshall, J., dissenting) ("[The materiality standard] 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 . . . Although this looks like a post-trial 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 . . . pursuant to a pretrial standard that virtually defies definition.").

[98] *See generally* O'Brien, *supra* note 20.

[99] *Bagley*, 473 U.S. at 700–03 (Marshall, J., dissenting).

[100] Allen & Pardo, *supra* note 2, at 16.

[101] Kuhn et al., *supra* note 50, at 295. Conducting a study on juror reasoning and verdict outcomes, the researchers found that the reasoning capabilities of a juror influence the verdict, but a juror's verdict cannot be predicted by reasoning power alone; additionally, the reasoning applied by an individual can vary on a case-by-case basis. *Id.*

[102] Brian H. Bornstein & Edie Green, *Jury Decision Making: Implications For and From Psychology*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 63, 64–65 (2011) ("Why do jurors who hear identical pieces of (albeit conflicting) evidence construct different stories? They do so primarily because they filter the evidence through their own experiences, expectations, values, and beliefs. And, like all decision makers, jurors tend to seek out and remember information that is consistent with their verdict preference and scrutinize and reject information that is inconsistent with that preference. These initial preferences can come from general legal attitudes, preexisting cognitive schemas about the law, pretrial publicity, opening statements, or early trial evidence.").

is no way to predict how an entire jury may have reasoned differently.[103] Relative plausibility shows why we cannot look back *ex post* and decide with any confidence how a trial could have changed in light of new evidence;[104] we must redefine materiality to give access to that evidence up front.

B. *BRADY* SHIFTS TOWARDS EXPLANATIONISM

Kyles v. Whitley was a substantial step towards a more explanatory view of the materiality standard.[105] In addition to holding that a prosecutor has a duty to learn of favorable evidence obtained by police and other government workers,[106] the Court recast materiality in key ways. First and foremost, Justice David Souter stipulated that a "reasonable probability" of a different result did not require a different verdict, as the phrase suggests, but instead required a showing that the suppression of the evidence undermined confidence in the outcome.[107] Materiality was not to be treated as a sufficiency of the evidence test.[108] The Court also reframed the inquiry to hold that a defendant shows a *Brad*y violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different

[103] Allen & Pardo, *supra* note 2, at 19 ("Evaluating explanations will depend on the details of individual cases, at the retail and not the wholesale level, as it were, as well as on the background knowledge of the decision maker.").

[104] Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 627 (1993) ("The proffered data become evidence if they influence a fact finder. Whether they do is determined by the sum total of that person's experiences at the moment of decision, experiences which will by that time include the advocates' efforts to enlighten the fact finder about the implications of the material produced at trial and all the other observations generated by the trial.").

[105] 514 U.S. 419 (1995). In 1997, two years after its *Kyles* decision, the Court decided *Old Chief v. United States* and based its ruling on the significance of narrative to the trial process. 519 U.S. 172, 187 (1997) ("In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.").

[106] *Kyles*, 514 U.S. at 437.

[107] *Id.* at 434.

[108] *Id.* ("The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test.").

light as to undermine confidence in the verdict."[109] Finally, the suppressed evidence had to be viewed collectively, "not item-by-item."[110]

Kyles represents a high-water mark for *Brady* doctrine. With this case, the Court embraces what is very close to an explanatory account of evidence, emphasizing that materiality must be decided by evaluating whether the evidence could put the case in a different light.[111] The holding rejects the requirement that a court look at the probability of a change in outcome, opting instead for evaluation of the accuracy of the trial as a whole.[112] *Kyles* also rejects the probabilistic assessment of each piece of evidence in isolation, embracing a standard of materiality that requires greater disclosure in order to allow each side to put forth its explanation—holding the State to its burden and ensuring due process of law.[113]

If *Kyles* was a high-water mark, *Strickler v. Greene* was a reversion back to probabilities—if not in outcome, then at least in language. In *Strickler*, the Court reaffirmed its commitment to looking at whether the suppressed material could put the case in a different light, but held that the "petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."[114] As in *Bagley*, the dissent again called for a different definition of materiality.[115]

The majority writer for *Kyles* now writing in dissent, Justice Souter argued that the probabilistic language used by the Court in *Strickler* would confuse lower courts, by suggesting that *Brady* requires showing a change in outcome was "more likely than not."[116] Justice Souter traced *Brady*'s

[109] *Id.* at 419.

[110] *Id.* at 436. And, the prosecution must "make disclosure when the point of 'reasonable probability' is reached." *Id.* at 420.

[111] *Id.* at 435.

[112] *Id.* at 421 ("On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland*, to disclose evidence favorable to the defense, turns on the *cumulative effect of all such evidence* suppressed by the government . . . .") (emphasis added).

[113] Allen, *supra* note 104, at 627–28 ("Evidence is not a set of things, as the conventional theory would have it; it is instead the process by which fact finders come to conclusions about the past . . . a disinterested fact finder reconstructs the past based on all the observational inputs available at the moment of judging.").

[114] Strickler v. Greene, 527 U.S. 263, 296 (1999).

[115] *Id.* at 296–97 (Souter, J., dissenting).

[116] *Id.* at 298 (Souter, J., dissenting). As Justice Souter explained, "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,' I think 'significant possibility' would do better at

evolution[117] to show that the standard's "circuitous path" was never meant to suggest a change in outcome must be "more likely than not" and argued that the probabilistic language should be omitted to reflect that the standard is something of a "reasonable possibility."[118] Justice Souter's dissent, while not embracing an explanatory definition of materiality, admonished the majority for using probabilistic language and focused instead on whether suppression of the evidence undermined the conviction's reliability.[119]

C. DO AS I DO, NOT AS I SAY

Banks v. Dretke was the next stepping stone. Since *Kyles*, the Fifth Circuit had continued to resist the more holistic analysis that the Supreme Court had set out.[120] In its review, the Supreme Court engaged in a substantial examination of how the suppressed evidence—a key witness's informant status—not only could have changed the jurors' evaluation of the evidence, but also affected how the defense could have gone about its strategy differently.[121] In doing so, Justice Ruth Bader Ginsburg, writing for the majority, acknowledged the interrelated and interdependent nature of the evidence, paying particular attention to how the informant's testimony related to other aspects of the State's explanation advanced at trial.[122] In an

capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence." *Id.* (internal citations omitted).

[117] *Id.* ("*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).").

[118] *Id.* at 298–302.

[119] *Id.* at 300–01 ("[T]he touchstone of the enquiry must remain whether the evidentiary suppression 'undermines our confidence' that the factfinder would have reached the same result.").

[120] Banks v. Cockrell, 48 F. App'x 104 (5th Cir. 2002), *rev'd sub nom* Banks v. Dretke, 540 U.S. 668 (2004).

[121] *Banks*, 540 U.S. at 692–704.

[122] *See, e.g.*, *id.* at 672 ("Farr was paid for a critical role in the scenario that led to Banks's indictment. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate robberies. Had Farr not instigated, upon Deputy Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to continue committing violent acts. Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to consider Banks's acquisition of a gun to commit robbery or his 'planned violence.' Because Banks had no criminal record, Farr's testimony about Banks's propensity to violence was crucial to the prosecution. Without that testimony, the State could not have underscored to the jury that Banks would use the gun fetched in Dallas to 'take care' of trouble arising during robberies. The stress placed by the prosecution on this part of Farr's testimony, uncorroborated by any other witness, belies the State's suggestion that Farr's testimony was

explanatory fashion, the majority looked at how the suppressed evidence related to the other evidence as well as the overall strategy and story.[123] This is not to say that the Court altered the language of the materiality test.[124] But in action, the majority employed explanationism by looking not only at how the suppressed evidence could have fit with the defense's explanation advanced at trial, but also how the evidence could have changed the defense's strategy and how the evidence's absence strengthened the prosecution's case.[125]

D. MODERN *BRADY*, A HODGEPODGE OF BOTH THEORIES

Current cases continue to conflate explanatory evaluation and probabilistic language. *Smith v. Cain* reiterated the probabilistic test—evaluating for a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"—but defining a reasonable probability in more explanatory terms, as enough likelihood to "undermine confidence in the outcome of the trial."[126] Despite speaking in probabilistic terms, the Court noted that "[w]e have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict,"[127] stressing the need to look at the evidence as a whole. *Wearry v. Cain* framed the test in a more explanatory fashion, requiring lower courts to look for "any reasonable likelihood [the suppressed evidence] could have affected the judgment of the jury" and whether the suppression of that evidence "undermine[s] confidence" in the conviction.[128] And in *Turner v. United*

adequately corroborated. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony.").

[123] *Id.* at 698–703.

[124] *Id.* at 703 ("On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense.").

[125] *See id.* at 698–703.

[126] Smith v. Cain, 565 U.S. 73, 75–76 (2012).

[127] *Id.* at 76.

[128] 136 U.S. 1002, 1006 (2016) (citations omitted). The Court approvingly cited a line in *United States v. Agurs*: "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* (citing United States v. Agurs, 427 U.S. 97, 113 (1976)). The majority also reiterated that evidence is to be looked at cumulatively. *Id.* at 1007. Interestingly, the dissent employed a more probabilistic framework. *Id.* at 1008 (Alito, J., dissenting) ("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.'") (citations omitted).

States, the Court again carefully looked at the entire record and how the suppressed evidence related.[129] These recent cases, with *Turner* coming down in 2017, are *Brady*'s current articulation.

What does this mean for materiality, then? First, a trace of the doctrine shows that while probabilistic articulations of the test for materiality remain good law, since 1995, the Court has insisted that lower courts look carefully at the entire evidentiary record.[130] In doing so, the Court requires the reviewing judge to gauge whether the suppressed evidence could put the case in "a different light"[131] and how the parties' explanations and strategy could have changed—rather than whether the evidence would result in a definite change in outcome. Second, the case law addresses the issue of accuracy; the standard is often formulated as a question of whether there is concern that confidence in the conviction has been undermined.[132] There is no doubt that *Brady* jurisprudence forbids a court from looking at each piece of evidence alone.[133] These developments reflect a dramatic shift, but one that has not been fully realized. *Brady* language continues to maintain an inquiry into probability, while the Court simultaneously requires a searching look at the evidence and its relationship to the greater explanations advanced.[134]

E. A MATERIALLY DIFFERENT CONCEPTION OF EVIDENCE

Explanationism shows that materiality should be accorded its understood meaning at the time *Brady* was decided.[135] Not to be conflated

[129] *See generally* Turner v. United States, 137 S. Ct. 1885 (2017).

[130] *See generally Banks*, 540 U.S. at 668; Kyles v. Whitley, 514 U.S. 419 (1995).

[131] Cone v. Bell, 556 U.S. 449, 476 (2009) (remanding "with instructions to give full consideration to the merits of Cone's *Brady* claim").

[132] *Id.* at 462 (examining whether the suppressed evidence would "undermine confidence in the verdict").

[133] *See supra* Section II(B).

[134] Smith v. Cain, 565 U.S. 73, 76 (2012) ("Again, the State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.")

[135] Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., dissenting) ("*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."); Weinstock v. United States, 231 F.2d 699, 701–02 (D.C. Cir. 1956) ("'Material' when used in respect to evidence is often confused with 'relevant,' but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. Professor Wigmore depicts with some acerbity the difference between relevancy and materiality, 'the inaccuracy of our usage' of the terms, and 'the harmfulness of this inveterate error.' Materiality, he maintains, is a matter of substantive law and does not involve the law

with relevancy, materiality encapsulates the underlying elements of the claim to ask whether evidence has a "tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made."[136] Under the explanatory account, material evidence is evidence that a defendant could use in constructing her story or theory of the case to influence the factfinders. Just as factfinders reason by evaluating competing explanations of the evidence,[137] materiality asks whether the evidence in question could be used to influence the factfinder in making assessments required to be made.[138] The issue centers on whether the defendant's ability to construct her case was impaired, not the potential changes in outcome. This definition is consistent with both how parties construct cases and how juries decide cases. Cases are decided based on the explanations built around the available evidence, so a denial of access to evidence is a denial of access to meaningful participation in the trial.[139] As Justice Marshall said in *Bagley*: "Formulation of this right [to *Brady* evidence], and imposition of this duty, are the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair."[140]

Because *Brady* materiality remains grounded in probabilism, it is problematic. Jurors and judges do not think about each piece of evidence in

of evidence. He does not include 'materiality' in the topics treated in his volumes on Evidence. The term 'material' is used in many fields of law; for example, insurance law, bankruptcy, agency, motions for new trial upon the ground of newly discovered evidence, and in respect to perjury. In respect to materiality in perjury Blackstone said, 'for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal.' The meaning of the word appears to be consistent in these various fields. The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. Materiality must be judged by the facts and circumstances in the particular case. The color of an accused's hair may be totally immaterial in one case, but in other circumstances the color of his hair may be not only material but decisively so.") (citations omitted).

[136] *Weinstock*, 231 F.2d at 702.

[137] *See infra* Section I.

[138] *Weinstock*, 231 F.2d at 701–02.

[139] *See generally* Allen & Pardo, *supra* note 2. Of course, the rules of evidence will continue to require compromises when it comes to admissibility, but this is a separate issue from initial disclosure and materiality.

[140] United States v. Bagley, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting) ("[T]he *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.")

isolation; they construct narratives.[141] The defense attorney constructs an entire complex narrative for trial based on all the evidence at her disposal, so there is no way for the prosecutor to assess the materiality of evidence without making the defense's case herself.[142] Omitting any piece of evidence could change how the rest of the evidence is processed and fits together, changing the resulting narratives that can be constructed and resulting in an outcome that could put the "whole case in such a different light."[143] And taking evidence from the defense diminishes its ability to craft its explanation, which in effect reduces the State's burden. Because trials are a process by which factfinders select the explanation that better matches with the evidence and satisfies the burden of proof, the loss of evidence on the part of the defendant is an affront to the accuracy of trials and due process of law.[144] The right to due process must encapsulate the right of a defendant to fully make her case. Knowing what we know about human cognition,[145] anything less seems unconstitutional under *Brady*.

The explanatory account explains why asking a factfinder to quantify the likelihood of various elements being met in isolation "requires frequently unavailable information to implement (or must rely instead on subjective beliefs)."[146] Far from being an objective evaluation, assessments of the probability of a given event most typically result in highly subjective judgments that are untethered to anything beyond the factfinder's own belief structures.[147] Applying such a subjective approach to the element of

[141] Allen & Pardo, *supra* note 2, at 17–18 ("That jurors typically attempt to construct narratives to fit evidence dovetails with the explanatory account of standards of proof. This more holistic account of evidence evaluation is inconsistent with probabilistic accounts that posit item-by-item processing of evidence in terms of probabilities, leading to a probabilistic conclusion for each element.").

[142] Robert Hochman, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1689–90 (1996).

[143] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[144] Allen & Pardo, *supra* note 2, at 12 n.43 ("Evidence at trial is contingent. What any offer of evidence means depends on all the evidence in the case.").

[145] Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 212 (2006) ("The deliberations of these 50 cases revealed that jurors actively engaged in debate as they discussed the evidence and arrived at their verdicts. Consistent with the widely accepted 'story model,' the jurors attempted to construct plausible accounts of the events that led to the plaintiff's suit. They evaluated competing accounts and considered alternative explanations for outcomes.").

[146] Allen & Pardo, *supra* note 2, at 17. As a result, a probabilistic *Brady* inquiry either asks a judge to do the impossible and find non-existent statistics, or assess materiality from her own subjective beliefs and biases.

[147] Bruno de Finetti, *Probabilism: A Critical Essay of the Theory of Probability and the Value of Science*, 31 ERKENNTIS 169, 174 (1989) ("[H]owever an individual evaluates the

materiality—asking judges to essentially guess at the probability that the outcome of the trial could change—results in almost complete subjectivity and irrationality.[148] The explanatory account highlights that "[w]hen favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision"[149]—directly challenging what we value about the adversary process. If the adversary process is intended to hold the State to its burden and achieve certain policy goals,[150] a probabilistic standard of *Brady* materiality actually diminishes the doctrine's effectiveness. The probability language in *Brady* materiality sets a very high bar—asking for evidence akin to the smoking gun, DNA evidence, the transcript of the alternate suspect who confessed—when many cases are won and lost on details.[151] Recent studies support this proposition: "[e]mpirical evidence confirms that most *Brady* and *Giglio* claims involve not smoking guns but ambiguous evidence, which prosecutors can easily overlook."[152]

A party that cannot present her explanation cannot participate fully in her trial, and a defendant is denied a fair trial and due process of law in the absence of that opportunity.[153] As the explanatory account teaches,[154] an accurate materiality standard is pivotal to a fair trial. Under the explanatory

probability of a particular event, no experience can prove him right, or wrong; nor in general, could any conceivable criterion give any objective sense to the distinction one would like to draw, here, between right and wrong."); *see also* Allen & Pardo, *supra* note 2, at 12.

[148] Allen & Pardo, *supra* note 2, at 11–13.

[149] United States v. Bagley, 473 U.S. 667, 694 (1985) (Marshall, J., dissenting).

[150] *See* Allen & Pardo, *supra* note 2, 9–10, 17.

[151] Medwed, *supra* note 6, at 1543–44 ("One study by Bill Moushey of the *Pittsburgh Post-Gazette* waded through 1,500 cases and determined that prosecutors routinely withheld favorable evidence. Despite this high rate of nondisclosure, appellate courts found reversible error in only a handful of cases where the mistakes were so glaring, the conduct so heinous, that judges had no other recourse.").

[152] Bibas, *supra* note 9, at 14 (reviewing 448 *Brady* and *Giglio* claims which succeeded or were remanded between 1959 and 2004, and finding that "only about one-fourteenth of the successful or remanded cases fall into the most compelling categories [of suppressed evidence]: identification evidence or strong forensic evidence"); O'Brien, *supra* note 20, at 999 (applying "the lessons of cognitive science to identify the ways in which prosecutors' distinctive institutional environment may undermine not just their willingness to play fair but also their ability to do so").

[153] U.S. CONST. amend XIV, § 1; Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("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.").

[154] Allen & Pardo, *supra* note 2, at 33.

account, *Brady* works to ensure that the defense has access to the evidence it needs to fully develop its explanation and therefore to have due process of law.

III. The Texas Story

This Comment has shown that an explanatory account of evidence more accurately reflects how factfinders reason and thus demands that legislatures and courts reconceptualize what it means for evidence to be material.[155] Explanationism shows why the current standard does not work—deciding after the fact what evidence could have changed the outcome of a case is difficult when parties create and jurors evaluate cases using a holistic reasoning process that incorporates the evidence.[156] Furthermore, the complexities of human thinking show that a court can very rarely, if ever, discern how a juror might reason differently.[157] Similarly, it would be almost impossible to know how a defendant would have constructed her case differently had evidence not been suppressed. In the past twenty-five years, the Supreme Court has moved towards an explanatory definition of materiality by evaluating evidence holistically and relationally.[158] However, the Court has also maintained probabilistic underpinnings and language in its definition of materiality, negatively impacting defendants' right to due process of law.[159]

The rest of this Comment is devoted to Texas and its discovery act as a case study to illustrate the importance of the theory underpinning our practice. Frustratingly, both federal and state courts continue to adhere to probabilistic conceptions of materiality at the expense of *Brady*'s promise of a fair trial.[160] For this reason, materiality must be redefined even if Congress or state legislatures undergo criminal discovery reform. To illustrate this point, the Morton Act of Texas serves as an especially important case study.[161] The Texas experience highlights both the interaction between the

[155] *See supra* Section II.

[156] Allen & Pardo, *supra* note 4, at 208 ("The primary message of relative plausibility is that from beginning to end the legal system pushes the parties to provide competing explanations, and these explanations structure the decision that is subsequently made (even if the decision is based on an explanation not advanced by the parties).").

[157] *See* Kuhn et al., *supra* note 50, at 295.

[158] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[159] *See supra* Section II(E).

[160] *See infra* Section IV.

[161] *Id.*

legislature and the courts in enacting reform as well as the importance of the assumptions that the judiciary brings to bear on the trial process.

Brady jurisprudence remains marred by the precedent of piecemeal analysis and probabilistic evaluation, but Congress and the states are free to adopt more robust criminal discovery.[162] Yet beyond its constitutional command, the *Brady* conception of materiality has profoundly impacted discovery statutes. Rule 16 of the Federal Rules of Criminal Procedure and many states require the disclosure of criminal discovery in *Brady* terms, using materiality and *Brady* language to assess what must be disclosed.[163] While discovery statutes need not consider materiality, state legislatures and courts have also traditionally adopted this evidentiary view.[164]

[162] *See, e.g.*, *Kyles*, 514 U.S. at 437 ("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."); Green, *supra* note 19, at 639 (evaluating Congressional legislation efforts to expand criminal discovery beyond the requirements of *Brady*); Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html [https://perma.cc/BMF2-2WXM] (discussing state and ABA efforts to expand criminal discovery). Many commenters, however, find that neither *Brady* nor statutes are adequately addressing criminal discovery issues. Jones, *supra* note 8, at 423 ("Despite the nationwide epidemic of *Brady* violations and the magnitude of injustice that results from such misconduct, the criminal justice system has not developed effective reforms to provide a remedy for defendants or appropriately sanction prosecutors for concealing evidence favorable to the defense.").

[163] FED. R. CRIM. P. 16; LAURAL L. HOOPER ET AL., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES, FED. JUD. CENTER (2004), https://www.uscourts.gov/sites/default/files/bradymat_1.pdf [https://perma.cc/N5KY-J3JR]. Rule 16 of the Federal Rules of Criminal Procedure mandates the disclosure of the defendant's statements and prior records. It also requires the prosecution to grant discovery of documents and objects possessed by the government if "(i) the item is *material* to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." FED. R. CRIM. P. 16(a)(1)(E)(i)-(iii) (emphasis added). Similarly, reports of examinations and tests must "be *material* to preparing the defense" or the government must "intend[] to use the item in its case-in-chief at trial" before their disclosure will be compelled. *Id.* at 16(a)(1)(F)(iii) (emphasis added). This focus on materiality has, in turn, seeped into state statutes. Emily Dyer et al., *Statewide Rules of Criminal Procedure: A 50 State Review*, 1 NEV. L.J. FORUM 1, 7 (2017) ("Although the ALI and other institutions have created model rules, nearly half the states used the FRCP to model their own rules.").

[164] *See infra* Section IV. This Comment takes Texas as its primary example of this issue. However, many states would equally serve to illustrate. *See, e.g.*, Darryl K. Brown, *Discovery in State Criminal Justice*, 3 REFORMING CRIM. JUST. 147–56 (2017).

A. FEDERAL MATERIALITY

Beyond the limitations of the Court's holdings in and of themselves, an equally significant issue has been lower courts' resistance to the evolution of *Brady*—and their manipulation of the materiality standard. Despite the Supreme Court's holdings, some federal and state courts remain reluctant to adopt a more robust assessment of materiality.[165] In these cases, we see adherence to a crabbed analysis which does not give the holistic evaluation called for by the Supreme Court.[166] Understanding the nature of the problem requires examining the relationship between the Fifth Circuit and the evolution of the materiality standard under *Brady*. To some degree, the modern standard applied today evolved from a conversation between the Fifth Circuit and the Supreme Court.

Kyles came to the Supreme Court from a Fifth Circuit defendant's appeal.[167] The Fifth Circuit claimed at the outset of its opinion that it would "examine the evidence presented at trial and how the extra materials would have fit," but really it evaluated the suppressed evidence separately and without considering its relationship to the rest of the evidence.[168] In fact, the

[165] Haskell v. Superintendent Greene SCI, 866 F.3d 139, 148 (3d Cir. 2017) ("Once a petitioner demonstrates 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' the inquiry is over . . . .") (citations omitted); United States v. Shields, No. 15–cr–00200–REB, 2017 WL 3085513, at *5 (D. Colo. July 20, 2017) ("The criterion of materiality is met only if there is a 'reasonable probability' that the outcome of a trial would have been different had the evidence been disclosed to the defense.") (citations omitted); Pennsylvania v. Natividad, 200 A.3d 11, 32–33 (Pa. 2019) (finding that "[t]here is no dispute the Commonwealth failed to disclose these materials to the defense prior to trial, and some of them were plainly exculpatory on their face, as they identified an alternate suspect who allegedly claimed responsibility for the murder," yet holding that "the Commonwealth's evidence against appellant was so overwhelming there is no reasonable probability that if the Commonwealth had turned over the relevant evidence the result of the trial would have been different"); *Ex parte* Carty, 543 S.W.3d 149, 177 (Tex. Crim. App. 2018) ("Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt. None of the witnesses stated that Carty was not involved in the murder. While the withheld witness statements may have contained inconsistencies that could have been brought out at trial to impeach those witnesses, none of those statements contained information justifying, excusing, or clearing Carty from the alleged guilt, or eliminating her as a party to this offense.").

[166] *See supra* notes 164–165. This is not to say that all courts take this limited view of materiality; *see, e.g.*, Tempest v. State, 141 A.3d 677, 687 (R.I. 2016) ("Contrary to what the dissent suggests, whether the defense would have actually used the statements is not relevant to our analysis—the bottom line is that it should have been defense counsel's choice to make.").

[167] *Kyles*, 514 U.S. at 422.

[168] Kyles v. Whitley, 5 F.3d 806, 811–12 (5th Cir. 1993), *rev'd*, 514 U.S. 419 (1995).

court even analyzed different components of a single transcript separately, separating whole documents into piecemeal evidence.[169] On review, the Supreme Court held that

> [a]lthough the [Fifth Circuit] 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,' the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone.[170]

The Court stressed that the sum of the suppressed evidence could allow the jury to decide differently, and so "confidence that the verdict would have been unaffected cannot survive."[171]

[169] The Fifth Circuit analyzed the evidence in an individualized fashion, in such a way as to suggest that no amount of evidence could have changed the outcome of trial. All of the evidence in the list to follow was dismissed as insufficient.

1. Use of the police transcript to show a prosecution informant had framed the defendant: "Even without these documents, Kyles made a credible case that Beanie could have planted this evidence."
2. Use of the police transcript to show the informant had been at the scene: "These notes refer to Beanie's presence at Kyles' apartment for Sunday dinner. Corroborating Beanie's presence, however, adds little credibility to an assertion that Beanie smuggled evidence in and hid it about the apartment on that occasion."
3. Use of the police transcript to show a second motive for the prosecution informant: "Beanie's request for the money on the transcript would have been cumulative, at best."
4. Use of the police transcript to show the informant had purchased the stolen car: "Ultimately, this evidence is at best cumulative on a factual point not rebutted by the State. The nondisclosure of this much of the transcript was insignificant."
5. Use of the police transcript to impeach the credibility of the informant: "This is but one problem. More importantly, evidence that Beanie lacked credibility would have had little impact on this case."
6. Use of written statements to impeach a second witness: "Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others."
7. Use of a license plate printout to show cars at the scene: "The evidence of guilt was otherwise so overwhelming that the rebuttal of the photograph would have made no difference." *Id.* at 811–18.

[170] *Kyles*, 514 U.S. at 440 (providing examples of Fifth Circuit language, in which the court dismissed and qualified each individual piece of evidence as insignificant, in isolation).

[171] *Id.* at 454. And, without this evidence, the defendant was unable to meaningfully advance his explanation.

This materiality conversation continued ten years later in *Banks v. Dretke*.[172] The Fifth Circuit held that a key witness's paid informant status, the pending charges against him, and his role in the indictment of the defendant were immaterial to the defendant's conviction.[173] In finding that the witness's "testimony was corroborated by other witnesses and the information's impeachment value would have been cumulative," the Fifth Circuit overturned the relief the district court had granted.[174] In doing so, the majority did not incorporate any of the holistic examination called for by *Kyles*.[175] The Supreme Court overturned the Fifth Circuit, reiterating its commitment to looking at whether the evidence could put the case in a different light.[176] The Court looked at the critical role which the paid informant played in the case from arrest, to indictment, to penalty phase.[177] The Court highlighted in particular how the paid informant's testimony was critical to the narrative that the State presented in the penalty phase of the trial.[178] Defendant Banks' legal battle continued for thirty-two years before he was saved from the death penalty.[179]

Like *Kyles* and *Banks*, *Wearry v. Cain*[180] was also an appeal from misapplication of *Brady* doctrine in the Fifth Circuit. These cases highlight the Fifth Circuit's repeated resistance to viewing materiality more broadly and accurately. They also show how probabilistic definitions of materiality undercut a defendant's access to evidence; a probabilistic view of the doctrine separates out each piece of evidence and views it in isolation, discounting the holistic reasoning process of the factfinder.[181] This insistence on probabilistic thinking in the Fifth Circuit has arguably been pivotal in the

[172] Banks v. Cockrell, 48 F. App'x 104, 112 (5th Cir. 2002), *rev'd sub nom.* Banks v. Dretke, 540 U.S. 668 (2004).

[173] *Id.* at 112–16.

[174] *Id.* at 137.

[175] *See generally id.*

[176] *Banks*, 540 U.S. at 698–99.

[177] *Id.* at 697–702.

[178] *Id.* at 699–703.

[179] Brandi Grissom, *Death Row Inmate's Sentence Reduced to Life*, TX. TRIB. (Aug. 2, 2012), https://www.texastribune.org/2012/08/02/death-row-inmates-sentence-reduced-life/ [https://perma.cc/LT9V-BEY3].

[180] 136 U.S. 1002, 1006 (2016).

[181] *Cf.* Allen & Pardo, *supra* note 2, at 16 ("A number of general criteria affect the strength or quality of an explanation. These criteria include considerations such as consistency, coherence, fit with background knowledge, simplicity, absence of gaps, and the number of unlikely assumptions that need to be made.").

development of *Brady* doctrine, but courts still persist in their crabbed and limited view of materiality.

B. STATE MATERIALITY

The problem is by no means limited to federal courts. Turning our focus to the states and our case study of Texas, even after *Kyles* and *Banks*, Texas state courts still evade the materiality analysis mandated by the Supreme Court by blending materiality with prejudice and only parenthetically noting the correct standard.[182] The Texas test cites to *Strickler* (the probabilistic opinion between *Kyles* and *Banks*), *Bagley* (a pre-*Kyles* case decided in 1985), and formulations of the standard written by Texas courts that do not engage in holistic analysis, inquire whether evidence changes the narrative at trial, or apply any of the developments in *Brady* law since the 1980s.[183] This refusal to use the more recent and explanatory analysis of the Supreme Court is persistent.[184] Indeed, Texas courts will often misstate the law:

> The court of criminal appeals has held that to find reversible error under *Brady*, an appellant must show that . . . the evidence is material, that is, it presents *a reasonable probability that had the evidence been disclosed, the outcome of the proceeding would have been different*. We analyze an alleged *Brady* violation in light of all the other evidence adduced at trial.[185]

The problems caused by a clubbed view of materiality have also seeped into statutory criminal discovery. Prior to amendment in 2013,[186] the Texas criminal discovery statute, Article 39.14(a) of the Texas Code of Criminal Procedure, only allowed defendants (under certain, limited circumstances) to produce or inspect "evidence *material to any* matter involved in the action" and "in the possession, custody, or control of the state."[187] And state courts

[182] *Ex parte* Reed, 271 S.W.3d 698, 726–27 (Tex. Crim. App. 2008). *But see Banks*, 540 U.S. at 703, ("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.") (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

[183] *Reed*, 271 S.W.3d at 726–27.

[184] *See, e.g.*, Gill v. State, No. 01-09-01012-CR, 2010 WL 4910210, at *4 (Tex. App. Dec. 2, 2010) (quoting Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (quoting United States v. Agurs, 427 U.S. 97, 109–10 (1976))); Lempar v. State, 191 S.W.3d 230, 241 (Tex. App. 2005) (citing *Ex parte* Richardson, 70 S.W.3d 865, 870 n.22 (Tex. Crim. App. 2002)).

[185] Pitman v. State, 372 S.W.3d 261, 264 (Tex. App. 2012) (citations omitted).

[186] This statute's amendment will be discussed at length in the following section. For now, I limit my discussion to state court interpretations of the statute prior to its amendment in 2013.

[187] Ehrke v. State, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015).

had, in turn, held that "[e]vidence is material if its omission would create '*a reasonable doubt that did not otherwise exist*.'"[188] In formulating this standard for materiality, Texas courts reverted materiality back to 1976, citing to *United States v. Agurs*.[189] In this move, the state courts of Texas actually entitled a defendant to less statutory discovery than she is owed under the constitutional minimum required by current *Brady* jurisprudence.[190]

Texan interpretations of the discovery statute look for the creation of doubt, a burden never meant to be imposed upon the materiality standard.[191] This standard does not consider the need to ensure due process of law, the search for accuracy, or how the suppressed evidence could change the narrative presented at trial.[192] Instead, Texas courts consistently define materiality by citing to the Texas Court of Criminal Appeals' *Quinones v. State* decision, which in turn cited to *Agurs* and held that the defendant's burden for proving materiality surpasses the harmless error standard and is only met "if the omitted evidence creates a reasonable doubt that did not otherwise exist."[193] The dissent pointed out that there was no evidence that the legislature intended such a limited reading of materiality, and rather intended to expand upon the Supreme Court's constitutional minimum, but

[188] *Id.* at 611 (citing *Agurs*, 427 U.S. at 112) (emphasis added). The Texas Court of Criminal Appeals has remained steadfast in its commitment to the 1976 *Brady* standard, which it adopted more than thirty years ago. Quinones v. State, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980), *abrogated on other grounds by* Ehrke v. State, 459 S.W.3d 606 (Tex. Crim. App. 2015) ("More recently in *Stone v. State* and *Frank v. State*, this Court has expressly chosen to define 'materiality' under Texas law in the due process terms employed by the Supreme Court in *United States v. Agurs*, one of the more recent elaborations on the disclosure requirements of *Brady v. Maryland*.").

[189] *Quinones*, 592 S.W.2d at 941.

[190] *Compare Ehrke*, 459 S.W.2d at 611 ("Evidence is material if its omission would create a reasonable doubt that did not otherwise exist.") (citations omitted) *with* Banks v. Dretke, 540 U.S. 668, 698 (2004) ("[T]he materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.") (citations omitted).

[191] Kyles v. Whitley, 514 U.S. 419, 434 (1995).

[192] Branum v. State, 535 S.W.3d 217, 224–28 (Tex. App. 2017) (evaluating the impact of each piece of suppressed evidence in isolation).

[193] *Quinones*, 592 S.W.2d at 941–42 (citing *Agurs*, 427 U.S. at 112).

to no avail.[194] And as *Brady* doctrine has evolved in the years since *Agurs*, Texas has not updated its standard.[195]

While *Agurs* has not been overturned, there is no debating that materiality analysis has dramatically evolved since 1976, and it is disingenuous for Texas courts to pretend otherwise.[196] Under Texas's formulation of materiality, the state criminal discovery statute gives defendants less access to discovery than is constitutionally required, let alone a level of discovery sufficient to ensure accurate truth-finding.[197]

IV. THE "MORTON ACT" AS A CASE STUDY

How courts define materiality matters a great deal for the litigants in our courts, and courts need to shed their prior assumptions about materiality to protect due process of law. Redefining materiality is essential even where legislatures step in with reform,[198] as the "Michael Morton Act" of Texas so aptly demonstrates. While legislatures can serve a key role in discovery reform,[199] judicial reform remains integral.

[194] *Id.* at 947–48 (Robert, J., dissenting) ("It should be abundantly clear from even a cursory reading of Article 39.14 that the Legislature intended no such restrictive definition and that Article 39.14 was not meant to be a mere codification of *Brady v. Maryland*. Materiality in the context of Article 39.14 should be accorded its commonly understood legal meaning . . . '[t]o be 'material' means to have probative weight: i. e., reasonably likely to influence the tribunal in making a determination required to be made.'") (citations omitted).

[195] *See, e.g.*, *Ehrke*, 459 S.W.3d at 606.

[196] *See, e.g.*, Dickens v. Court of Appeals for the Second Supreme Jud. Dist. of Tex., 727 S.W.2d 542, 559–60 (Tex. Crim. App. 1987) (Clinton, J., dissenting) ("As demonstrated in the margin, the stark reality is that this Court has taken a simple job of fulfilling statutory requirements for obtaining discovery—practically like procedure on the civil side—and turned it into a requirement that in its constitutional sense 'materiality' to the defense of an accused must be shown when discovery is refused. Unlike a broad scope of discovery in civil cases, in a criminal prosecution, as the majority opinion emphasizes, 'the *right* to discovery is limited to exculpatory or mitigating evidence.'") (citations omitted).

[197] As noted above, Texas courts also define materiality under *Brady* in a limited way—reading out *Kyles*, *Banks*, and most of the language used by the Supreme Court now. See *infra* Section III(B). This conception of materiality ignores the impact any piece of evidence could have on how a party constructs her story, the arguments she makes at trial, or the cognitive reasoning the jury undertakes.

[198] TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017).

[199] A survey of the states shows that while many states require a minimal to intermediate level of discovery, there has been a movement towards broader and more open file discovery. THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 8 (2007) (finding that "one-third of the states (including California, Florida, New Jersey, Illinois, Michigan, and Pennsylvania) have implemented discovery rules modeled on the ABA standards," which do not call for an assessment of materiality); *see also* Brown, *supra* note 164; DISCOVERY REFORM LEGISLATIVE VICTORIES, NATIONAL ASSOCIATION OF CRIMINAL

A. THE MORTON ACT, ART. 39.14 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS

Michael Morton was released from prison on October 14, 2011, after spending twenty-five years in prison for the murder of his wife—a crime he did not commit.[200] During Morton's trial, prosecutors withheld evidence of his son's eyewitness account that his father was not the killer, neighborhood reports of a man in a green van seen lurking around the Morton's home, and evidence of his wife's credit card being used after her death.[201] With this evidence withheld, Morton was convicted.

While no single cause can bring about reform alone, Morton's persistent advocacy after his exoneration—so no other innocent defendant would suffer his fate—was instrumental.[202] Faced with a series of high-profile wrongful convictions like Morton's and a judiciary exhibiting a bulldogged refusal to give defendants access to evidence, the Texas legislature entered the conversation by introducing Senate Bill 1611, the "Michael Morton Act."[203] The Morton Act was drafted through the efforts of all stakeholders, including prosecutors and defense attorneys, and passed with bipartisan, unanimous support.[204] The legislature's passage of Senate Bill 1611 made major changes to Article 39.14 of the Code of Criminal Procedure of Texas, the state's criminal discovery provision, which had remained untouched since 1965.[205]

Explaining the bill and its purpose, the Senate Committee Report stated that SB 1611 "requires prosecutors to turn over to the defense *any relevant evidence* that may help the defendant, including witness lists."[206] Before

DEFENSE LAWYERS, https://www.nacdl.org/criminaldefense.aspx?id=31324 [https://perma.cc/9VUV-22UP] (discussing the legislative broadening of criminal discovery in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina); Green, *supra* note 19 (assessing federal efforts at legislative reform to broaden criminal discovery).

[200] The Innocence Project, *Michael Morton*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton/ [https://perma.cc/DJD4-A7FV].

[201] *Id.*

[202] Jessica A. Caird, *Significant Changes to the Texas Criminal Discovery Statute*, 51 HOUS. LAW. 10, 10 (2014); Brandi Grissom, *Morton Act, Prosecutor Accountability Bill Head to Governor*, TEX. TRIB. (May 14, 2013), https://www.texastribune.org/2013/05/14/house-approves-morton-act-sanctions-prosecutors/ [https://perma.cc/RU6C-P57F].

[203] *See generally* Grissom, *supra* note 202.

[204] *See generally* TEX. APPLESEED & TEX. DEF. SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR (2015); Grissom, *supra* note 202.

[205] TEX. APPLESEED & TEX. DEF. SERV., *supra* note 204, at 1.

[206] S. COMM. ON CRIM. JUST., BILL ANALYSIS, TEX. S.B. 1611, 83d Leg., R.S. 1 (2013), https://capitol.texas.gov/tlodocs/83R/analysis/pdf/SB01611S.pdf [https://perma.cc/5NZF-266D] [hereinafter COMMITTEE REPORT] (emphasis added) ("Criminal discovery—the exchange

detailing the bill's new provisions, the report addressed the key reasons for the bill and for reform: the need for fair trials and efficiency in the judicial system, the necessity that defendants be able to make informed decisions to plead, the obligation to uphold the constitutional right to present a full defense, and the goal to "lessen[] the likelihood of an overturned verdict on appeal."[207] The Senate Report emphasized that open file discovery "saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions," as well as establishes uniformity, so that a defendant's chance at a fair trial would not vary by where in the state she was tried.[208] Most importantly, the Bill's drafters declared that "[e]very defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it."[209] In passing SB 1611, the legislature adopted a new model and values for discovery—essentially embracing an explanatory account of juridical proof.

The Morton Act was a watershed change. Pre-Morton Act, all discovery was left to the courts' discretion, and until 2005 "a motion of the defendant showing good cause" was required before a court would grant the defendant access to a limited category of *material* evidence.[210] Moreover, abuse-of-discretion standards insulated both prosecutors and trial judges that declined to grant discovery from appellate censure and reversals.[211]

The 2013 Morton Act substantially amended the first section of Article 39.14 and added twelve additional sections.[212] Because the first section of Article 39.14 sets out the majority of what is discoverable and the key procedures for discovery, these changes were the most significant.[213] The legislature eliminated the requirement that a defendant show cause to obtain

of relevant information between prosecutors and the defense prior to trial—is both necessary for a fair and just criminal justice system, and also required as part of a defendant's constitutional right to a full defense.").

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] Caird, *supra* note 202, at 10–11. The prior versions of Article 39.14 were easy for prosecutors to circumvent. Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 84 TEX. TECH L. REV. 893, 902 (2015) ("[A]rticle 39.14 never functioned as a true discovery statute, but only as a kind of safety net to prevent the worst kinds of unfairness to the accused.").

[211] Reamey, *supra* note 210, at 902–03.

[212] Caird, *supra* note 202, at 10.

[213] COMMITTEE REPORT, *supra* note 206, at 1. I focus on the most substantial change—the amendment to the first section.

discovery and required broad access to evidence given a "timely request from the defendant."[214] Production allowed for the actual duplication of evidence and included police reports and witness statements for the first time.[215] The statute also required that "the State [] provide copies of designated documents, papers, written or recorded statements of the defendant, books, accounts, letters, photographs, objects or tangible things not otherwise privileged that contain material evidence and are in the possession of the State or any person under contract with the State."[216]

Open file discovery legislation like the Morton Act gives the defense access to all information that is, or should be known to the prosecution, law enforcement, and other agencies working for the prosecution, with the exception of any privileged material.[217] And prosecutors can still seek a protective order to withhold sensitive information from defense counsel.[218] By granting the defendant access to any unprivileged evidence, and therefore giving her counsel the full opportunity to present a complete explanation of the case to the factfinders, open file discovery helps to hold the State to its burden.[219] And the benefits are not limited to due process: "the nondisclosure of information beneficial to criminal defendants causes wrongful convictions, wasteful litigation, and uncertainty in criminal adjudications."[220] In terms of judicial economy, open file discovery limits, if not eradicates, the necessity for extensive post-conviction *Brady* claims.[221]

[214] *Id.* at 2.

[215] *Id.*

[216] *Id.*

[217] THE JUSTICE PROJECT, *supra* note 199, at 2.

[218] Joy, *supra* note 20, at 425.

[219] *See supra* Sections I, II.

[220] Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1371 (2012). It is estimated that some form of prosecutorial misconduct contributes to more than half of all wrongful convictions. *% Exonerations by Contributing Factor*, THE NATIONAL REGISTRY OF EXONERATIONS (Oct. 23, 2019), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/PXJ9-FNDL].

[221] This is not to say that there is not opposition to open file discovery or criticism. For a summary on the competing arguments, see Brown, *supra* note 199.

B. A MATERIAL LIMITATION ON REFORM

Despite the landslide and bipartisan nature of the reform,[222] the Morton Act has not been able to deliver fully on its promise of open file discovery.[223] Texas courts have shown that old precedent dies hard, and without a material rethinking of juridical proof, reform cannot truly be realized.

Given the purpose of the act explicitly stated by the legislature—that "[e]very defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it"[224]—and the explicit designation of the Morton Act as one of open file discovery, discovery disputes should require only one straightforward question: was the defendant given broad access, or did the prosecution fail to disclose evidence the statute makes available to the defendant?

But Texas courts often gut the changes made to Article 39.14.[225] While the revisions were substantial, portions of the language from the prior act were left in place.[226] Notably, this included the requirement to produce "designated . . . evidence *material to any matter* involved in the action."[227] In ruling on discovery issues, the Texas Court of Appeals held:

> If we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder. We do not write on a clean slate. The phrase at issue, "that constitute or contain evidence material to any matter," was present in Article 39.14 before it was amended by the Michael Morton Act. The phrase was not modified or defined by the Legislature when it passed the amendments to Article 39.14. What is "material" had been subject to substantial judicial interpretation prior to the debate and passage of the Michael Morton Act. Thus, applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, *regardless of what the Legislature may have thought they were accomplishing*.[228]

The point is worth repeating—the Court of Appeals held that, regardless of what the legislature thought it was accomplishing, a prosecutor is only

[222] TEX. APPLESEED AND TEX. DEF. SERV., *supra* note 204, at ii ("This legislation received bipartisan support in both chambers and was drafted in consultation with stakeholders who work in nearly every division of the criminal justice system.").

[223] *See generally* Reamey, *supra* note 210.

[224] COMMITTEE REPORT, *supra* note 206, at 1.

[225] Watkins v. State, 554 S.W.3d 819, 824 (Tex. App. 2018).

[226] Caird, *supra* note 202, at 10–11.

[227] TEX. CRIM. PROC. CODE ANN. § 39.14 (West 2017).

[228] *Watkins*, 554 S.W.3d at 824.

required to turn over what is material.[229] And to make the blow all the more severe, courts employ an antiquated definition of materiality—indeed, one that has been in use since 1980.[230] The court's interpretation limits defendants to evidence which would, with reasonable probability, change the outcome of trial.[231] This definition of materiality is not only counter to the legislature's desire, but also runs counter to the entire explanatory account.

Even with passage of the Morton Act, Texas courts consistently hold that "[e]vidence must be indispensable to the State's case or must provide a reasonable probability that its production would result in a different outcome to be considered material and subject to mandatory disclosure under Article 39.14(a)."[232] In fact, courts even conflate the Morton Act with *Brady* itself: "[b]oth the statute and *Brady* require that the data be 'material' before it is discoverable. And, like the definition of 'material' in a *Brady* setting, materiality for purposes of Article 39.14(a) means that 'there is a reasonable probability that had the evidence been disclosed, the outcome of the trial

[229] The court did so knowing that it was disregarding the intent of the legislature in amending the statute. *Id.* at 824 n.1 ("While we generally agree that a sea change in criminal discovery was anticipated, and probably intended as a result of the passage of the amendments, the legislature's writings do not always accomplish what was intended and further amendment is thus required. The legislature did not change a term in the existing statute that had already been interpreted by the State's highest court in criminal matters. As we explained in our opinion, we do not write on a clean slate . . . Accordingly, we decline the invitation of the Amicus Curiae to revisit our analysis and holding of the meaning of 'material' as used in article 39.14.").

[230] *Id.* at 822 ("Therefore, we hold that in order to establish that requested evidence is material, it is necessary that a defendant must provide more than a possibility that it would help the defense or affect the trial. Materiality for purposes of Article 39.14(a) means that 'there is a reasonable probability that had the evidence been disclosed, *the outcome of the trial would have been different*.'") (emphasis added) (citations omitted).

[231] *Id.*

[232] Carrera v. State, S.W.3d 554, at *2 (Tex. App. 2018) (citations omitted); Branum v. State, 535 S.W.3d 217, 224 (Tex. App. 2017) ("To establish that requested evidence is material, a defendant must provide more than a possibility that it would help the defense or affect the trial."). A review of prosecutorial briefs shows that many prosecutors are pushing for this interpretation. *See, e.g.*, State's Response and Objection at 3, State v. Oliver, (Tex. Dist. Ct., Aug. 2., 2018), No. F17-18595-V, 2018 WL 4185923 ("To be considered material and to be subject to mandatory disclosure under Article 39.14(a), a defendant must show a reasonable probability that production of the evidence would result in a difference in the outcome of the proceeding . . . Defendant has not shown materiality here, nor has he attempted to do so. Furthermore, the State does not believe that production of the evidence would alter the outcome of the proceeding or that the information is subject to discovery under Article 39.14 . . . That a request 'could' reveal significant information is nothing more than a mere possibility, which is insufficient for purposes of mandatory disclosure under Article 39.14(a).")

would have been different.'"[233] To be sure, there has been at least one case, in dicta, interpreting the Morton Act in line with an open file regime,[234] but this case was not published and is non-binding. Further, prosecutors in Texas have actually alleged wrongful termination for their compliance with *Brady* and the Morton Act.[235]

The courts of Texas interpret the new discovery regulation using conceptions of materiality that predate the Morton Act and modern *Brady* doctrine by thirty years. More importantly, this interpretation actively disregards the intention of the Texas legislature, showing that statutory change alone can be ineffective in bringing about discovery reform.[236] Juridical theories and assumptions about the trial process and what role evidence has in arriving at truth and accuracy are vital to real-world outcomes.[237]

Because the concept of materiality is so laden with definitions and limitations that do not serve the purposes of accurate factfinding, it may be advisable to abandon the term altogether.[238] Materiality must be given its originally understood definition—having the "tendency to influence, or []

[233] Whitney v. State, No. 05-17-00417-CR, 2018 WL 3583358, at *3 (Tex. App. July 26, 2018); Moody v. State, 551 S.W.3d 167, 171 (Tex. App. 2017) ("[P]assage of the Michael Morton Act in 2014 amended article 39.14(a) . . . Appellant does not provide argument or authority to explain *why article 39.14(a) would impose any greater duty of preservation on the State* than has previously been imposed under *Youngblood* and other jurisprudence, that is, that the State may destroy potentially favorable evidence as long as it does not do so in bad faith, i.e., at a time when its potential for exoneration was apparent.") (emphasis added); Meza v. State, No. 07-15-00418-CR, 2016 WL 5786949 at *2 (Tex. App. Sep. 29, 2016) (citation omitted).

[234] Hart v. State, 2016 WL 4533419, at *5 (Tex. App. Aug. 30, 2016) ("The Act creates a general, continuous duty of the State to disclose before, during, or after trial any discovery evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive.").

[235] *See generally* Hillman v. Nueces Cty., No. 17-0588, 2019 WL 1231341, at *1 (Tex. Mar. 15, 2019).

[236] Without judicial enforcement, the Act loses its meaning. If applied with a correct interpretation of materiality, the Act can make a big difference; of the change, Travis County District Attorney Rosemary Lehmberg said, "We've got to have every scrap of evidence. It's the way things should be, but we have been surprised at how dramatic the increase in the workload has been." Esther Robards-Forbes, *Michael Morton Act boosts transparency — and workload, attorneys say*, STATESMAN (Aug. 11, 2014), https://www.statesman.com/news/20140811/michael-morton-act-boosts-transparency--and-workload-attorneys-say [https://perma.cc/5A2W-Z2R6].

[237] See *infra* Section II, III.

[238] *See* Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., dissenting). Since we have given materiality such a broken and twisted definition, it seems wise to define it anew—or scrap it.

capable of influencing, the decision of the tribunal in making a determination required to be made."[239] The interpretations of the Morton Act demonstrate the long-standing commitment many lawyers—prosecutors and judges alike—have to inaccurate definitions of materiality.[240] For the Morton Act to realize its full potential, it will be necessary for the Criminal Court of Appeals to rule on the materiality issue in line with the purposes of the legislature.[241] The Morton Act endeavored to move towards a more explanatory account of the evidence but has been held back by materiality definitions underpinned by probabilism.

CONCLUSION

While there has been a movement towards an explanatory conception of juridical proof, that movement is only beginning to take root. If factfinders are expected to hand down confident verdicts, then the trial processes and evidentiary standards we employ must reflect how humans reason and make decisions. Explanatory concepts provide the best current model for how trials function, and in turn, show how *Brady*, criminal discovery, and pervading ideas about the materiality of evidence are pivotal to the success of our legal system. Remember that trials are processes in which factfinders weigh the competing explanations of what happened against the evidence presented at trial and the burden of proof; depriving a party of information she could use in presenting her case, then, is an affront to due process of law. If we are to maintain our commitment to due process of law and hold the State to its burden, criminal discovery must be expanded to give each party full opportunity to develop her own account of the evidence.

Both the Supreme Court and lower courts need to abandon probabilistic language in their materiality inquiry. Although the Supreme Court has moved towards an explanatory account of evidence and has pushed lower courts to examine how suppressed evidence relates to the case as a whole and the parties' strategies, the Court has relapsed into probabilism at critical

[239] Weinstock v. United States, 231 F.2d 699, 702–03 (D.C. 1956); *see also* COMMITTEE REPORT, *supra* note 206, at 1 (describing how the Morton Act gives a defendant access to "the evidence relevant to his guilt or innocence").

[240] State v. Escobedo, No. 13-16-00684-CR, 2018 WL 6627321, at *7 (Tex. App. Dec. 19, 2018) (equating the Morton Act with a *Brady* assessment and holding that "there is not a reasonable probability that but for the failure to produce the undisclosed information . . . the jury would not have convicted [the defendant]."); Nelson v. State, 2018 WL 6495171 at *13 (Tex. App. Dec. 11, 2018) ("Limited statutory discovery is available pursuant to . . . article 39.14 . . . Article 39.14 does not require the State to comply with general tools of discovery used in civil cases, such as the requests for admissions and requests for production of documents that appellants served here.").

[241] Or for the legislature to amend its work.

junctures. Those lapses into probabilism diminish the burden placed on the State, because the defendant cannot fully present her case. This constitutes a violation of due process of law. The materiality of evidence is not a question of whether the outcome of the trial would have changed, but instead whether the evidence could be used to influence the factfinder in reaching a verdict. Withholding this evidence from the defendant diminishes the State's burden, increases the burden for the defense, and casts doubt over whether a conviction has been found beyond a reasonable doubt.

The Texas story shows that so long as probabilism remains part of the materiality test, judges and prosecutors have the means to skirt modern and more accurate materiality standards. Moreover, the Texas experience also shows that changing how we define materiality is imperative even where legislative reform is successful. In the meantime, the states seeking to reform their criminal discovery would be best served by either removing materiality language from discovery statutes or defining materiality very specifically—particularly in recognition of the widespread judicial adherence to an incorrect conception of materiality. The Morton Act shows a commitment to creating fair trials, but its shortfalls show what the next crux of reform must be.

For the United States to retain its commitment to rule of law and due process, it must materially rethink criminal discovery.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ali Sadr Hashemi Nejad,

Defendant.

18-cr-224 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

Mr. Ali Sadr has been under criminal indictment for over two years. On March 16, 2020, following a two-week trial, a jury convicted Mr. Sadr of conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, bank fraud conspiracy, and money laundering. *See* Dkt. No. 310. Mr. Sadr could face years of incarceration and other collateral consequences as a result of his conviction. At the time the jury convicted, the Government moved for Mr. Sadr's immediate detention, which the Court denied. *See* Trial Tr. at 2129:1–10. A co-defendant in the indictment, Bahram Karimi, has not yet been tried.

On Friday evening, June 5, 2020, however, the Court received an application from the United States Attorney for the Southern District of New York "for an order of *nolle prosequi* of the Indictments filed in this case against Ali Sadr Hashemi Nejadin ('Sadr') and Bahram Karimi." Dkt. Nos. 348, 348-1. The letter accompanying the application says that "[t]he Court is familiar with disclosure-related issues that arose during the March 2020 trial as well as in pre- and post-trial motion practice, including with respect to the pretrial suppression litigation." Dkt. No. 348. The United States Attorney concludes that "the Government has determined that it would not be in the interests of justice to further prosecute this case." *Id.*

The letter from the United States Attorney follows a number of developments in this case that, even before his letter, raised serious concerns about the conduct of the Government, from the actions that led the Court to suppress material pre-trial, *see generally* Dkt. No. 197; to a conceded *Brady* violation during the course of the trial involving GX 411 that caused the Court to give the jury a curative instruction and strike portions of the testimony of a Government witness, *see* Trial Tr. at 1391:9–17, 1822:3–21; to Government counsel's efforts to conceal that late disclosure from defense counsel, *see* Dkt. No. 279-1, and then mislead the Court about that effort, *see* Dkt. No. 277 at 1; Trial Tr. at 989:16–994:2. Since trial, the Government has continued to turn over material that it apparently failed to produce before and during trial. *See* Dkt. Nos. 303, 305, 337, 340, 341. In the post-verdict motions, the defense alleges that these additional disclosure failures by the Government support its *Brady* motion, *see* Dkt. No. 336 at 56–69; Dkt. No. 341 at 1–7, and call into question the Government's account of GX 411, *see* Dkt. No. 341 at 7–9.

Mr. Sadr has now submitted a response to the Government's application. *See* Dkt. No. 349. In it, he contends that the *nolle prosequi* is not the proper mechanism for dismissal and instead requests that the Court enter an order granting Mr. Sadr's—now unopposed—new trial motion (based, in relevant part, on *Brady* violations), setting aside the verdict, and dismissing the case with prejudice. *Id.*

On or before June 18, 2020, the Government is ordered to respond to Mr. Sadr's submission, including his specific suggestion for the appropriate mechanism for dismissal, as outlined in Dkt. No. 349. The Government's submission must also include specific answers to the following questions:

1. List all material in the case that was potentially improperly withheld from the defense.

a. For each item responding to 1, indicate all Government attorneys who were responsible for the disclosure failures, including supervisors.

b. For each item responding to 1, indicate whether the Government agrees or disagrees that the withholding of the item was intentional withholding of exculpatory evidence.

2. Identify with specificity the "disclosure-related issues that arose during the March 2020 trial as well as in pre- and post-trial motion practice, including with respect to the pretrial suppression litigation," Dkt No. 348, that are the basis for the Government seeking to *nolle* the indictment against Mr. Karimi, who has not yet been tried.

3. Identify all Government lawyers, including supervisors, who were involved in the decision to transmit GX 411 to the defense during trial without expressly indicating that it had not previously been disclosed. *See* Dkt. No. 279-1 at 3.

4. In an order dated March 8, 2020, the Court required, among other things, the Government to "explain precisely when and how it realized that [GX 411] had erroneously been withheld and when, if at all, upon learning of the failure to disclose this was communicated to the defense." Dkt. No. 290. In its response letter, the Government explained that "members of the team discussed the document . . . and confirmed that it likely had not been produced to the defense previously. The Government promptly had a paralegal mark it as an exhibit and produced it to the defense along with other exhibits and 3500 material. The *Government made clear that GX 411 was a newly marked exhibit* and that we intended to offer it . . . ." Dkt. No. 277 (emphasis added). In Court the next day, the Government conceded that this was false. *See* Trial Tr. at 993:24–994:2 (Court: "When this was disclosed to the defense Saturday around 4:00, did you identify it as a newly-marked document?" AUSA: "No."). In a letter dated March 9, 2020, "the Government reiterate[d] its earlier concessions of error in failing to timely produce GX 411, *and failing to make accurate disclosures regarding the status of the document on March 7 and March 8, 2020*." Dkt. No. 283 at 1 (emphasis added).

a. In light of how GX 411 was actually transmitted to the defense, was it false and/or misleading to state to the Court that "[t]he Government made clear that GX 411 was a newly marked exhibit"?

b. Name all Government lawyers, including supervisors, who were involved in making that representation to the Court.

5. Do the disclosures made by the Government after trial on May 21, 2020, discussed in Dkt 341 at 7–9, cast doubt on any representations made to the Court, including in the March 9, 2020 letter, about the prosecutions team's awareness of the contents of GX 411? Name all Government lawyers, including supervisors, responsible for any misstatements made to the Court.

6. Identify all known misstatements (in writing or orally) made to the Court about disclosure issues in this case.

7. Following a conceded *Brady* violation in another case before this Court *in United States v. Pizarro*, No. 17-cr-151, the leadership in the United States Attorney's Office assured the Court that significant new training on disclosure issues was being systematically instituted in the Office in order to prevent a similar issue from recurring. Did all AUSAs in this matter, including the Special AUSA (SAUSA) assigned from the District Attorney of New York (DANY), receive the newly-instituted training?

8. What, if any, steps are being taken by the US Attorney's Office and/or DANY, in response to the handling of this case?

9. Does the Government agree that even after granting the application for *nolle prosequi* or dismissing the indictment in the manner requested by the defense, the Court possesses continuing supervisory authority to determine if sanctions are appropriate for any ethical violations and/or prosecutorial misconduct? *See United States v. Seltzer*, 227 F.3d 36, 41–42 (2d Cir. 2000) (discussing district courts' inherent power to impose sanctions).

SO ORDERED.

Dated: June 9, 2020
New York, New York

ALISON J. NATHAN
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ali Sadr Hashemi Nejad,

Defendant.

18-cr-224 (AJN)

<u>OPINION & ORDER</u>

ALISON J. NATHAN, District Judge:

Federal prosecutors have constitutional and statutory duties to disclose many types of evidence to defendants. This principle of disclosure is central to our criminal-justice system. "A prosecutor 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 v. Maryland*, 373 U.S. 83, 87–88 (1963). And federal prosecutors, like all parties that appear before the Court, have ethical duties of candor. *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962) ("The prosecution has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth."). In the near decade the Undersigned has sat on the bench in the Southern District of New York, the vast majority of Assistant United States Attorneys before the Court have embraced their disclosure obligations, worked diligently to meet them, and forthrightly admitted when they did not.

But not all. In this case, federal prosecutors have by their own admission repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor. Over the course of years in this prosecution—before, during, and after trial—the

Government has made countless belated disclosures of arguably (and, in one instance, admittedly) exculpatory evidence. For some pieces of evidence, the Government provides plausible explanations for its late disclosure. For others, it provides no explanation at all. And when the Court pressed for more information about one of these failures, the Government made a misrepresentation to the Court. This serious dereliction requires a serious response.

The story begins in 2018, with the Government's indictment of Mr. Sadr. After a two-week trial in March 2020, a jury found him guilty on five counts. But in part because of its disclosure failures, the Government later agreed that the Court should grant Mr. Sadr's motion for a new trial, vacate his guilty verdict, and dismiss the indictment against him with prejudice. The Court did just that, thus ending this criminal proceeding with respect to Mr. Sadr—but it is not the end of the matter. As this Court stated to the Government lawyers at trial and in several later orders, the serious and pervasive issues related to disclosure failures and misleading statements to the Court by at least one or more of the Government lawyers must be addressed separate and apart from the resolution of this case against Mr. Sadr. *See* Trial Tr. at 998:8–9; Dkt. Nos. 350, 357.

Consistent with that view, after dismissing the indictment, the Court pressed the Government for more information about its disclosure failures and misstatements. Unfortunately, the response from the United States Attorney's Office (USAO) for the Southern District of New York has been inadequate. To be clear, the Court does commend the USAO for admitting error and ultimately seeking to do justice in this case. But the dismissal of charges is not a basis for sweeping the Government's repeated failures under the rug. Nor does the dismissal of the indictment obviate the need for inquiry into whether the Government intentionally and in bad faith withheld exculpatory evidence or intentionally misled the Court.

The Court hoped that the Government's response would create a record sufficient to resolve these issues. Instead, the Government revealed an array of additional errors, including disclosure failures and new admissions of misconduct related to the Government's handling of search-warrant returns.

The Government also revealed new, highly problematic internal communications between the AUSAs who prosecuted this case. In particular, in the middle of trial, Government lawyers allegedly realized for the first time that they had not turned over a particular document to the defense. Instead of immediately disclosing that file, Government lawyers spent almost twenty hours strategizing how best to turn it over. One prosecutor suggested to another that they "bury" the evidence along with other, already-disclosed documents, and the second prosecutor agreed. And after looping in more prosecutors, the Government did just that, obfuscating its disclosure. The Government now admits that this document had exculpatory value for Mr. Sadr. Disappointingly, the leadership of the USAO has failed to unequivocally condemn these prosecutors' improper actions and communications, and the Court has not been ensured that an investigation by the Department of Justice's Office of Professional Responsibility will take place. A further response is therefore required from the Court.

Such a response includes making a clear record of the Government's failures in this case in an effort to prevent these issues from reoccurring. The Court thus begins by recounting the factual and procedural background of this prosecution. The Court then details the Government's many search-warrant and disclosure-related failures and urges structural solutions. This factual recitation is based on information provided by the Government. The Court then narrows its focus to a single piece of evidence disclosed mid-trial, and concludes that the Government both violated its disclosure obligations and subsequently made a misrepresentation to the Court about

its conduct. The Court finally orders additional fact-finding and briefing to determine whether any of the Government lawyers in this case either intentionally withheld exculpatory evidence or intentionally misled the Court about one of the late disclosures.

Government lawyers wield enormous prosecutorial power. They must exercise it in a way that is fully consistent with their constitutional and ethical obligations. And it is the obligation of the courts to ensure that they do and hold them accountable if they do not.

I. DISCLOSURE AND SUPPRESSION FAILURES RESULT IN DISMISSAL OF THE INDICTMENT

In March 2018, the Government charged Mr. Sadr with conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, bank-fraud conspiracy, money laundering, and money-laundering conspiracy. Dkt. No. 2. Over one year later, this case was transferred to the Undersigned. This Court presided over extensive pretrial litigation—including suppression litigation—after which Mr. Sadr's case proceeded to trial. *See* Dkt. Nos. 164, 197. The Court held a two-week trial in early March 2020, during which the jury continued to serve diligently despite the onset of the COVID-19 pandemic in New York City. On March 16, 2020, the jury convicted Mr. Sadr on five counts, finding him guilty on all but the money-laundering-conspiracy charge. *See* Dkt. No. 310. The Government asked that Mr. Sadr immediately be taken into federal custody, but the Court denied this request. *See* Trial Tr. at 2129:1–10.

After the trial, Mr. Sadr moved for acquittal as a matter of law or, in the alternative, for a new trial. Dkt. No. 335. Although the Court was assured in March that the disclosure issues in this case were being raised at the "level of the U.S. Attorney," Trial Tr. at 996:6–10, it was apparently not until the end of May 2020 that the USAO's Criminal Discovery Coordinator and Professional Responsibility Officer "began" looking into disclosure issues in this case. Dkt. No.

352 at 1. As a result of this inquiry—and while Mr. Sadr's motion remained pending—the Government determined that it would not be in the "interests of justice" to further prosecute this case. Dkt. Nos. 348, 348-1. It thus took the extraordinary step of asking the Court to enter an order of *nolle prosequi* as to the indictments filed against both Mr. Sadr and his co-defendant Bahram Karimi. *Id.*

While Mr. Sadr agreed that the indictment against him should be dismissed with prejudice, he disagreed with the Government's proposed procedural mechanism for dismissal. *See* Dkt. Nos. 349. The Government eventually acceded to Mr. Sadr's request that the verdict be vacated and a new trial be granted under Federal Rule of Criminal Procedure 33(a), and that the indictment subsequently be dismissed with prejudice under Rule 48(a). *See* Dkt. Nos. 360, 361. On July 17, 2020, the Court therefore granted Mr. Sadr's motion for a new trial, vacated the verdict against him, and dismissed the indictment with prejudice. *See* Dkt. No. 362. The Court's July 17 Order referenced the Government's explicit acknowledgement of the "disclosure-related issues that arose during the March 2020 trial as well as in pre- and post-trial motion practice, including with respect to pretrial suppression litigation." *See id.* (quoting Dkt. No. 348).

As noted, the Court commends the USAO's admission of error and effort to do justice in this case by agreeing to dismiss the indictment. Better late than never. Still, that dismissal cannot be a basis for failing to grapple fully with the Government's many errors in this prosecution.

II. THE EXISTING RECORD EXPOSES SIGNIFICANT ERRORS

Before granting Mr. Sadr's motion for a new trial and vacating his conviction, the Court ordered the Government to respond to a series of questions addressing disclosure-related issues and any associated misrepresentations or misstatements made to the Court. *See* Dkt. No. 350. The Government's responses not only detailed issues already familiar to the Court, but they also

raised—for the first time, over two years after this case was charged and over two months after a jury found Mr. Sadr guilty on five counts—a slew of search-warrant-related issues implicating the Fourth Amendment. Several of these issues, both new and old, suggest patterns that may extend beyond this case and require systemic solutions.

A. Suppression Issues

The Court begins briefly with suppression issues raised by the Government for the first time in its July 2, 2020 letter. *See* Dkt. No. 354. To understand these issues, some background is helpful: The Manhattan District Attorney's Office (DANY) investigated this matter for state-law crimes before referring the case to the USAO. During its state-law investigation, DANY executed search warrants of various email accounts, including Mr. Sadr's personal email accounts. *See, e.g.*, Dkt. No. 96-1. The affidavit in support of one warrant cited "reasonable cause to believe that evidence of the crimes of Money Laundering [under New York State Law,] as well as attempt and conspiracy to commit said crimes, may be found" in these email accounts. *Id.* at 3–4. And the warrant authorized "members of the New York County District Attorney's Office" to seize and search these documents. *Id.* at 38–39. Some of those emails were later turned over to the USAO, and the Government viewed their content as "particularly incriminating and pertinent." Dkt. No. 147-3. Mr. Sadr however argued in his pretrial motions that much of this evidence should be suppressed. The Court only partially granted his request, rejected most of Mr. Sadr's arguments, and allowed the Government to rely upon thousands of pages of seized documents. *See United States v. Sadr*, 436 F. Supp. 3d 707, 736–38 (S.D.N.Y. 2020).

During this extensive pretrial suppression litigation, Government lawyers consistently argued that DANY searched those state email search-warrant returns for material pertinent to violations of state law alleged in those warrants. Dkt. No. 354 at 16. In September 2019, the

Government specifically represented to Mr. Sadr "that the email search warrant returns had been reviewed by DANY personnel and that after the DANY review had ended . . . , 'hot docs' were provided to the U.S. Attorney's Office." *See id.*; *see also* Dkt. No. 147-3. But over six years after the first of these state email search warrants was issued, the Government now informs the Court—and Mr. Sadr—that in fact federal investigators were mining the state search-warrant returns for federal crimes without authorization of a warrant. Dkt. No. 354 at 6, 16. The Government confesses that "early on in the DANY investigation, the FBI had had DANY personnel search email data in general support of at least one witness interview, and that the FBI *was investigating federal crimes rather than the state-law offenses at issue in the warrants, contrary to arguments [the Government] made during suppression litigation.*" Dkt. No. 354 at 6 (emphasis added). The Government further acknowledges "that the FBI was seeking to use material gathered in response to the state email search warrants in aid of FBI interviews, and to further investigation of federal charges." *Id.* at 7. This conduct was likely unconstitutional because review of search-warrant returns must be done in conformity with the warrants themselves. *See generally United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) ("A search must be confined to the terms and limitations of the warrant authorizing it."). Moreover, the Government now admits that a central premise of its pretrial arguments opposing Mr. Sadr's suppression motion was directly contrary to what actually occurred during the investigation of this case.

The Court cannot state with certainty the outcome of the pretrial suppression litigation had these additional search-warrant-related issues come to light earlier. But it is certainly possible, as Mr. Sadr argues, that had the Government "disclosed the true facts [regarding the execution of the state email search warrants] to [him], the email evidence would have been

suppressed, and the trial would have been avoided altogether." Dkt. No. 355 at 5. Indeed, one of the Government's arguments in seeking dismissal of the indictment against Mr. Sadr's co-defendant Bahram Karimi, who was not tried (and thus not prejudiced by the late disclosure issues discussed extensively below), is that the discovery of the FBI's involvement in DANY's investigation creates a "substantial risk that essential email evidence would be suppressed." Dkt. No. 354 at 7. What is clear, however, from the Government's belated revelations is that the USAO for SDNY specifically, and the Department of Justice more broadly, must implement policy and training procedures that instill in FBI agents the permissible limits of searching electronic warrant returns in a way that conforms to constitutional requirements. Moreover, AUSAs must be trained to conduct proper due diligence about the conduct of investigating agents *before* making misleading representations to the Court about that conduct. *See, e.g.*, Dkt. No. 155 at 3–4 (describing searches of state email search-warrant returns from April 2014 to April 2017, but nowhere mentioning FBI investigation of federal crimes during this period). And if any of the Government lawyers made (or allowed others to make) knowing misrepresentations to the Court in opposing the motion to suppress, as Mr. Sadr argues likely occurred, Dkt. No. 355, their conduct would constitute an egregious ethical violation.

In light of the dismissal of the indictments here, there will be no further litigation of these issues before the Court. Accordingly, it is the view of the Court that the suppression issues belatedly revealed by the Government in its July 2 letter, Dkt. No. 354, ought to be the subject of a referral to the Department of Justice's Office of Professional Responsibility for a full investigation.

B. Disclosure Issues

The Court next turns to the numerous disclosure-related issues that arose prior to, during, and after Mr. Sadr's trial. Disclosure-related issues first arose shortly after this case was

transferred to the Undersigned and have—disturbingly—continued unabated since. The Court and Mr. Sadr were made aware of the first of these issues in a conference held on September 9, 2019. At that conference, the Government revealed to Mr. Sadr for the first time information it had learned back in May 2019—namely, that "there were custodians searched and documents seized . . . that were not produced in [the] initial Rule 16 discovery." Dkt. No. 137 at 35:5–7. At that point in time, Mr. Sadr believed—based on representations made by the Government—that Rule 16 discovery had been closed for over a year. *See id.* at 40:11–19. The Government did not uncover these discovery-related issues until new prosecutors came into the case in the spring and summer of 2019 and, "in the process of attempting to understand the case," asked questions of former prosecutors regarding the production of documents to the defense. *See id.* at 35:14–22. As a result of the Government's failure to timely comply with its discovery obligations, it agreed not to rely on any of the untimely produced documents at trial. *See* Dkt. No. 155 at 11; Dkt. No. 173 at 38:24–39:4.

The next disclosure-related issue arose during trial, shortly before the Government rested. Though the Court discusses issues surrounding Government Exhibit (GX) 411 in greater detail below, *see* Section III, it mentions the Government's failure to timely disclose this exhibit here to situate it within the larger pattern of the Government's failure to satisfy its disclosure obligations under the Constitution and the Federal Rules of Criminal Procedure. GX 411 is a letter sent by Commerzbank to the Office of Foreign Assets Control (OFAC) flagging the first payment charged in this case. *See* Dkt. No. 274-1. The failure to timely disclose this exhibit precipitated a cascade of failures to timely disclose related materials—including materials from DANY's and the USAO's earlier investigations of Commerzbank and communications with OFAC—some of which were not disclosed until after the trial in this case had concluded. *See*

Dkt. No. 354 at 3, 8–9.

The belated disclosures did not stop there. The Government disclosed several additional possibly exculpatory documents *after* the trial in this case ended. Perhaps the most egregious of these relate to two interviews of Mr. Sadr's co-defendant, Mr. Karimi. First, a recording was made by Canadian authorities of a January 22, 2020 interview with Mr. Karimi. *See* Dkt. No. 307-1 at 2. On February 3, 2020, after Mr. Karimi's public indictment, counsel for Mr. Sadr requested Mr. Karimi's witness statements. *See id.* at 3. On February 11, 2020, the FBI New York office received a recording of the January 22, 2020 interview of Mr. Karimi. *See id.* at 4. By the next week, the FBI special agents were aware that the FBI was in possession of the recording—but they did not inform the prosecutors of this fact. *See id.* Due to communication breakdowns between the prosecutors and the FBI, the prosecutors informed Mr. Sadr on two separate occasions—first on February 23, 2020, and again on March 10, 2020—that the FBI had requested but not yet received the recording from Canadian authorities. *See id.* at 5. After trial ended, an AUSA followed up with the FBI and learned that the recording *had been in the FBI's possession since before the trial had started*. *See id.* at 5–6. The Government finally produced the recording to Mr. Sadr on March 31, 2020, over two weeks after Mr. Sadr's trial had ended. *See id.* at 6.

Second, a classified FD-1057 report was created from an interview with Mr. Karimi on September 14, 2016. *See* Dkt. No. 354 at 5. Yet despite multiple communications with the FBI, beginning in 2017, regarding discoverable information, the prosecutors on this case did not learn of the FD-1057 Karimi report until an AUSA conducted an "on-site personal review of the FBI case file" in *mid-May 2020*, two months after trial. *Id.* As a result, this report was not declassified and disclosed to Mr. Sadr until May 19, 2020. *Id.* The Government attributes the

failure to timely disclose this report, as well as the recording discussed above, to breakdowns in communication between prosecutors and the FBI. Troublingly, the Government makes little effort to explain in detail *why* or *how* these communication breakdowns came to pass, or *why* the prosecutors—well aware of their constitutional and statutory obligations—were not more diligent in communicating with the FBI.

The final category of disclosures made after trial consists of three FBI interview reports (FD-302s) of interviews with Victor Aular, the former CFO and Director of a Venezuelan state-owned oil company, that took place in early 2016. *See* Dkt. No. 354 at 3–4. The parties dispute whether these interviews constitute *Brady* material that the Government was required to disclose. *Compare* Dkt. No. 354 at 3–4 *with* Dkt. No. 355 at 4. But the Government concedes that "even if not required to be disclosed, the Aular 302s *should have been* disclosed ahead of trial as a matter of good practice so that potential defense theories about Sadr's state of mind . . . and the admissibility of Aular's statements, could have been developed and addressed in an orderly fashion in limine." Dkt. No. 354 at 4 (emphasis added). Setting aside whether these interview reports constitute *Brady* material, the Government's handling of them reveals failures in its treatment of potentially exculpatory material. Specifically, at the end of January 2020, the prosecutors discussed whether they were required to disclose the Aular 302s under *Brady*. One prosecutor suggested that it "could be worth running [the question] by a chief," but the AUSAs inexplicably "*did not further pursue the question*" and did not ultimately disclose the interview reports to Mr. Sadr pre-trial. *See id.* (emphasis added). Especially in light of the trial blinders that prevented it from timely disclosing conceded *Brady* material to Mr. Sadr, *see* Section III, the Government's failure to further pursue the question of whether the Aular 302s were required to be disclosed under *Brady* is shocking. And even if the Government had considered the *Brady*

question and concluded that the Aular 302s did not constitute *Brady* material, the Court agrees that the 302s should nonetheless have been disclosed in advance of trial as a matter of good practice. *See Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (noting that a prosecutor's ethical "obligation to disclose evidence favorable to the defense" may be broader than constitutional or statutory duties) (citing ABA Model Rule of Professional Conduct 3.8(d)). Better training and an expansive approach to the Government's discovery obligations would help ensure that, in the future, "trial blinders" do not cause AUSAs to wrongfully withhold potentially exculpatory evidence.

The Court turns finally to the Government's complete failure to produce certain classified material at any point—either before, during, or after trial. During its post-trial review, the Government discovered additional classified material subject to Rule 16 disclosure that was never declassified and disclosed to Mr. Sadr. *See* Dkt. No. 354 at 5. It does not explain why this material was discovered only after trial, and it maintains that, following its application for an order of *nolle prosequi*, the components of the United States Government involved in the handling of classified information would have been unlikely to authorize use of the information. *See id.* As a result, this classified material has never been disclosed to Mr. Sadr.

C. These Issues Call for Systemic Solutions

Having set forth several of the suppression and disclosure-related issues that plagued the prosecution in this case, the Court notes some common themes that have emerged. The issues discussed above appear to have been precipitated by one or a number of the following factors:

1. The sheer number of prosecutors who worked on this case (fourteen total—seven line prosecutors, one Special Assistant United States Attorney (SAUSA), and six supervisors, *see* Dkt. No. 354 at 1–2);
2. The frequency with which different prosecutors subbed into and out of the case, *see id.*;

3. The number of AUSAs on the trial team (this case was tried by four Government lawyers);
4. A failure to coordinate and effectively communicate with the Manhattan District Attorney's Office;
5. Failures to communicate between the AUSAs and the Special Assistant United States Attorney appointed from DANY;
6. Breakdowns in communication between the FBI and line prosecutors, including regarding the FBI's investigation of this case;
7. Insufficient training of FBI agents and AUSAs on appropriate limits to searches of electronic search-warrant returns;
8. Insufficient training for all participating AUSAs and the SAUSA on disclosure obligations;
9. Insufficient policies in place that ensure timely and complete compliance with disclosure obligations; *and*
10. Insufficient supervision of disclosure obligations by the USAO's Unit Chiefs.

It is possible that the issues articulated above, as well as the precipitating factors the Court identifies, are not unique to this case. Indeed, in the last criminal case tried before the Undersigned, the Government also seriously breached its *Brady* obligations. *See United States v. Robert Pizarro*, No. 17-cr-151 (AJN). Following that revelation, the Court was repeatedly assured by the leadership of the USAO that the matter was being taken seriously, would be systemically addressed through training, and would not reoccur. No. 17-cr-151 (AJN), Dkt. No. 135 at 8:11–10:10, 58:2–15. The record before the Court in this case belies those assurances.

It is impossible for the Undersigned alone to address and resolve these issues. Here too, it is thus the Court's view that these errors should be investigated by DOJ's Office of Professional Responsibility. Moreover, the manifold problems that have arisen throughout this prosecution—and that may well have gone undetected in countless others—cry out for a *coordinated*, *systemic* response from the highest levels of leadership within the United States Attorney's Office for the Southern District of New York. The Court implores the Acting United

States Attorney to take seriously the numerous deficiencies set out in detail above and to take action to ensure future prosecutions brought under the aegis of her office do not suffer from the same. In that regard, the Court will prescribe her first order of business: the Acting United States Attorney shall ensure that all current AUSAs and Special AUSAs read this Opinion.

III. THE GOVERNMENT'S FAILURE TO DISCLOSE EXHIBIT 411

The Court next turns to a narrower set of concerns related to Government Exhibit 411. The Court concludes that the Government failed to satisfy its disclosure obligations with respect to this exhibit and then made a misrepresentation to the Court about its conduct. Unfortunately, following the Government's July 2 letter, there remain several significant open questions regarding the Government's conduct that this Court is obligated to resolve. As explained below, further fact-finding by the Court is necessary.

A. The Government Admits GX 411 is Exculpatory

Before diving into the Government's failure to timely disclose GX 411, it is helpful to catalogue the contents of this document and explain why the Government now concedes that it has exculpatory value for Mr. Sadr.

The document that came to be known as Government Exhibit 411 is a 2011 letter from the New York branch of Commerzbank, a German financial institution, to the Treasury Department's Office of Foreign Assets Control. *See* Dkt. No. 274-1 (GX 411). In this letter, Commerzbank's New York branch informs OFAC of an approximately $30 million payment from a Venezuelan entity to Stratus International Contracting Company. As noted, this payment is the first payment charged in this case. The letter further provides information about Stratus and notes that the "purpose of the payment is for the construction of a 7000 apartment unit project" in Venezuela. *Id.* The letter goes on to say that "Although Stratus is not listed as an SDN [Specially Designated National], and the payment does not indicate any direct involvement

of Iran or with Iran, due to conflicting information between [Stratus's] website and the response forwarded by the [Venezuelan bank], [Commerzbank] believes it appropriate to share this information with OFAC since Stratus may be an Iranian Company." *Id.* The letter concludes by noting that Commerzbank had added Stratus "into [its] sanctions filter to monitor any future payments," that Commerzbank had not processed any other transactions involving Stratus, and that this information was being provided to OFAC in hopes of complying with Commerzbank's sanctions-related reporting requirements. *Id.*

The Government maintains that for years it viewed the letter as wholly inculpatory. Specifically, the Government argues that GX 411 was "helpful [to its case-in-chief] because it showed that the information the defendant was trying to hide from the bank was material to the bank, which wouldn't have processed the transaction if it knew it was connected to Iran, and that the bank put the name of the company on its sanctions filter." Dkt. No. 354 at 11; *see also* Trial Tr. at 986:7–16 (The Court: "In the course of this discussion was there any notion as to [GX 411's] potential use to the defense case, having yourselves sat through a week of trial, heard rulings on objections, heard the defendant's opening, in any of that discussion, right at the moment you're talking about, is there the thought: Whether we want to use this or not, it needs to be turned over?" The Government: "Candidly, your Honor, no, there was not that discussion. The discussion was solely about how inculpatory the government viewed the document.").

Mr. Sadr, however, contends that the letter is exculpatory for a slew of reasons. *See* Dkt. No. 274 at 1–2; Dkt. No. 336 at 70–77. To take just a few of Mr. Sadr's explanations of the letter's clear exculpatory value, he argues that GX 411 shows that the affiliation between the recipient of the payment—Stratus International Contracting, a Turkish company—and Stratus Group, an Iranian conglomerate, was immaterial to OFAC. *See* Dkt. No. 274 at 1–2. Indeed, he

points out that this affiliation was ultimately not enough for OFAC to stop U.S. dollar payments to Stratus International Contracting. *Id.* at 2. This point undermines several counts of the indictment, including at least the *Klein* conspiracy alleged in Count One and the bank fraud "right to control" charges alleged in Counts Three and Four. Each of these counts is predicated on the prospect of OFAC enforcement—and associated penalties levied on the intermediary banks—had OFAC known of Stratus International Contracting's Iranian connections. *See United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996) (holding that a *Klein* conspiracy requires a "purpose of *impairing, obstructing, or defeating the lawful function*" of OFAC (citation omitted)); *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (holding that "misrepresentations or non-disclosure of information cannot support a conviction under the 'right to control' theory [of bank fraud] unless those misrepresentations or non-disclosures can or do result in tangible economic harm" to the banks at issue). But as GX 411 and related disclosures demonstrate, when OFAC was apprised by Commerzbank of this very fact, it took *no* enforcement action.

Mr. Sadr also contends that this letter undermines an argument that was central to the Government's trial theory: that Mr. Sadr structured the charged transactions to conceal connections to Iran. To the contrary, he claims that GX 411 demonstrates that the affiliation between Stratus International Contracting and Stratus Group was readily identifiable—so readily identifiable that it was discovered when the *first* charged payment was processed. *See* Dkt. No. 336 at 74. For these reasons, Mr. Sadr's attorneys stress that if GX 411 had been timely disclosed, their pre-trial investigation, theory of the case, opening and closing statements to the jury, evidentiary submissions, and cross examination of a Government witness all would have materially differed. Dkt. No. 336 at 74–75; Trial Tr. 999:8–18.

The Government has now come around to Mr. Sadr's position and concedes that GX 411 has exculpatory value. *See* Dkt. No. 275 at 2; Dkt. No. 354 at 8; Trial Tr. at 1005:5–6. In the Government's own words, GX 411 is exculpatory because it "advances the defendant's claim that any decision by OFAC not to take enforcement action following this disclosure is probative of the risk of harm from OFAC enforcement that banks face when they process transactions in violation of the sanctions law." Dkt. No. 275 at 2. The Government has thus "concede[d] that it erroneously failed to timely disclose the document at issue, and apologize[d] to the Court and counsel for its error." *Id.* at 1.

B. The Government Has Possessed GX 411 Since 2015

Even accepting the Government's contention that it did not appreciate the letter's exculpatory value does not change the fact that government actors knowingly possessed GX 411 for almost a decade. In January 2011, a slew of federal and state actors—Main Justice, the United States Attorney's Office for the Southern District of New York, OFAC, the Federal Reserve's Board of Governors, and the New York County District Attorney's Office—began investigating Commerzbank for violating U.S. sanctions. Dkt. No. 283 at 2; *see also* Dkt. No. 354 at 8. During these parallel investigations, Commerzbank's New York City branch provided the District Attorney's office various voluntary disclosures, one of which was GX 411. Dkt. No. 283 at 2–3. And about a year into these investigations, an Assistant District Attorney (ADA) was assigned to the District Attorney's investigation. (That ADA would later be appointed a Special Assistant United States Attorney in this case.) In March 2015, Commerzbank resolved these investigations by entering into a universal deferred prosecution agreement. *Id.* at 3; *see also* Dkt. No. 354 at 8.

Two months later, the ADA was assigned to work on the District Attorney's investigation of the "Venezuela housing matter, which ultimately led to this case." Dkt. No. 354 at 9. At

around the same time, the ADA was "boxing up material from the Commerzbank investigation that had [recently] ended." *Id.* In doing so, he "came across some documents (including or consisting of [GX 411]) that he realized related to the [investigation of Mr. Sadr.]" *Id.*; *see also* Dkt. No. 283 at 3. At that time, the ADA "set those documents aside in a hard-copy manila folder." Dkt. No. 354 at 9. These documents then lay dormant for years, somewhere in the ADA's office.

In August 2015, "[the ADA] issued a state grand jury subpoena" to Commerzbank's New York branch in connection with the District Attorney's investigation of Mr. Sadr, and the branch duly responded to that request with many documents. Dkt. No. 354 at 9; Dkt. No. 283 at 3. The parties refer to this as the "Commerzbank Subpoena Production." Dkt. No. 283 at 3. The Government produced this entire Subpoena Production to Mr. Sadr during Rule 16 discovery in this case. *Id.*; *see also* Trial Tr. 988:14–25. But there's a catch: GX 411 was *not* part of the Commerzbank Subpoena Production in this matter, so it was not produced to the defense along with these documents. GX 411 had only been turned over to the Government in the earlier and unrelated investigation of Commerzbank, and the letter remained in that manila folder on the ADA's desk for years. By the time of the Commerzbank Subpoena Production in connection with this case, GX 411's contents were, according to the Government, "lost to [the ADA's] memory." Dkt. No. 354 at 9.

Fast forward four years, to late 2019. By this point, the United States Attorney's Office had indicted Mr. Sadr, and attorneys on both sides were gearing up for trial. Around this time, the ADA, who was now an SAUSA, "rediscovered" the hard copy of GX 411 in his office. The Government has made two different representations about how this rediscovery came to pass. First, in its March 9 letter, the Government stated that on January 10, 2020, "AUSA[-1] sent an

email to [the SAUSA] . . . mention[ing] the April 4, 2011 wire transfer from Fondo Cino to Stratus International Contracting J.S. for $29 million, which is described in GX 411." Dkt. No. 283 at 4. AUSA-1 "stated a document previously provided by a witness—which was produced to the defense during Rule 16 discovery—'should be helpful in tying the wire information we have showing the Fondo Chino transfer to PDVSA.'" *Id.* Her email "triggered for [the SAUSA] a recollection of GX 411." *Id.* "That same day, [the SAUSA] located GX 411 in a hard copy file at his DANY office; [the SAUSA] had segregated [GX 411] from Commerzbank's other voluntary disclosures and stored it in the folder, but does not recall when he did so." *Id.* at 4–5. The SAUSA then emailed the prosecution team, attached GX 411, and said, "In the spirit of closing the loop on the $29M payment through Commerz, attached is the voluntary disclosure Commerze (sic) made to OFAC re: the payment." *Id.* at 5.

But in its July 2 letter, the Government puts forward a different story regarding this rediscovery. This one begins a month earlier: In December 2019, the SAUSA was "making a pre-trial sweep through his office for everything[, and] he rediscovered the separate folder of Commerzbank-Sadr documents." Dkt. No. 354 at 9. The target of the SAUSA's purported pre-trial sweep—"everything"—is vague and unclear. The SAUSA then referenced GX 411 in a December 19 email, three weeks before the January 10 email discussed above. In that December 19 email to the prosecution team, the SAUSA made the following comment, purportedly relating to GX 411: "Now I'm really going off on a tangent, but Commerzbank was an intermediary bank in the first USD payment (to Stratus Turkey) and they actually picked up on 'Stratus' in the payment message, drew the connection to the Iranian entity, and filed a report with OFAC." *Id.* Yet the SAUSA did not attach GX 411 to the December 19 email. He only shared the document with the team three weeks later, in his January 10 email discussed above. In short, the

Government has presented two different versions of events. In one, an email from a colleague "triggered" the SAUSA's memory of GX 411 in January 2020. In the other, the SAUSA was conducting a "pre-trial sweep" of his office, stumbled upon GX 411 in December 2019, and referenced GX 411 in an email that same month.

Whichever is true, here's the nub: On January 10, 2020, every prosecutor active in the case received an email with GX 411. But even on that late date—months after *Brady* and Rule 16 disclosures had been made and two months before trial—no attorney disclosed GX 411 to the defense. The Government proffers that the prosecution team made a "reasonable assumption . . . that all Commerzbank documents had previously been disclosed" through the Commerzbank Subpoena Production. *Id.* at 10. Of course, recall that GX 411 was not part of that Subpoena Production, but instead came from the earlier, non-Sadr-related investigation of Commerzbank. The Court agrees that this is a plausible explanation for why at least some of the prosecutors thought that GX 411 had already been disclosed and thus took no further action in January. From their perspective, nothing in GX 411 distinguished it from the many other documents from Commerzbank that the Government had duly disclosed. Still, it is harder to accept how the SAUSA, who was fully aware of (and indeed had worked on) the separate, non-Sadr related investigation of Commerzbank and who had himself possessed GX 411 as a result of that investigation since 2015, could have assumed throughout that GX 411 had been produced to the defense. And to be clear, he was appointed as an SAUSA in this matter effective June 2017. *Id.* at 2 n.2. As the Government recognizes, "when an attorney from another agency is appointed a SAUSA to assist this Office in a criminal case, it is this Office, and our AUSAs, who are ultimately responsible for disclosures in the case, and knowledge of any matter in the investigation that may be overlooked by a SAUSA is imputed to the Government, whether or not

the AUSAs on a case have actual knowledge of the matter." *Id.* The Government had therefore possessed GX 411 since the day Mr. Sadr was indicted—yet did not disclose the document for *more than two years*, in the midst of trial. Once again, the Government's explanation that it thought the document had been produced to the defense as part of the Commerzbank subpoena production is plausible, but the Court has lingering doubts based on matters discussed below.

C. Government Prosecutors Discuss "Burying" GX 411

Now jump forward another two months, to March 6, 2020. By this point, trial has begun. Around 8 P.M. on that Friday evening, after trial had concluded for the day, AUSA-1 was, according to the Government, "organizing her emails" and stumbled upon the SAUSA's January 10 email attaching what would later be marked as GX 411. Dkt. No. 283 at 5; Dkt. No. 354 at 10. In an email to her colleagues, she wrote, "Given what defense did today, I think [the exhibit that would later be marked as GX 411] could be really valuable to put in. Among other difficulties with doing that is the fact that I don't know that it was ever produced to defense (it's not in the Commerzbank subpoena production). [SAUSA] – do you know where it came from?" Dkt. No. 354 at 10.

But AUSA-1 was unable to get in touch with the SAUSA, so she instead spoke with AUSA-2, another prosecutor on the case. In a chat message, AUSA-1 wrote, "[I] feel like it might be too late to do anything about it, but [I] can't believe we all missed that [C]ommerzbank document," adding "[I] have no idea where that letter came from[;] [I] don't think it has ever been produced to the defense." *Id.* AUSA-2 replied, "[O]h, that letter[;] we can produce it tonight[;] produce it right now and the defense can have 3 days to review[;] that's more than enough time for one document[;] mark and produce it stat—[I] think we should at least try." *Id.* Astonishingly, AUSA-1 responded, "[I]'m wondering if we should wait until tomorrow and <u>bury it in some other documents</u>." *Id.* (emphasis added). In response to AUSA-1's proposal to "bury"

GX 411, AUSA-2 agreed and took the plan further by proposing documents along which GX-411 could be buried when disclosing it to the defense. *Id.* at 11. Specifically, she replied, "that's fine too—some of the [Financial Action Task Force] stuff," referring to another exhibit. *Id.* Later in that chat, AUSA-1 noted that the Government "need[ed] to come up with some explanation for why the defense is just seeing this for the first time . . . ." *Id.* at 11. According to their own internal communications, therefore, on the evening of March 6, the prosecutors in this case again came across GX 411, recognized somehow for the first time that it had never been disclosed to the defense, recognized that its lack of disclosure would likely draw objection, strategized how to "bury" the document, settled on a plan to do so, and discussed waiting an additional day before turning it over to aid in burying the document among others.

Even the next day, disclosure was not immediately forthcoming. Instead, on the morning of Saturday, March 7, the Government admits that several members of the prosecution team discussed GX 411 and debated how and even whether the exhibit should be disclosed. *Id.* at 11. At this time—in the midst of trial—the Government represents that "there was never any notion [among the AUSAs] that GX 411 might be of exculpatory value to the defense." *Id.* On that morning, "AUSAs discussed . . . [w]hether the exhibit was worth offering." *Id.* According to the Government's own theory, if prosecutors believed that the document was wholly inculpatory and decided not to offer it at trial, they likely would have never turned it over to the defense. Indeed, AUSA-1 "did not want to get into a fight with defense counsel over the document," and she "recalls a discussion" amongst the prosecutors that its lack of disclosure may not violate Federal Rule of Criminal Procedure 16. *Id.* There were thus some members of the prosecution team who, even after recognizing that the document had not been disclosed, argued that the Government should not turn it over.

D. The Government Discloses GX 411

At around 4 P.M. on Saturday, March 7, the Government disclosed GX 411. It did so in an email sent from AUSA-1 to the defense team. Dkt. No. 354 at 12–13. The specifics of this transmittal email are critical, so the Court attaches it to this Opinion. *See* Exhibit A. The email began by noting that a potential Government witness remained ill and so he would not testify in the Government's case-in-chief. *Id.* AUSA-1 then wrote "we've attached the following documents" and provided a bulleted list of about fifteen documents, at least two of which were marked for the first time as new Government exhibits. *Id.* All but one of these documents, GX 411, had already been disclosed through discovery; in other words, GX 411 was the *only* document on the list that had not already been provided to the defense. Trial Tr. at 993:5–16 (noting that GX 411 "was the only document" on this list that had not previously been disclosed to the defense); *see also* Dkt. No. 354 at 13 (noting that the other documents were "mostly duplicates of 3500 material or revisions of exhibits"). The *third* bullet, which was virtually identical to the next bullet listing a previously disclosed document, stated as follows: "GX 411 – we intend to offer this Monday. Let us know if you will stipulate to authenticity." Ex. A.

Nothing in this email identified GX 411 as a newly disclosed document, a fact that we now know the Government lawyers were aware of and discussed with each other prior to transmittal. To the contrary, the bulleted list deliberately obscured the fact that GX 411 was different in kind than the other exhibits listed, as it was the only exhibit on that list that had not been previously turned over to the defense. Indeed, as noted, the Government's wording with respect to GX 411 was the same as its wording regarding another exhibit, GX 456, that had already been disclosed. *See id.* (stating as to both exhibits, "we intend to offer this on Monday. Let us know if you will stipulate to authenticity.). Nothing in this email indicated how long the Government had possessed the document. And nothing indicated why the document was

disclosed one week into trial. Indeed, the Government now concedes that "[t]his email does not, as we believe it should have, identify GX 411 as a new document that was not previously disclosed." Dkt. No. 354 at 13 (emphasis in original); *see also* Dkt. No. 283 at 1 (Government admitting that it "fail[ed] to make accurate disclosures regarding the status of [GX 411] on March 7 and March 8, 2020."). All four prosecutors who represented the Government at trial have admitted that the "[t]he transmittal email failed to disclose that GX 411 had not been produced previously" and that "there is *no dispute* that [this] was a failure in judgment on [their] part." Dkt. No. 283 at 5 (emphasis added).

Surprisingly, the Government represents that this "failure in judgment" was no accident—it was the product of reasoned discussion among the prosecution team. In addition to the contemporaneous communications among the AUSAs discussed above, the Government states that the prosecutors discussed how to disclose GX 411 before sending this email. AUSA-1 and AUSA-3, both "confident that the defense would know it was a new document given their knowledge of the case," suggested "that the Government should simply produce it and wait for the defense's questions, and if the Government did not make a big deal about the document, the defense might decide that it was not important enough to object." Dkt. No. 354 at 12. In other words, according to their own after-the-fact account, the Government lawyers knew that GX 411 had not previously been disclosed, but nonetheless thought it best to call no attention to the document and hoped that the defense would stipulate to its authenticity with little fanfare. That did not come to pass.

Even if the story stopped there, things would be bad enough. No responsible Government lawyer should strategize how to "bury" a document that was not, but should have been, previously disclosed to the defense. A responsible Government lawyer should—at a

minimum—forthrightly and truthfully reveal late disclosures to the defense. The leadership of the USAO attempts to justify this conduct by arguing that what the prosecutors did was not, in fact, "burying" a now-admittedly exculpatory document, and instead conveys to its prosecutors and the Court that the conduct of the Government lawyers described above is not condemnable. Dkt. No. 354 at 11 ("[T]he document, which was in fact produced less than 24 hours later, was not buried. . . . [W]e believe it would go too far to condemn [AUSA-1] for a Friday night lapse in thinking regarding a document that was in fact disclosed Saturday afternoon."). This Court disagrees and hereby strongly condemns this conduct.

E. The Government Makes a Misrepresentation to the Court

Unfortunately, that is not the end of the story. The day after this disclosure, Mr. Sadr wrote to the Court, represented that the Government had produced GX 411 for the first time, argued that GX 411 was *Brady* material, and sought a curative instruction. *See* Dkt. No. 274. In simpler terms, Mr. Sadr argued that the Government had breached its constitutional duties in failing to turn over this document, and asked the Court to explain that failure to the jury. The Court quickly ordered the Government to make a "detailed representation" explaining why this document was not disclosed, what led to its March 7 disclosure, and which attorneys were involved in this process. Dkt. Nos. 286, 287. The Government provided a narrative that is now familiar: the prosecution team incorrectly believed that GX 411 had been disclosed to Mr. Sadr with the Commerzbank Subpoena Returns, and only realized it had not on March 6. Dkt. No. 275.

The vagueness of the Government's explanation immediately raised flags for the Court. That same day, the Court issued an order stating that the Government had failed in its letter to "indicate if, upon learning of the late disclosure [of GX 411], the Government informed defense counsel or not." Dkt. No. 290. The Court thus ordered "the Government [to] explain precisely

when and how it realized that the document had been erroneously withheld," and—importantly for present purposes—"when, if at all, . . . the failure to disclose . . . was communicated to the defense." *Id.* This Order is also attached to this Opinion. *See* Exhibit B.

The Government's next letter is central to the lingering ethical questions in this case, and the Court likewise attaches it to this Opinion. *See* Exhibit C. In that letter, the Government recounted how its lawyers had "found" GX 411 on Friday evening and discussed the document the next day. *Id.* at 1. The Government then stated that it "promptly had a paralegal mark it as an exhibit and produced it to the defense along with other exhibits and 3500 materials." *Id.* The Court does not dwell on the Government's representation of promptness, though it does note that the Government disclosed GX 411 about twenty hours after it realized it had never been turned over, consistent with the discussion between the AUSAs about waiting a day in order to "bury" it with other documents. The Government next represented that it "*made clear [in its email] that GX 411 was a newly marked exhibit* and that we intended to offer it, and asked the defense if they would stipulate to authenticity." *Id.* (emphasis added).

To reiterate, the Court asked the Government a direct question: When and how did it inform the defense of the failure to timely *disclose* GX 411? *See* Ex. B. But the Government did not respond to that direct question with a direct answer. Rather, it answered that it had made clear in its March 7 email to defense counsel that GX 411 was newly *marked*. Ex. C. The Court finds that the Government's representation was misleading, as it implied that it had explicitly informed the defense that GX 411 was being disclosed for the first time. Indeed, the Court was misled. Upon receipt of that letter, the Court took great comfort in believing that, despite the disclosure failure, at the very least the Government had clearly indicated that GX 411 had not been previously disclosed. But that was not the truth. To the contrary, the Government placed

GX 411 in the middle of a bulleted list of several other documents, *all of which* had already been disclosed, and at least one other of which was newly marked. *See* Ex. A. The Government did not say that the exhibit was not previously disclosed. The Government did not indicate that GX 411 was different in any way from the other, already-disclosed attachments. Nor did the Government's request for a stipulation of authenticity make clear that this exhibit was newly disclosed—the Government made the same request as to another document on the list that had already been disclosed. *See id.* (GX 456). The Government admits that "[t]he transmittal email failed to disclose that GX 411 had not been produced previously." Dkt. No. 283 at 5.

What arguably occurred here is that at least some of the Government lawyers implemented and executed the strategy the prosecutors had discussed: to "bury" GX 411 by deceptively hiding it among several other documents that had previously been disclosed. Having gotten caught in this effort, the Government then made a misleading representation to the Court, perhaps in an attempt to make its conduct appear better than it was. To make matters worse, as recounted in more detail below, the Court has now learned that certain Government lawyers edited the sentence in question from an accurate recounting of the facts—the letter's first draft rightly stated that the "Government did not specifically identify that GX 411 had not previously been produced in discovery," *see* Dkt. No. 354 at 14—to its final, misleading form.

F. Further Fact-Finding Is Necessary

Several critical questions remain regarding the untimely disclosure of GX 411 and the Government's subsequent misleading representation to the Court. The Court is obligated to determine what has occurred.

First, there are discrepancies presented to the Court about who knew what when regarding the provenance of GX 411. To start, as the Court has discussed, the SAUSA has presented two different stories about how and when he "rediscovered" GX 411. Moreover, the

SAUSA recalls discussing GX 411 "with AUSAs in January 2020," and further represents that "at or about [this] time, he had a telephone conversation with [AUSA-1] about 'how and from where' [GX 411] had been obtained." Dkt. No. 354 at 10 n.6. If this is true, it means that at least two prosecutors knew in January 2020 that GX 411 had not been disclosed as part of the Commerzbank Subpoena Production, yet they took no steps to produce the document to the defense or correct representations to the contrary made to the Court by other Government lawyers. *See, e.g.*, Dkt. No. 277 at 1–2; Trial Tr. at 982:13–17; *id.* at 984:11–19; Dkt. No. 283 at 5. For their part, the AUSAs deny this account and say they did not discuss GX 411 with the SAUSA in January 2020, and learned only in the middle of trial that the exhibit had not been disclosed. Dkt. No. 354 at 10 n.6. At this stage, the Court cannot determine which version is true.

Second, and relatedly, the Court cannot yet firmly conclude based on the existing factual record whether any of the Government lawyers deliberately withheld exculpatory information. The Government maintains that no prosecutor "had any inkling . . . that GX 411 would have exculpatory value for the defense" until defense counsel's emails on March 7. Dkt. No. 354 at 13. The Government further represents that "[h]ad any of the attorneys on the case recognized the exculpatory theory the defense has articulated, that would, we believe, have trigged further analysis, but they did not." *Id.* at 10. And during trial, the Government attributed its misunderstanding to "trial blinders." Trial Tr. at 991:10–992:19.

Certainly, the now-disclosed written, internal communications of the AUSAs—which discuss the usefulness of GX 411 to only the Government's case, and do not speak to its exculpatory value—support the Government's contention that none of the prosecutors recognized the document's now-conceded exculpatory value. The contention that trial blinders

prevented the prosecutors from perceiving the exculpatory value of GX 411 is plausible. But there are other facts in the current record that cast some doubt on this representation of ignorance. To start, by the time the AUSAs were discussing "burying" the document, even if not earlier, the relevance of GX 411 to the defense arguably should have been apparent. Indeed, for reasons already discussed above, GX 411 and subsequent responses to it by OFAC and the intermediary bank tend to demonstrate that Stratus International Contracting's affiliation with Stratus Group was not material to either OFAC or the intermediary banks, a point critical to the Government's ability to establish the elements of several charged counts. *See* Section III.A. Moreover, emails from the SAUSA in late January and early February further call the Government's contention into doubt. The SAUSA at that time notified the trial team that Commerzbank "filed a voluntary disclosure with OFAC regarding the payment [GX 411]," described this disclosure as an "asterisk," and suggested that the team "discuss whether it's worth having the Commerz witness go into that." Dkt. No. 341 at 8. And in a subsequent email, the SAUSA stated "we [the prosecution team] can discuss how we would want to handle" the Commerzbank disclosure. *Id.* Although there are alternative explanations available, these emails at least arguably suggest, as Mr. Sadr argues, that the prosecutors recognized that GX 411 was not wholly helpful to the Government and considered not calling a Commerzbank witness because doing so could lead to disclosure of this document—cutting against the Government's narrative that its prosecutors thought GX 411 was inculpatory. *See* Dkt. No. 355 at 3.

Third, there are discrepancies about which prosecutor(s) were involved in making the misrepresentation in the Government's March 8 letter. These discrepancies prevent the Court from resolving, at this time, whether the misrepresentation was intentional. The Government drafted the letter in question in about one hour. *See* Dkt. No. 354 at 14–15. To her credit, in the

letter's first draft, written by AUSA-1, the sentence in question stated, "The Government did not specifically identify that GX 411 had not previously been produced in discovery." *Id.* at 14. This sentence was directly responsive to the question the Court had asked and was accurate—had it been included in the final letter, this inquiry may have been avoided. But because AUSA-1 "was ill [and] had to leave the Office shortly after" circulating this first draft, *id.* at 14, the drafting of the letter was passed onto other prosecutors, and AUSA-3 took the lead. In the ten minutes before the Court's deadline, AUSA-3 sent AUSA-1's draft to the Co-Chiefs of the Terrorism & International Narcotics Division of the USAO and then spoke with them on the phone. *Id.* at 14–15. At some point in this process, this truthful sentence was edited to make the misrepresentation in question, becoming "The Government made clear that GX 411 was a newly marked exhibit . . . ." *Id.* at 15. AUSA-3 then filed the letter. *Id.* One minute after the Court's deadline, AUSA-3 emailed AUSA-2 saying, "They [the Chiefs] called me with some changes. I made them and filed." *Id.*

When pressed to disclose the prosecutor(s) responsible for this edit, the Government lawyers point fingers. The Unit Chiefs "advise[] that they did not request . . . deletion of the [original language], although they may have missed that deletion . . . if the final draft was read to them over the phone." Dkt. No. 356 at 2 n.1. Significantly, this runs contrary to one of the Unit Chief's explanation at trial on the day after the letter was drafted, when he informed the Court that "[The other Unit Chief] and I reviewed [this] letter in realtime before it was filed—our understanding in submitting [the misrepresentation] to your Honor was that this clearly marked language . . . related to the fact that the document had been marked as a government exhibit with a yellow government sticker. That is what we intended to convey with that." Trial Tr. at 997:14–20. In other words, nearly contemporaneously with the letter's drafting, the Unit Chiefs

represented that they were aware of this language and that it was purposely included in the Government's letter—but in post-trial briefing, the Chiefs claim that they did not request this change and may have missed it entirely. For his part, AUSA-3 "recalls opening [AUSA-1's] draft during the call and making changes that he understood to reflect the input from the unit chiefs." Dkt. No. 354 at 15. AUSA-3 thus "filed a letter that he believed reflected the considered judgment of his supervisors." *Id.* And the other prosecutors' involvement is unclear; AUSA-1 had left the office due to illness by the time of these edits, and the Government says nothing about the SAUSA's and AUSA-2's roles. *Id.* Despite the extensive letter briefing about this issue, therefore, the Court still does not know which prosecutor(s) were responsible for making this misrepresentation. Indeed, the Court notes that these drafting changes were first revealed only with the filing of the Government's July 2 letter, months after trial had ended and months after the Court inquired on the record about this precise misrepresentation. *See* Trial Tr. 989:16–995:16, 996:18–998:18. Fully understanding this drafting process is necessary to determine whether any of the prosecutors intentionally misled the Court.

* * * * *

Even though the Court has now granted Mr. Sadr's motion for a new trial, vacated the verdict against him, and dismissed the indictment with prejudice, the Court retains authority to sanction the prosecutors in this case. *See United States v. Seltzer*, 227 F.3d 36, 41–42 (2d Cir. 2000) (discussing district courts' inherent power to impose sanctions). The Government agrees that the Court retains this supervisory power. Dkt. No. 352 at 2.

It is the fervent hope of the Court that no sanctions are necessary. But it is the firm view of the Court that if Government lawyers acted in bad faith by knowingly withholding exculpatory material from the defense or intentionally made a misleading statement to the Court,

then some sanction or referral to the Grievance Committee of the Southern District of New York would be appropriate. The record before the Court neither conclusively establishes intentionality nor resolves the issue.

Given the lack of clarity surrounding the disclosure of GX 411 and the subsequent misrepresentation to the Court, the Court requires further information. The Court therefore orders each AUSA on the trial team, the two Unit Chiefs, and the SAUSA to submit individual declarations, under penalty of perjury, regarding these issues. These declarations should, at a minimum, respond to the following questions with specificity:

1. When did you first learn of GX 411?
2. When did you first realize that GX 411 had not been disclosed to the defense? Why did you not immediately disclose the document at that time?
3. What specific communications did you have regarding GX 411 or the disclosure of GX 411 with other prosecutors, whether oral, written, or electronic in any form? When did these communications occur? Attach any record you have of any such communication.
4. When did you first recognize GX 411 as having exculpatory value? If you thought the document was wholly inculpatory, provide a good-faith basis for that understanding.
5. With specificity, what role did you play in drafting the Government's March 8, 2020 letter? *See* Ex. C. What role did you play in deleting the accurate sentence responsive to the Court's question that was originally drafted by AUSA-1? *See* Dkt. No. 354 at 14 ("The Government did not specifically identify that GX 411 had not previously been produced in discovery."). What role did you play in drafting the sentence that the Court has concluded was a misrepresentation? *See* Dkt. No. 277 at 1 ("The Government made clear that GX 411 was a newly marked exhibit . . . ."). Why was this sentence changed? Attach any communications related to this change.
6. When the Court asked specific questions at trial on March 9, 2020 regarding the Government's misrepresentation, were you aware that the accurate sentence responsive to the Court's question had been edited or deleted? If so, explain why this was not conveyed to the Court.

The declarations shall further provide any and all other information the prosecutor believes relevant to the unresolved issues identified in this Opinion. Following these declarations, the executive leadership for the USAO may submit letter briefing as to why no further proceeding for additional fact-finding or credibility determinations is necessary. Counsel for Mr. Sadr may file a responsive letter brief, and the Government may file a reply.

After the Court reviews these submissions, it will determine whether a hearing to conduct further fact-finding, including credibility determinations, is necessary.

IV. CONCLUSION

Almost a century ago, the Supreme Court defined the singular role federal prosecutors play in our system of justice:

> 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 . . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The Government in this case has failed to live up to these ideals. The Court has recounted these breaches of trust, proposed some systemic solutions, urged referral to the Office of Professional Responsibility for admitted prosecutorial failures apparent in the existing record, and ordered further fact-finding. The cost of such Government misconduct is high. With each misstep, the public faith in the criminal-justice system further erodes. With each document wrongfully withheld, an innocent person faces the chance of wrongful conviction. And with each unforced Government error, the likelihood grows that a reviewing court will be forced to

reverse a conviction or even dismiss an indictment, resulting in wasted resources, delayed justice, and individuals guilty of crimes potentially going unpunished.

The Court thus issues this Opinion with hopes that in future prosecutions, the United States Attorney for the Southern District of New York will use only "legitimate means to bring about a just" result. *Id.* Nothing less is expected of the revered Office of the United States Attorney for the Southern District of New York. That Office has a well- and hard-earned reputation for outstanding lawyers, fierce independence, and the highest of ethical standards. The daily work of the prosecutors in that Office is critically important to the safety of our community and the rule of law. Those who stand up in court every day on behalf of that Office get the benefit of that reputation—but they also have the responsibility to maintain it.

The Court hereby ORDERS that the Acting United States Attorney ensure that all current AUSAs and SAUSAs read this Opinion. Within one week of the date of this Opinion, the Acting United States Attorney shall file a declaration affirming that this has occurred.

The Court FURTHER ORDERS that each of the trial team AUSAs, supervising Unit Chiefs, and the SAUSA submit the declarations described in Section III no later than October 16, 2020. By October 30, 2020, the executive leadership for the USAO may submit a brief as to why no further proceeding for additional fact-finding or credibility determinations is necessary. Counsel for Mr. Sadr may, if they wish, submit a responsive filing by November 13, 2020, and the Government a reply by November 20, 2020.

SO ORDERED.

Dated: September 16, 2020
New York, New York

ALISON J. NATHAN
United States District Judge

Exhibit A

From: [redacted]
Sent: Saturday, March 07, 2020 4:04 PM
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Sadr

Counsel,

Mr. Dubowitz is still very ill. As a result, we do not intend to call him as a witness in our case-in-chief. It's possible that, depending on the defense case, we will call him as a rebuttal witness.

In addition, we've attached the following documents:

- Updated GX 2284D – there were formatting problems with our version. We think the attached corrects them.
- 3508-08 – 3500 from today
- GX 411 – we intend to offer this on Monday. Let us know if you will stipulate to authenticity.
- GX 456 – we intend to offer this on Monday. Let us know if you will stipulate to authenticity.
- GX 495A & B – we intend to offer these on Monday (likely in redacted form), although think a stipulation that the defendant had bank accounts at HSBC from January 2010 through October 2013 might be simpler. Let us know how you prefer to proceed.
- GX 704 – this is the modified version of the travel chart. Please confirm whether you have any remaining concerns.
- GX 705A & B – these are summary charts reflecting the information in GX 2090A. Please confirm whether you have any objections.
- Updated GX 2304A – we enlarged some of the cells, as the formatting of the PDFd excel file was cutting off some of the data. The content is the same.
- 3504-10 – Peri 3500, which was provided in hard copy yesterday morning.
- 3505-06 – Blair 3500, which was provided in hard copy yesterday morning.
- 3513-02 – Paralegal 3500 for summary chart (you may already have this)
- 3513-03 – Paralegal 3500 for summary chart (you may already have this)

We are still working on one additional summary chart, which we expect to provide later today.

[redacted]
Assistant United States Attorney
Southern District of New York
One Saint Andrew's Plaza
New York, NY 10007
Tel: [redacted]

Exhibit B

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ____
DATE FILED: MAR 1 0 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ali Sadr Hashemi Nejad,

Defendants.

18-cr-224 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

In the letter filed this evening by the Government, Dkt. No. 275, the Government states that "It was only in the context of this process that the Government realized that GX 411 was not part of Bank-1's subpoena production, which had been provided to the defense in discovery."

The Court requires further explanation. Specifically, it is unclear from this sentence if the Government realized GX 411 had not been previously disclosed before or after the Government turned it over to the defense yesterday. Nor does this sentence indicate if, upon learning of the late disclosure, the Government informed defense counsel or not. The Government shall explain precisely when and how it realized that the document had erroneously been withheld and when, if at all, upon learning of the failure to disclose this was communicated to the defense.

Furthermore, the previously filed letter does not offer an explanation for how it came to be that GX 411 was not (though should have been) provided to the defense as part of Bank-1's subpoena production.

The Government is ordered to address these points by letter to be filed no later than 10 p.m. this evening. The defense may reply to the Government's letters by 11 p.m.

SO ORDERED.

3/8/20

Dated: March 8, 2020
New York, New York

ALISON J. NATHAN
United States District Judge

Exhibit C

Case 1:18-cr-00224-AJN Document 327 Filed 03/08/20 Page 1 of 2

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 8, 2020

FILED BY ECF

The Honorable Alison J. Nathan
United States District Judge
Southern District of New York
United States Courthouse
40 Foley Square, Courtroom 1306
New York, New York 10007

Re: *United States* v. *Ali Sadr Hashemi Nejad*, 18 Cr. 224 (AJN)

Dear Judge Nathan:

The Court writes in response to the Court's order from 9:00 this evening. The Government apologizes for the lack of clarity in its prior email.

The Government found GX 411 in its emails on Friday night, looked at the Bank-1 subpoena production, and did not find it. The members of the team discussed the document the next morning and confirmed that it likely had not been produced to the defense previously. The Government promptly had a paralegal mark it as an exhibit and produced it to the defense along with other exhibits and 3500 materials. The Government made clear that GX 411 was a newly marked exhibit and that we intended to offer it, and asked the defense if they would stipulate to authenticity. Defense counsel responded shortly after the Government provided GX 411 and asked how long the Government had GX 411, and why they had not previously received it. The Government responded and explained that we had been aware of the letter since mid-January, and that, at the time, the Government had mistakenly believed it was part of the discovery in the case.

When SAUSA [redacted] sent what is now GX 411 to the AUSAs in the case in January, the AUSAs assumed that this was a document that came from this case (specifically, the subpoena to Bank-1), and that it was therefore a document that had been previously produced to the defense as part of the Rule 16 discovery. This was an incorrect assumption. The document in fact was

Case 1:18-cr-00224-AJN Document 297 Filed 03/16/20 Page 42 of 42

obtained in an unrelated DANY investigation and was not provided to this Office before January 2020.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: /s/
[redacted]
Assistant United States Attorneys
[redacted]
Special Assistant United States Attorney
(212) 637-2038 / 2279 / 1066

cc: Defense Counsel (by ECF)

373 F.Supp. 289
United States District Court, S.D. New York.

UNITED STATES of America, Plaintiff,
v.
Bernard DEUTSCH et al., Defendants.

No. 73 Cr. 1904.
|
March 4, 1974.

Synopsis

Motions by criminal defendants for production by Government of exculpatory materials. The District Court, Frankel, J., held that the Government's duty to divulge exculpatory material required that such material be made available to defendant far enough in advance of trial to allow him sufficient time for its evaluation, preparation and presentation at trial.

Motions granted.

Attorneys and Law Firms

***289** Paul J. Curran, U.S. Atty., for S.D.N.Y., Gerald Feffer, Asst. U.S. Atty., for the United States.

Marvin E. Segal, New York City, for Deutsch.

Morton S. Robson, New York City, for Duboff.

Irving Anolik, New York City, for Kores.

Jay Goldberg, New York City, for Levy.

Guggenheimer & Untermyer, New York City, Attn: David Brodsky, New York City, for Driesman.

Opinion

MEMORANDUM

FRANKEL, District Judge.

We profess as a basic principle that the prosecutor's 'duty * * * is to seek justice, not merely to convict.'[1] He is 'to guard the rights of the accused as well as to enforce the rights of the public.'[2] The ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), enforces this principle in an important respect. The prosecutor is required as a matter of constitutional law to disclose to defendants evidentiary material that may help them to avoid conviction. As the Court has made clear:

***290** '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, 83 S.Ct. at 1196.[3]

Defense counsel in this District routinely, and properly, make pretrial demands for exculpatory material to which they may be entitled under Brady. The United States Attorney no less routinely, but less justifiably, responds in a few spare lines of boiler-plate, as he has again in this case, viz.:

'The Government is aware of its obligations under Brady v. Maryland, 373 U.S. 83, (83 S.Ct. 1194, 10 L.Ed.2d 215) (1963) and will comply with it. The rule concerning governmental disclosure of exculpatory material or material favorable to the defendant established in Brady, imposes no pretrial obligation upon the Government. United States v. Armentrout 278 F.Supp. 517 (S.D.N.Y.1968), aff'd 411 F.2d 60 (2d Cir. 1969); United States v. King, 49 F.R.D. 51 (S.D.N.Y.1970): United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y.1965).'[4]

This seems incredible after some of the national traumas of recent times, including gross neglects to divulge exculpatory material in timely fashion (see, e.g., the declaration of a mistrial and the granting of defendants' motion to dismiss the indictment on May 11, 1973, in United States v. Anthony Joseph Russo and Daniel Ellsberg, C.D. Calif. No. 9373-CD). Constitutional rights, including those vouchsafed by Brady v. Maryland, are not dependent 'upon the benevolence of the prosecutor.' Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968). Nor is the presumption, which we fully respect, that government attorneys will do (as well as be aware of) their duty sufficient alone to silence demands for clearer assurance. Fuller demonstrations than the proclamation that justice will be done are owed by the prosecutors to the equally dignified officers of the court who are their adversaries.

The ritual rebuff is not made more satisfying by the bland, repeated, and erroneous insistence that exculpatory material need never be made available before trial. It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is given only at trial, and

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that the effective implementation of Brady v. Maryland must therefore require earlier production in at least some situations.

Our Court of Appeals has pointed out that:

'The importance of Brady * * * is its holding that the concept out of which the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect upon the jury's verdict.' United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). See also United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973).

With this basic understanding it becomes plain 'that evidence in the government's possession favorable to the defendant should be made available to him far enough in advance of trial to allow him sufficient time for its evaluation, preparation, and presentation at trial.' United States v. Partin, 320 F.Supp. 275, 285 (E.D.La.1970). To allow routinely (as the United States Attorney ***291** for this District seeks) a 'more lenient disclosure burden on the government would drain Brady of all vitality.' United States v. Elmore, 423 F.2d 775, 779 (4th Cir. 1970).[5]

Recognizing that the judges of this court have not always dealt uniformly with matters of criminal procedure,[6] I now remind the United States Attorney of the repeated occasions on which I have ordered better responses to Brady demands than the cursory formula proffered in this case. See, e.g., United States v. John Capra, et al., 73 Cr. 460 (1973); United States v. Paul Katz, et al., 73 Cr. 799 (1973); United States v. Luis Norberto Otero, 73 Cr. 744 (1973); United States v. Melvin Moller and Julius Rosen, 72 Cr. 818 (1972). Until or unless some higher authority decrees that that formula is sufficient, it should not be employed any more in cases for which I am responsible.

Specifically, the United States Attorney is directed in the instant case to proceed as follows:

(1) He will determine particularly and thoroughly what exculpatory material, if any, is in the possession of the Department of Justice or known by people in the Department to exist.

(2) He will permit discovery and inspection of all such material as promptly as reasonably possible, and, in any event, not later than April 1, 1974; provided, that if the United States Attorney believes such material should justly and properly be withheld until a later time, he may make specific application to me for a postponement.

(3) He will bring before the court with all reasonable speed any questions or doubts touching compliance ***292** with the Brady principle. Cf. United States v. Gleason, 265 F.Supp. 880, 885 et seq. (S.D.N.Y.1967).

(4) He will serve and file, on or before April 8, 1974, a statement recounting the actions taken in compliance with the directions herein.

In all future cases of Brady demands, the United States Attorney will propose a program of response similar to that hereinabove outlined or state with particularity why some different course is claimed to be appropriate.

It is so ordered.

All Citations

373 F.Supp. 289

Footnotes

1 ABA Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function, § 1.1(a) (App. Draft 1971).

2 Id. at 44; Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

3 See also Moore v. Illinois, 408 U.S. 786, 794-795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972), where the Brady rule is reiterated as follows:
'The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.'

4 Affidavit Opposing Motion of Defendant Driesman, par. 6.

5 See United States v. Houston, 339 F.Supp. 762, 764 (N.D.Ga.1972); United States v. Eley, 335 F.Supp. 353, 355 (N.D.Ga.1972); United States v. Leichtfuss, 331 F.Supp. 723, 730-731 (N.D.Ill.1971); United States v. Ahmad, 53 F.R.D. 186, 194 (M.D.Pa.1971) ('material bearing on * * * defense preparation will be supplied to the defendants thirty days prior

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to trial'); United States v. White, 50 F.R.D. 70, 73 (N.D.Ga.), aff'd 450 F.2d 264 (5th Cir. 1971); United States v. Ladd, 48 F.R.D. 266, 267 (D.Alaska 1969); United States v. Cobb, 271 F.Supp. 159. 163-164 (S.D.N.Y.1967); United States v. Gleason, 265 F.Supp. 880, 883-886 (S.D.N.Y.1967); ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(c) (App. Draft 1970), see also Id., § 2.12(a) which calls for disclosure 'as soon as practicable following the filing of charges against the accused'; ABA Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function, § 3.11(a) (App. Draft 1971) which specifies disclosure 'at the earliest feasible opportunity'; Preliminary Draft of Proposed Amendments to Federal Rules of Criminal Procedure, Proposed Rule 16(a)(iv), 48 F.R.D. 553, 558-589 (1970); J. Moore, 8 Federal Practice § 16.06(2) at 16-75-76 ('On the basis of policy the Brady doctrine should be assimilated to pre-trial discovery * * *'); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145, 149 (1964).

6 Including administration of the Brady rule. See United States v. King, 49 F.R.D. 51, 53-54 (S.D.N.Y.1970); United States v. Wolfson, 289 F.Supp. 903, 914-915 (S.D.N.Y.1968); United States v. Armantrout, 278 F.Supp. 517, 518 (S.D.N.Y.1968), aff'd 411 F.2d 60 (2d Cir. 1969); United States v. Leighton, 265 F.Supp. 27, 35 (S.D.N.Y.1967); United States v. Manhattan Brush Co., 38 F.R.D. 4, 6 (S.D.N.Y.1965) ('The Brady decision must be understood to refer to the application of tests of fairness to the prosecution at trial, and not at an earlier point in the proceedings.') Elsewhere, too, courts have held that Brady imposes no pretrial obligations upon the Government. See United States v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971) ('Brady was never intended to create pretrial remedies.') United States v. Condor, 423 F.2d 904, 911 (6th Cir.), cert. denied, 400 U.S. 958, 91 S.Ct. 357, 27 L.Ed.2d 267 (1970); United States v. Sklaroff, 323 F.Supp. 296, 310 (S.D.Fla.1971); United States v. Zirpolo, 288 F.Supp. 993, 1019 (D.N.J.1968). The commentators are cognizant of the unsettled posture of this issue. See Nakell, Criminal Discovery for the Defense and the Prosecution— The Developing Constitutional Considerations, 50 N.Car.L.Rev. 437, 452-453 (1972); Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U.Chi.L.Rev. 112, 117 (1972).

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New York Law Journal

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The 'Brady' Obligation: A True Boost from District Judge Allison Nathan

The author shares his views on District Judge Allison Nathan's opinions in 'U.S. v. Ali Sadr Hashemi Nejad,' and the earlier 'U.S. v. Pizarro,' where she makes it clear that there cannot be adherence to 'Brady' by merely allowing the government to state that it is "aware of its obligation."

By **Jay Goldberg and Alex S. Huot** | July 31, 2020

It is suggested that most lawyers and perhaps judges should subscribe to the Annual Review of Criminal Procedure contained in the Georgetown Law Journal. This includes every case decided by the Courts of Appeal each year. It details how said courts have handled the *Brady* obligation. As well, the Library of Congress prepares an extraordinary treatise, available from the Superintendent of Documents entitled "The Constitution of the United States of America: Analysis and Interpretation." This contains every case since the

founding of our nation, including the *Brady* obligation and its progeny. The experience of this author with *Brady* issues is explained somewhat in the book *The Courtroom is My Theater* (Post Hill Press 2018). *See* also www.JayGoldberg.com (http://www.jaygoldberg.com).

What prompts this article is the absolutely brilliant decision by District Judge Allison J. Nathan (U.S.D.J., S.D.N.Y.) in the case of *United States v. Ali Sadr Hashemi Nejad*, 18-cr-224 (AJN), decided June 9, 2020, and the judge's earlier decision in *United States v. Pizarro*, 17-cr-151 (AJN). These cases demonstrate quite clearly that the judge, in our opinion, "gets it" with respect to the obligation imposed on the government by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

The court did not rely on the government's sometimes, lame representation that it is "aware" of its obligation. This has characterized the sad approach by a number of judges who, in our opinion, seem somewhat oblivious to the fact that as Justice William Brennan wrote: the trial of a criminal case is likened to combat (*see* the respected writer Joel Cohen's article in the *New York Law Journal* on July 9, 2020).

Much to my dismay, Cohen seems somewhat pleased that some judges have standing rules, and is satisfied that the government's representation is enough, and this has been so for years.

The compelling decisions and orders of District Judge Nathan make it crystal clear that there cannot be adherence to the rule of the *Brady* obligation simply by the judge taking the word of the government with respect to the government's *Brady* obligation.

In a luncheon meeting with then Chief Judge Thomas P. Griesa, who served as Chief Judge of the U.S. District Court for the Southern District of New York from 1993 to 2000, and senior judge from 2000 to 2017, he commented that we were fortunate to live during the "golden age" of interesting trial work, this being 1970-1990. We thank him, but the period did not reflect "happy times," because many judges did not engage in searching inquiries with respect to *Brady*.

The opinion and order in *United States v. Flynn*, 17-cr-232, decided June 24, 2020, can be read for other principles leading to the order directed to Judge Sullivan (U.S.D.J., D. DC). According to J. Michael Luttig, a former judge on the U.S. Court of Appeals for the Fourth Circuit, *New York Times*, June 30, 2020, there is a remark in the court's opinion that can be read that the government withheld "exculpatory evidence" from Flynn

We choose not to discuss the opinions and orders of District Judge Nathan, for it is must reading, absolutely critical reading for those concerned with the obligation of prosecutors and how to require adherence to the rule and obligation of *Brady*.

Generally, those released after a conviction has been reversed for serious *Brady* violations, are people of color (innocenceproject.org). New York's release of wrongly convicted defendants has reportedly cost state taxpayers over $50 million due to violations of *Brady*. How terribly sad this is.

Our press in every case was so common that the respected criminal defense attorney, Gerald L. Shargel, pinned the moniker on me—whether true or not—as "Mr. Brady." For in every case, I had, where appropriate, argued that the court must monitor the government's behavior. I hardly ever succeeded in getting past the government's representation, except for one ground-breaking option by U.S. District Judge Marvin E. Frankel in *United States v. Agone*, 203 F.Supp. 1258 (S.D.N.Y. 1969), where he, like Judge Nathan, issued a sweeping discovery order, with monitoring being the order of the day. This so apparently outraged the U.S. Attorney that he came to the courtroom and spread on the record his view that the court had overstepped its bounds in questioning the integrity of the U.S. Attorney's Office. Assistants can be counted on without further inquiry to satisfy the obligations imposed by *Brady*. Judge Frankel adhered to his opinion and order, much to the apparent dismay of the government.

In a Robing Room Conference, with the respected District Judge Edmund Palmieri (U.S.D.J., S.D.N.Y.), following the opinion and order of Judge Frankel, he told me: I consider your *Brady* motion to be frivolous, you have to understand how well regarded Assistants are in the Southern District. They are interested in a verdict that reflects the truth. I will not adhere to Judge Frankel's opinion and order in *Agone*.

Despite the hostile attitude of district court judges, we pressed on with multiple motions and writings. *See* "*Brady* and the Unfulfilled Promise of an Even Playing Field," *New York Law Journal* (Dec. 13, 2013); "Defendants' 'Informational Disadvantage' Continues in Federal Criminal Cases," *New York Law Journal* (August 20, 2012). We wrote articles published in the New York State Association of Criminal Defense Lawyers and The Champion, a publication of the National Association of Criminal Defense lawyers.

For some time, as long as a half century ago in May 1963, courts promised that the government and defense would, as far as possible, engage on a level playing field.

With it all, on no lesser authority than our scholarly Second Court of Appeals, the court as far back as 2005 recognized there is an informational gap that exists between the defense and the prosecution. *See United States v. Yakobowicz,* 427 F.3d 144 (2d Cir. 2005); *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003). But these opinions and orders were not reflective of how necessary it was for a court to monitor the government's behavior.

We are fortunate to have at this time extraordinarily able members of the Court of Appeals and the district court benches. Action can be taken, and must be taken, lest our criminal justice system be thought by the public to be fraught with miscarriages of justice.

Certainly the criminal defense bar, with the passage of time since the holding in *Brady* should be able to look back (and of course this includes district court judges) on what has occurred and conclude that the promises made as to equality between counsel in terms of information and adherence to *Brady* and its progeny reflect the true principles behind this cases.

In the U.S. District Court for the District of Massachusetts, the court commissioned a detailed study of problems presented by what appeared to be endemic violations of the *Brady* rule. It perceived the violations to be such miscarriages of justice that there was a need for courts to remedy the apparent violations It articulated what should be done to remedy the failings that had occurred and would likely continue to occur in the absence of a standing rule of Court. *See* the report of the Boston Bar Association Task Force entitled "Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System (http://www.bostonbar.org/prs/reports/BBA-Getting_It_Right).

For a then comprehensive review of how district court judges are to act to ensure that *Brady* and its progeny have been adhered to, see "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders and Policies. Hooper and Thorpe, "*Brady v. Maryland* Material in the United States District Courts: Rules Orders, and Policies—Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States," *Federal Judicial Center* (http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf).

It is time enough to face reality. It is time for all district court judges to not simply count on the government to adhere to its obligations in representations made to courts that it will adhere to its obligations.

The approach taken by District Judge Nathan should be the "order of the day" to ensure that justice is done in a criminal case.

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