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Reflections on Brady v. Maryland

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REFLECTIONS ON *BRADY V. MARYLAND*

BENNETT L. GERSHMAN*

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I. INTRODUCTION

*Brady v. Maryland*¹ has reached a respectable age. Not as venerated, perhaps, as *Gideon v. Wainwright*,² the famous “right to counsel” case also decided that Term, *Brady* nonetheless occupies a special place in the constellation of Supreme Court decisions protecting a criminal defendant’s right to a fair trial.³ *Brady*’s holding is familiar to virtually every practitioner of criminal law: “[T]he suppression by the prosecution of evidence favorable to an accused

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

2. 372 U.S. 335 (1963).

3. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 643 (2002) (describing *Brady* as one of a “handful of Warren Court cases [that] have taken on superhero status”).

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.”⁴

This principle, according to the *Brady* Court, reflects our nation’s abiding commitment to adversarial justice and fair play toward those persons accused of crimes.⁵ As 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.”⁶ Indeed, by explicitly commanding prosecutors to disclose to defendants facing a criminal trial any favorable evidence that is material to their guilt or punishment, *Brady* launched the modern development of constitutional disclosure requirements.⁷

Reflecting on this landmark decision forty-three years later, one is struck by the dissonance between *Brady*’s grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise. That the so-called “*Brady* rule” has influenced in varying degrees the conduct of U.S. prosecutors is undoubtedly true. More than any other rule of criminal procedure, *Brady* has illuminated the prosecutor’s constitutional and ethical obligations to ensure that defendants receive fair trials, as well as warning prosecutors of the consequences of violating the rule. Thousands of decisions by federal and state courts have reviewed instances of serious *Brady* violations, and hundreds of convictions have been reversed because of the prosecutor’s suppression of exculpatory evidence.⁸ Reinforcing this judicial oversight, prosecutors have been cautioned by their peers to learn and to conscientiously follow the constitutional requirements of *Brady*,⁹ and prosecutors’ offices have

4. *Brady*, 373 U.S. at 87.

5. *Id.*

6. *Id.*

7. *Brady* built its holding principally on several earlier Supreme Court and circuit court decisions dealing with the prosecutor’s use of perjured testimony, and in a few cases with the prosecutor’s suppression of exculpatory evidence. *See infra* notes 35–44 and accompanying text.

8. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 5 (2000) (noting that prosecutorial suppression of evidence accounted for sixteen percent to nineteen percent of reversible errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, 57 (1987) (asserting that thirty-five of 350 wrongful convictions resulted from prosecutorial suppression of evidence); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 3 (reporting that convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence proving the defendant’s innocence or presented evidence they knew to be false).

9. *See* NAT’L COLL. OF DIST. ATTORNEYS, DOING JUSTICE: A PROSECUTOR’S GUIDE TO ETHICS AND CIVIL LIABILITY 36 (Ronald H. Clark ed., 2002) (stating that “a

formulated guidelines to foster compliance with the requirements of *Brady*.¹⁰ Finally, and more explicitly than any other constitutional procedural guarantee, *Brady*'s due process standard has been incorporated into an explicit ethical duty upon government attorneys.¹¹

Nevertheless, despite reversals, guidelines, ethical oversight, and hortatory appeals to prosecutors to seek justice, *Brady*'s promise of transforming criminal trials from a "sporting" theory of litigation into a genuine search for the truth has largely been unkept. Indeed, by exposing the seamy, secretive, and cavalier disregard by prosecutors of the rights of criminal defendants, *Brady* has engendered widespread cynicism about the capacity of prosecutors to comply with their constitutional and ethical obligations, as well as the willingness of courts and disciplinary agencies to hold prosecutors accountable for their derelictions. *Brady*, one may correctly conclude, is "[m]ore honored in the breach than the observance."¹²

Brady has failed as a discovery doctrine.¹³ *Brady* is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden. Because *Brady* applies to evidence known only to the prosecutor and unknown to the defense, disclosure of this evidence depends almost exclusively on the diligence, integrity, and good faith of the prosecutor. If the prosecutor chooses to conceal

prosecutor's *Brady* duty to disclose exculpatory evidence to a criminal defendant is an important component of the prosecution function and every prosecutor should undertake to know and conscientiously follow the prosecutor's duties under *Brady*").

10. See, e.g., LOS ANGELES COUNTY DIST. ATTORNEY'S OFFICE, SPECIAL DIRECTIVE 02-08, BRADY PROTOCOL (2002), available at <http://da.co.la.ca.us/sd02-08.htm> (establishing the "*Brady* Compliance Division" to coordinate and make available known *Brady* information, including preparation and completion of "*Brady* Forms" describing the search required to be conducted by law enforcement personnel to determine the existence of *Brady* material); see also Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct*, THE CENTER FOR PUBLIC INTEGRITY, June 26, 2003, <http://www.publicintegrity.org/pm/default.aspx?sid=main> (describing San Diego County District Attorney's implementation of a training program and comprehensive manual to enforce *Brady* obligations).

11. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3-3.11(a) (1992), reprinted in PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & REGULATIONS 1146 (John S. Dzienkowski ed., West Group 2001).

12. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET PRINCE OF DENMARK act 1, sc. 4.

13. See Sundby, *supra* note 3, at 645 (noting that "if we do not expressly recognize *Brady*'s limitations as a discovery doctrine, we may erroneously be tempted to dismiss or downplay complaints that discovery rules are inadequate because of a misguided belief that *Brady* ultimately will ensure that nothing important slips through").

exculpatory evidence, the evidence usually will remain hidden until long after the defendant is convicted, and in fact may never be discovered.¹⁴ The extent to which prosecutors fail to discharge their *Brady* obligations therefore is almost impossible to measure accurately.

Nevertheless, by extrapolating from judicial decisions, disclosures by the media, and anecdotal evidence, it is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations. Indeed, *Brady* may be the paradigmatic example of prosecutorial misconduct. Numerous studies have documented widespread and egregious *Brady* violations.¹⁵ Many of these violations have occurred in the same prosecutors' office,¹⁶ and appear to have occurred disproportionately in capital cases.¹⁷ And most tragically, *Brady* violations have not infrequently contributed to the convictions of innocent persons who, because of the prosecutor's suppression, lacked critical evidence to prove their innocence.¹⁸

14. *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files."), *vacated sub nom.* *United States v. Plfaumer*, 473 U.S. 922 (1985) (mem.).

15. See sources cited *supra* note 8.

16. See Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 281–82 (2004) (noting seventy-two reported cases of prosecutorial misconduct from the Bronx District Attorney's office between 1975–1996, eighteen of which involved reversals of convictions based on prosecutorial suppression of exculpatory evidence); see also Weinberg, *supra* note 10. The Center for Public Integrity analyzed post-1970 cases involving prosecutorial misconduct and found that, in many instances, misconduct occurred in the same office and often by the same prosecutor. *Id.*

17. Most of the post-*Brady* decisions by the United States Supreme Court addressing the nondisclosure of exculpatory evidence occurred in capital cases. See *infra* notes 214–19 and accompanying text.

18. See, e.g., *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986); *Carter v. Rafferty*, 621 F. Supp. 533, 548 (D.N.J. 1985), *aff'd in part*, 826 F.2d 1299 (3d Cir. 1987); *People v. Ramos*, 614 N.Y.S.2d 977, 984 (N.Y. App. Div. 1994); *People v. Jackson*, 538 N.Y.S.2d 677, 679 (N.Y. Sup. Ct. 1988); *Pierce v. State*, 786 P.2d 1255, 1261 (Okla. Crim. App. 1990); *Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989). These cases are almost certainly only a tiny fraction of the total number of cases in which defendants have been falsely convicted due in large part to a prosecutor's misconduct, especially misconduct involving the willful suppression of exculpatory evidence or subornation of perjury. See JIM DWYER ET AL., *ACTUAL INNOCENCE* 172–82 (Doubleday 2000) (recounting several cases in which a prosecutor's misconduct resulted in the conviction and incarceration of an innocent person); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 533–34, 539 (2005) (locating 340 exonerations from 1989–2003, not counting hundreds of additional exonerated defendants in Tulia and Ramparts scandals and other mass exonerations of more than seventy convicted childcare sex abuse defendants); see also Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L.

Abetting the prosecutor's misconduct is the failure of the judiciary to adequately enforce *Brady*'s constitutional command and thereby protect a defendant's right to due process. Even in those infrequent instances when a prosecutor's suppression of evidence is discovered, the judiciary's enforcement of *Brady* has been inconsistent, confusing, and increasingly deferential to the prosecutor's discretion. Whereas the courts continue to recognize and articulate the broad components of the *Brady* rule, the so-called "rule" has undergone considerable judicial alteration over the years so that its original formulation is largely unrecognizable. To be sure, a few of these changes have added modest increments that theoretically benefit criminal defendants, such as abolishing the need for a defendant to make a specific request for "*Brady*" evidence¹⁹ and applying *Brady*'s coverage equally to exculpatory and impeachment evidence.²⁰

However, as courts and commentators consistently have recognized, the most far-reaching modification of *Brady* has been the judiciary's interpretation of the concept of "materiality," and the resulting prosecutorial "gamesmanship."²¹ Whereas *Brady* used the term "materiality" prospectively to identify evidence that a prosecutor is required to disclose to a defendant to protect his right to a fair trial,²² the judiciary's current approach defines materiality retrospectively to identify evidence that a prosecutor should have disclosed to the defendant, and whether the prosecutor's nondisclosure was so prejudicial that it denied the defendant a fair trial.²³ The most pernicious consequence of the judiciary's radical reconstruction of the concept of materiality has been to afford prosecutors an extraordinarily wide berth to conceal favorable evidence from the defense in the completely rational expectation that

REV. 125, 132-69 (2004) (analyzing institutional and political barriers deterring prosecutors from accepting the potential legitimacy of post-conviction claims of innocence).

19. See *infra* notes 134-46 and accompanying text.

20. See *infra* notes 105-17 and accompanying text.

21. United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) (noting the "annoying frequency [of] gamesmanship by some prosecutors" is attributable to the "prosecutor's tendency to adopt a retrospective view of materiality"), *vacated sub nom.* United States v. Plfaumer, 473 U.S. 922 (1985) (mem.).

22. See United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001) ("[*Brady*] appears to be using the word 'material' in its evidentiary sense, *i.e.*, evidence that has some probative tendency to preclude a finding of guilt or lessen punishment.").

23. *Id.* at 140 ("[T]he scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."); see *infra* notes 147-55 and accompanying text.

the suppression either will not be discovered or, if discovered, will be found by a reviewing court to not be material.²⁴ And given this retrospective, ad hoc, fact-intensive, and wholly speculative factual and doctrinal analysis required to determine the “materiality” of suppressed evidence, it is increasingly likely that even in egregious instances of nondisclosure, a court will find the suppression to be not material.²⁵ Prosecutors are thereby encouraged to “play the odds,” and are almost totally insulated from meaningful judicial supervision.²⁶

24. See *infra* notes 147–55 and accompanying text. Compare *Oxman*, 740 F.2d at 1314 (“What we can no longer tolerate is the prosecutor’s guess before trial that the evidence after trial will not prove to have been material, and the consequent decision to conceal it even from the trial court.”), with *Coppa*, 267 F.3d at 143 (“The prosecutor, however, cannot await the outcome and must therefore make a prediction before the trial as to how the nondisclosure of favorable evidence will be viewed after the trial.”).

That prosecutors view their disclosure obligation extremely narrowly is confirmed by anecdotal evidence. For example, Judge Jon Newman of the Second Circuit Court of Appeals, when he was a United States Attorney, posed to a large audience of prosecutors a hypothetical bank robbery in which the defendant was identified by two or three tellers and one or two customers. See *United States v. Bagley*, 473 U.S. 667, 697 (1985) (Marshall, J., dissenting) (citing *Discovery in Criminal Cases*, 44 F.R.D. 481, 500–01 (1968)). Another customer was located who stated that the defendant was not the perpetrator. *Id.* According to Judge Newman, “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?’” *Id.* Only two prosecutors felt they should disclose the information. *Id.* “Yet I was putting to them what I thought was the easiest case—the clearest case of disclosure of exculpatory information!” *Id.*

In a survey of New York State prosecutors conducted by the John Jay Legal Clinic of Pace Law School relating to a domestic violence prosecution in which the defendant has been charged with assault, aggravated harassment, and menacing, prosecutors were asked whether they would disclose to the defense statements made by a hypothetical victim. Sixty-two questionnaires were sent out and thirty-two prosecutors offices responded. Prosecutors were asked whether the following statements by the victim were *Brady* evidence that should be disclosed:

1. “It was all my fault.” Twelve prosecutors said it was *Brady*; twelve said it was not *Brady*.
2. “I instigated the whole encounter.” Ten said it was *Brady*; thirteen said it was not *Brady*.
3. “I made him hit me.” Twelve said it was *Brady*; twelve said it was not *Brady*.
4. “He didn’t hurt me.” Twenty-three said I was *Brady*; seven said it was not *Brady*.
5. “I hit him too.” Fourteen said it was *Brady*; fourteen said it was not *Brady*.
6. “I exaggerated what happened.” Eighteen said it was *Brady*; ten said it was not *Brady*.
7. “What’s in the police report isn’t true.” Twenty-three said it was *Brady*; three said it was not *Brady*.

JOHN JAY LEGAL CLINIC, DOMESTIC VIOLENCE VICTIM STATEMENTS: *BRADY* OR NOT? 1–6 (2000).

25. See *Bagley*, 473 U.S. at 702 (Marshall, J., dissenting) (“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.”).

26. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 439 (1992) (“Thus, by avoiding any inquiry into the prosecutor’s culpability, and focusing entirely on the materiality of the evidence, the Court encourages prosecutors, even ethical

Finally, apart from legal accountability, prosecutors are almost never disciplined by the legal profession for *Brady* violations, even in the most blatant and easily provable cases.²⁷ Of all the ethical rules regulating courtroom conduct by prosecutors, the rule governing a prosecutor's obligations under *Brady* is the most explicit provision and the easiest to enforce.²⁸ It is therefore profoundly ironic that, given the multitude of instances involving unambiguous and easily provable *Brady* violations, the imposition of professional discipline on prosecutors by agencies mandated to enforce ethical rules has been so rare.²⁹ As it enters its forty-fourth year, *Brady v. Maryland*, more than any of the other icons of the Warren Court era, has become a monument to judicial and ethical impotence.

Part I of this Article describes the evolution of the *Brady* rule over the past forty-three years. Part I sketches the origins of the rule and its doctrinal developments. Part II closely examines *Brady*'s impact on constitutional criminal procedure. Part II suggests that *Brady*'s essential goal has been eroded by the courts, subverted by prosecutors, and ignored by disciplinary bodies. Part III proposes that only through expanding a defendant's right to discovery can the goal of *Brady* be realized. The Article concludes that *Brady*, more than any

prosecutors, to withhold evidence.”).

27. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987); Armstrong & Possley, *supra* note 8, at 3.

28. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (2004); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3-3.11(a) (1992), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & REGULATIONS 1146 (John S. Dzienkowski ed., West Group 2001). The prosecutor's ethical duty is broader than her constitutional duty. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (constitutional rule requires less than the ethical rule). Under the constitutional rule, a prosecutor is required to disclose only evidence that is materially favorable to the defense, whereas the ethical rules require the prosecutor to disclose all evidence or information that tends to “negate the guilt of the accused or mitigates the offense.” Compare *id.* (describing the constitutional duties), with MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (stating the relevant ethical rule). Moreover, the ethical rule is not limited to admissible evidence; it includes all evidence or information that is favorable to the accused, whether or not it is admissible. MODEL RULES OF PROF'L CONDUCT R. 3.8(d). Additionally, under the constitutional rule, a prosecutor can avoid a violation for nondisclosure if the evidence is cumulative of evidence already disclosed, whereas the ethical rule contains no such limitation. See *Kyles*, 514 U.S. at 437. Finally, a defendant's knowledge of the undisclosed evidence, or ability with reasonable diligence to acquire such evidence, usually relieves the prosecutor of his disclosure obligation, whereas no such limitation is contained in the ethical rule. See Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1219–20 (2000) (arguing against changing the ethics rules to include materiality requirement).

29. See *infra* notes 267–78 and accompanying text.

other rule of constitutional criminal procedure, has been the most fertile and widespread source of misconduct by prosecutors and, more than any other rule of constitutional criminal procedure, has exposed the deficiencies in the truth-serving function of the criminal trial.

II. *BRADY* THEN AND NOW

Brady v. Maryland,³⁰ in hindsight, is a curious decision, both factually and legally. Brady conceded that he participated with an accomplice in a gruesome murder, his guilt was proved overwhelmingly; the prosecutor's failure to disclose to Brady an isolated statement made by his accomplice was arguably inadvertent, the statement had no bearing on Brady's guilt, and was of only marginal relevance to his punishment.³¹ The Maryland Court of Appeals vacated Brady's conviction, however, finding that the prosecutor's suppression of the accomplice's statement violated due process, but remanded the case for a new trial on the issue of punishment only, not on the issue of guilt.³² The federal question in the Supreme Court, then, was whether the state court's decision limiting Brady's new trial to the issue of only his sentence violated the federal constitution.³³ The Supreme Court affirmed the Maryland judgment, finding that the state court's decision did not violate the United States Constitution, but then proceeded to announce a new rule of discovery for criminal defendants based on constitutional due process.³⁴

30. 373 U.S. 83 (1963).

31. *Id.* at 84. Brady and his companion, Boblit, were found guilty of capital murder at separate trials and sentenced to death. *Id.* Brady, at his trial, took the stand and admitted that he participated in the crime, but claimed that Boblit did the actual killing. *Id.* Brady's lawyer conceded in his summation that Brady was guilty of murder in the first degree, asking only that the jury return a verdict without capital punishment. *Id.* Prior to trial, Brady's lawyer requested the prosecution show him Boblit's extrajudicial statements. *Id.* Several statements were disclosed, but one statement in which Boblit admitted to the actual killing, was not revealed. *Id.*

32. *Id.* at 85. The Maryland court found that Boblit's statement would have no bearing on Brady's guilt for first degree murder under the law of accomplice liability. *Id.* at 88. However, Boblit's statement admitting to being the actual killer might have persuaded the jury to spare Brady's life. *Id.* at 89.

33. *Id.* at 85. The issue of whether the prosecutor's suppression of evidence violated due process was neither briefed nor argued. See Brief of Petitioner at 2, *Brady v. Maryland*, 373 U.S. 83 (1963) (No. 490).

34. *Brady*, 373 U.S. at 86. Given the limited disposition of the appeal, the due process discussion by the Court, in Justice White's view, "is wholly advisory." *Id.* at 92 (White, J., concurring). The dissenting opinion of Justices Harlan and Black contended that the issue before the Court was whether the Maryland state court order granting a new trial, limited to the issue of punishment, violated Brady's Fourteenth Amendment right to equal

The Court's opinion is peculiar.³⁵ The Court suggested that its decision in *Brady* was merely an "extension" of earlier decisions concerning a defendant's due process right to a fair trial.³⁶ However, each of those decisions related principally to a prosecutor's deliberate use of false testimony at trial to secure the defendant's conviction, clearly not the case in *Brady*.³⁷ In only one of those decisions did the Court cite the prosecutor's failure to disclose favorable evidence.³⁸ The Court also cited two decisions from the United States Court of Appeals for the Third Circuit,³⁹ both also cited by the Maryland Court of Appeals, which, according to the Supreme Court, "state the correct constitutional rule."⁴⁰ Considered collectively, the unifying theme of all these cases is the recognition by the Court of the central role played by the prosecutor in ensuring that the accused receives a fair trial.⁴¹ Indeed, the Supreme Court in *Brady* described the prosecutor

protection. *Id.* (Harlan, J., dissenting).

35. See *United States v. Oxman*, 740 F.2d 1298, 1308 (3d Cir. 1984) (characterizing Justice Douglas's opinion for the Court as "unfortunately unanalytical"), *vacated sub nom.* *United States v. Plfaumer*, 473 U.S. 922 (1985) (mem.).

36. *Brady*, 373 U.S. at 86–87. The leading cases cited by the Court are *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959); and *Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam). The Court also added citations to *Wilde v. Wyoming*, 362 U.S. 607, 607 (1960) (claiming that defendant's guilty plea "was induced when he 'had no counsel present' and that the prosecutor willfully suppressed the testimony of two eyewitnesses to the alleged crime which would have exonerated the petitioner") and *Durley v. Mayo*, 351 U.S. 277, 287 (1956) (Douglas, J., dissenting) (alleging that witnesses lied to curry favor with prosecution).

37. See *Brady*, 373 U.S. at 84. The Court also introduced the words, "upon request," even though none of the cases cited by the Court turned on the presence or absence of a request. *Id.* at 87; see also *Oxman*, 740 F.2d at 1309 (Justice Douglas's inclusion of the words "upon request" suggested to prosecutors that they had no duty to disclose exculpatory evidence in absence of a request.).

38. See *Pyle*, 317 U.S. at 214–16 (reviewing a claim that defendant's 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").

39. See *United States ex rel. Thompson v. Dye*, 221 F.2d 763, 767 (3d Cir. 1955) (finding the state failed to disclose evidence of defendant's intoxicated condition at time of arrest, which should have been submitted to the jury); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 819–20 (3d Cir. 1952) (finding the state's failure to disclose ballistics evidence may have been helpful to defense).

40. *Brady*, 373 U.S. at 86.

41. *Id.* at 87 (noting that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"). The Court had previously emphasized the prosecutor's duty at trial to avoid committing "foul blows" to win a conviction. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[W]hile [a prosecutor] 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."). In *Brady*, the Court for the first time articulated the prosecutor's affirmative

not merely as the attorney for one of the parties, but as the “architect” of the proceeding with the power to “shape a trial that bears heavily on the defendant.”⁴² Accordingly, under *Brady*, when a prosecutor fails to comply with a defendant’s request for evidence that might be relevant to proving the defendant’s innocence, or mitigating the offense or the punishment, the prosecutor violates due process if the evidence is material to guilt or punishment.⁴³

The holding in *Brady* contains several components, each of which raises difficult questions of interpretation.⁴⁴ What constitutes “suppression” of evidence? What constitutes “favorable” evidence? Does the prosecutor have to be aware that she possesses *Brady* evidence? Does *Brady* apply if the defense already knows about the evidence? Does the evidence have to be admissible for *Brady* to apply? What type of “request” by the defense satisfies the *Brady* standard? Is there a distinction in *Brady* between suppressed evidence that exculpates an accused and suppressed evidence that impeaches a prosecution witness? What did the Court mean by its requirement that the evidence must be “material either to guilt or to punishment”? Finally, is a prosecutor’s “bad faith” in deliberately suppressing favorable and material evidence relevant? The following sections attempt to answer these questions by identifying the components of the *Brady* rule and examining how these concepts have been interpreted by the courts since *Brady*.

A. “Suppression”

Although *Brady* did not define the meaning or scope of a prosecutor’s “suppression” of evidence, the concept has been understood by the courts to include several distinct kinds of nondisclosures: a prosecutor’s concealment from the accused of information or evidence that could negate guilt or reduce the crime or punishment,⁴⁵ a prosecutor’s knowing use of false testimony and the failure to reveal such testimony,⁴⁶ and a prosecutor’s allowing false testimony to remain uncorrected when the prosecutor should have

obligation not simply to avoid misconduct, but to ensure that “justice is done its citizens in the courts.” 373 U.S. at 87.

42. *Brady*, 373 U.S. at 87–88.

43. *Id.* at 87.

44. *See id.*

45. *Kyles v. Whitley*, 514 U.S. 419, 453–54 (1995); *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972).

46. *Banks v. Dretke*, 540 U.S. 668, 701–03 (2004); *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

known that the testimony is false.⁴⁷ The concept of suppression also includes a prosecutor's failure to investigate the background of her witness and the apparently false testimony given by her witness.⁴⁸

Neither *Brady* nor its antecedents established a test to determine whether a conviction based on a prosecutor's knowing use of false testimony must be reversed as a violation of due process. The Court subsequently stated the test to be whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."⁴⁹ Relevant factors in making this assessment include the importance of the witness,⁵⁰ the significance of his testimony,⁵¹ the strength of the government's case,⁵² and the prosecutor's attempt to exploit the false testimony for a tactical advantage.⁵³

Suppression of information bearing on the falsity of testimony typically encompasses perjured testimony by a witness. A prosecutor's elicitation, or his failure to correct, a witness's misleading, incomplete, or technical misstatements ordinarily is not viewed as a suppression of evidence.⁵⁴ However, a prosecutor suppresses evidence when he devises a scheme to shield the witness from knowledge of an agreement between the prosecutor and the witness's lawyer and thereby allows the witness to give technically truthful, but essentially false testimony.⁵⁵

A prosecutor does not suppress evidence if the defendant already knows about the existence of the evidence.⁵⁶ A defendant's actual or

47. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *People v. Steadman*, 623 N.E.2d 509, 512 (N.Y. 1993).

48. *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1117 (9th Cir. 2001).

49. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also* *United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003) ("[P]rosecution's knowing use of false testimony entails a veritable hair trigger for setting aside the conviction.").

50. *Giglio*, 405 U.S. at 154–55; *Mitchell v. Gibson*, 262 F.3d 1036, 1062, 1064 (10th Cir. 2001).

51. *Jenkins v. Artuz*, 294 F.3d 284, 297 (2d Cir. 2002); *see* *Fairman v. Anderson*, 188 F.3d 635, 646 (5th Cir. 1999).

52. *See* *Fulford v. Maggio*, 692 F.2d 354, 357 (5th Cir. 1982); *United States v. Ramos Algarin*, 584 F.2d 562, 565 (1st Cir. 1978).

53. *Jenkins*, 294 F.3d at 295; *Mitchell*, 262 F.3d at 1064–66.

54. *See* *United States v. Bailey*, 123 F.3d 1381, 1395–96 (11th Cir. 1997) (reasoning memory lapse, unintentional error, or oversight is not considered false testimony); *United States v. Payne*, 940 F.2d 286, 291 (8th Cir. 1991) (noting the fact that testimony challenged by another witness or inconsistent with prior statements is not necessarily false testimony).

55. *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc); *People v. Steadman*, 623 N.E.2d 509, 511 (N.Y. 1993); *see also* *Willhoite v. Vasquez*, 921 F.2d 247, 251 (9th Cir. 1990) (Trott, J., concurring) (characterizing the prosecutorial tactic as a "pernicious scheme without any redeeming features"); *see infra* notes 248–58 and accompanying text.

56. *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

probable knowledge of the evidence may relieve a prosecutor of his *Brady* obligation.⁵⁷ Although *Brady* did not discuss whether a defendant's knowledge of the evidence negates a claim of suppression, the Court later suggested that a prosecutor does not suppress evidence under *Brady* if the defendant already knew about the undisclosed evidence.⁵⁸ Nor, according to several courts, is evidence suppressed under *Brady* if the defendant, with reasonable diligence, could have learned about the evidence.⁵⁹ However, evidence that theoretically may be accessible to the defense does not necessarily insulate that evidence from disclosure by the prosecutor. According to some courts, to hold a defendant accountable for every conversation he has ever had would constitute an undue burden,⁶⁰ as it would be unfair to require a defendant to learn about the existence of all documentary evidence bearing on his case.⁶¹

Whether the nondisclosure by a prosecutor of favorable evidence during plea negotiations and guilty pleas constitutes suppression under *Brady* is unclear.⁶² 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.⁶³ The Court has not decided whether a prosecutor suppresses evidence when he fails to disclose to a defendant contemplating a guilty plea the existence of exculpatory evidence. However, several courts have held that a prosecutor suppresses evidence when he conceals exculpatory evidence during

permitting him to take advantage of any exculpatory evidence." *Id.* (citations omitted). *But see* *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (recognizing a prosecutor's duty to disclose evidence independent of defendant's knowledge).

57. *United States v. Bhutani*, 175 F.3d 572, 578 (7th Cir. 1999) (noting that even if defendant has no actual knowledge of the suppressed information, *Brady* is not violated if defendant, with reasonable diligence, could have obtained such evidence).

58. *United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating *Brady* involves "the discovery, after trial of information which had been known to the prosecution but unknown to the defense").

59. *Bhutani*, 175 F.3d at 577.

60. *Schledwitz v. United States*, 169 F.3d 1003, 1013 (6th Cir. 1999) ("We do not believe that due process stretches so far as to hold a defendant accountable for every conversation he has ever had in his lifetime regardless of the surrounding and intervening circumstances.").

61. *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995) (noting the defense had no reason to know that government witness's affidavit had been filed in court prior to her guilty plea).

62. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 958 (1989) (noting that although *Brady* issues frequently are raised in the plea bargaining process, the extent of a prosecutor's duty to disclose exculpatory evidence during plea negotiations is unclear).

63. *See United States v. Ruiz*, 536 U.S. 622, 623 (2002).

plea negotiations.⁶⁴ Moreover, a prosecutor may be found to have suppressed evidence when he fails to disclose, during plea negotiations, relevant information relating to the plea, such as the existence of other ongoing investigations involving the defendant.⁶⁵

A prosecutor also may suppress evidence under *Brady* when he fails to preserve favorable evidence from loss or destruction.⁶⁶ Otherwise, some courts have observed, the disclosure obligation could easily be circumvented by suppression of evidence by means of destruction rather than mere failure to disclose. Common examples of unpreserved evidence include 911 tapes,⁶⁷ handwritten notes of interviews with witnesses,⁶⁸ erased videotapes relevant to the crime,⁶⁹ discarded samples used in chemical tests,⁷⁰ lost blood, sperm, hair, or urine samples,⁷¹ and unpreserved clothing worn by the defendant or the victim.⁷² Although *Brady* explicitly stated that a prosecutor's bad faith in suppressing evidence was not a relevant consideration,⁷³ the failure by prosecutors or police to preserve potentially exculpatory evidence from loss or destruction is not a due process violation unless

64. See *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453–54 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 495–96 (10th Cir. 1994); *White v. United States*, 858 F.2d 416, 421–22 (8th Cir. 1988); see also Corinna Barrett Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 21 (2002) (arguing that *Brady*'s role in protecting the innocent from wrongful conviction is just as essential in the plea bargaining context as it is at trial); Andrew P. O'Brien, *Reconcilable Differences: The Supreme Court Should Allow the Marriage of Brady and Plea Bargaining*, 78 IND. L.J. 899, 911 (2003) (obligating prosecutors to disclose material exculpatory evidence during plea negotiations would ensure better informed and more accurate guilty pleas). But see John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 516 (2001) (concluding that plea bargaining "brings out the worst in *Brady*").

65. See *United States v. Krasn*, 614 F.2d 1229, 1234 (9th Cir. 1980).

66. *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988) (finding a due process violation only if a defendant can show that failure to preserve the evidence was in bad faith); see also *Illinois v. Fisher*, 540 U.S. 544, 545 (2004) (per curiam). State courts need not apply *Youngblood*'s bad faith test. See *State v. Morales*, 657 A.2d 585, 589 (Conn. 1995); *People v. Newberry*, 638 N.E.2d 1196, 1199 (Ill. App. Ct. 1994), *aff'd*, 652 N.E.2d 288 (Ill. 1995).

67. *People v. Brock*, 740 N.Y.S.2d 54, 55 (N.Y. App. Div. 2002).

68. *United States v. Riley*, 189 F.3d 802, 804–05 (9th Cir. 1999).

69. *United States v. Parker*, 72 F.3d 1444, 1451 (10th Cir. 1995).

70. *California v. Trombetta*, 467 U.S. 479, 482–83 (1984).

71. *United States v. Boswell*, 270 F.3d 1200, 1206 (8th Cir. 2001); *Virgin Islands v. Testamark*, 570 F.2d 1162, 1167 (3d Cir. 1978); *People v. Allgood*, 517 N.E.2d 1316, 1317 (N.Y. 1987); *Ex parte Brandley*, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (en banc).

72. *State v. Matafeo*, 787 P.2d 671, 672 (Haw. 1990); *People v. Walker*, 628 N.E.2d 971, 973 (Ill. App. Ct. 1993).

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

the defendant can establish the government's bad faith.⁷⁴

Finally, suppressed evidence may also include evidence disclosed by the prosecutor too late for effective use by the defendant at trial.⁷⁵ *Brady* did not address the issue of when a prosecutor is required to disclose favorable evidence, nor has the Supreme Court since *Brady* answered that question. Whereas a demand for *Brady* evidence ordinarily is made prior to trial, the prosecutor's disclosure duty does not necessarily require pretrial disclosure.⁷⁶ The settled rule seems to be that *Brady* evidence must be disclosed in time for its effective use at trial⁷⁷ or at a plea proceeding.⁷⁸ The ethics codes similarly require "timely disclosure," but do not explicitly require pretrial disclosure.⁷⁹

Delayed disclosure ordinarily is reviewed to determine whether the defendant had a meaningful opportunity to make effective use of the evidence at trial.⁸⁰ Courts may also review a prosecutor's untimely disclosure to determine whether a defendant's ability to adequately prepare for trial was impaired.⁸¹ Thus, to successfully claim that a prosecutor's belated disclosure constituted a "suppression" of evidence, a defendant must demonstrate an impaired ability to use the evidence effectively, either in preparing for trial or at the trial itself, and that prejudice resulted from the belated disclosure.⁸² Defense counsel's failure to request a continuance after belatedly receiving the evidence would be a circumstance negating prosecutorial suppression.⁸³ The prosecutor's good or bad faith in delaying the disclosure also may be a relevant circumstance.⁸⁴ In those relatively

74. *Arizona v. Youngblood*, 488 U.S. 51, 58 ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

75. *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001).

76. *United States ex rel. Lucas v. Regan*, 503 F.2d 1, 3 n.1 (2d Cir. 1974).

77. *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (noting that evidence "must be disclosed in time for its effective use at trial").

78. *United States v. Persico*, 164 F.3d 796, 804 (2d Cir. 1999).

79. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004) (requiring prosecutor to make "timely disclosure"); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004) (same); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3-3.11(a) (1992), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & REGULATIONS 1146 (John S. Dzienkowski ed., West Group 2001). (requiring prosecutor to disclose evidence "at the earliest feasible opportunity").

80. *Madsen v. Dormire*, 137 F.3d 602, 605 (8th Cir. 1998).

81. *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001).

82. *Grant v. Alldredge*, 498 F.2d 376, 381 (2d Cir. 1974) (finding belated disclosure of identification evidence impaired defense counsel's ability to uncover additional exculpatory evidence).

83. *United States v. Watson*, 76 F.3d 4, 8 (1st Cir. 1996).

84. *See United States v. Richman*, 600 F.2d 286, 292 (1st Cir. 1979) (finding no deliberate wrongdoing in late disclosure); *see also United States v. Campagnuolo*, 592 F.2d

infrequent cases in which a defendant can demonstrate that delayed disclosure prejudiced his ability to prepare for trial or to present his case meaningfully and effectively, a prosecutor may be found to have unconstitutionally suppressed evidence.⁸⁵

B. "By the Prosecution"

In *Brady*, the prosecutor had actual knowledge of a statement of Brady's accomplice that might have mitigated Brady's punishment and failed to disclose it to the defense.⁸⁶ The Supreme Court did not consider whether a due process violation required a prosecutor to have actual knowledge of the undisclosed evidence and make a purposeful decision to suppress the evidence. In other words, could suppression by a prosecutor be established if the prosecutor was ignorant of the existence of the favorable evidence? In *United States v. Agurs*,⁸⁷ the Court framed the disclosure duty of the prosecutor as relating to evidence "known to the prosecution but unknown to the defense."⁸⁸ Thus, "knowledge" by the prosecutor appears to be the touchstone of *Brady*.⁸⁹ What are the extent and limits of a prosecutor's knowledge? A prosecutor's knowledge reasonably extends beyond her actual knowledge, for otherwise, the *Brady* rule could easily be nullified simply by keeping the trial prosecutor ignorant of information adverse to the government's case. Accordingly, a prosecutor is required to disclose not only evidence he actually knows about, but also evidence about which he "should have known."⁹⁰

A prosecutor is charged with knowledge of evidence held by government agencies investigating the case.⁹¹ However, a prosecutor usually is not charged with knowledge of evidence in the possession of government agencies that are neither investigative arms of the

852, 858 (5th Cir. 1979) (suppressing evidence for "prophylactic purposes").

85. See *Leka*, 257 F.3d at 91 (holding that delayed disclosure of a key eyewitness impaired ability of defense to effectively assimilate new evidence into existing trial strategy and violated *Brady*).

86. *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

87. 427 U.S. 97 (1976).

88. *Id.* at 103.

89. See *Giles v. Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring) ("[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.").

90. *Agurs*, 427 U.S. at 103; 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.").

91. *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995); *Moore v. Gibson*, 195 F.3d 1152, 1164 (10th Cir. 1999); *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999).

prosecutor nor participated in the investigation of the case.⁹² Nor is a prosecutor responsible for evidence possessed by investigative agencies of other jurisdictions, even though such agencies might be part of a joint-task-force investigating the same criminal activity.⁹³ A prosecutor probably has an affirmative duty to acquire knowledge about relevant aspects of his case.⁹⁴ For example, a prosecutor has an affirmative duty to review personnel files of law enforcement officials he intends to call as witnesses, particularly if the defense requests production of the files.⁹⁵ A prosecutor also has an obligation to learn about the background, criminal record, and other relevant information of his key witnesses.⁹⁶

C. "Of Evidence"

Brady did not explain the meaning of the term "evidence," particularly whether the suppressed evidence must be admissible as a precondition to establishing a due process violation. The Court agreed with the Maryland state court that the accomplice's undisclosed confession could not have affected the verdict of guilt because it was legally irrelevant to the jury's determination.⁹⁷ The Court also agreed

92. See *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (refusing to charge federal prosecutors with the knowledge of materials in possession of a state police department). But see *Pennsylvania v. Ritchie*, 480 U.S. 39, 43, 57–58 (1987) (holding that a defendant, charged with raping his thirteen-year-old daughter, was entitled to have the file of a state agency that investigates cases of suspected child mistreatment reviewed by prosecutor, even though prosecutor had not seen the file, did not have access to it, and therefore did not comply with defense's request for its production).

93. *Moreno-Morales v. United States*, 334 F.3d 140, 146–47 (1st Cir. 2003).

94. For discussions of the nature and scope of a prosecutor's duty to seek out evidence favorable to a defendant, see Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1529 (2003) (suggesting an affirmative duty on a prosecutor to search files of government entities in terrorism cases for exculpatory evidence exists only if those entities have acted in a law enforcement capacity under the prosecutor's direction and control); 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, 1424–27 (2000) (proposing amendments to the codes of ethics that would require prosecutors to more aggressively search for exculpatory evidence in police hands); Robert Hochman, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1676 (1996) (suggesting that *Brady* imposes duties not only on prosecutors but on all state actors involved in the investigation and prosecution).

95. See *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996).

96. *Carriger v. Stewart*, 132 F.3d 463, 479–80 (9th Cir. 1997) (stating that a prosecutor has a duty to learn of the criminal record of a star witness known to be a career criminal, including prison records on file with correction agencies).

97. *Brady v. Maryland*, 373 U.S. 83, 90 (1963). The Court assumed that if the suppressed confession had been used at the first trial, the judge's ruling that it was

with the Maryland state court that the accomplice's confession would have been relevant at the sentencing stage because it could have influenced the jury to mitigate Brady's punishment.⁹⁸ The Supreme Court, since *Brady*, has suggested that the admissibility of suppressed evidence may be a factor in determining whether a prosecutor engaged in an unconstitutional nondisclosure.⁹⁹ Indeed, in *Wood v. Bartholomew*, the Supreme Court intimated that admissibility of the evidence is a precondition to triggering the prosecutor's disclosure duty.¹⁰⁰ In *Wood*, a polygraph test showing that a key government witness had lied would not have been admissible at trial and, therefore, did not constitute *Brady* evidence requiring disclosure.¹⁰¹ Several courts have construed the *Brady* rule to require that, unless the evidence would be admissible, it need not be disclosed.¹⁰² Other courts, by contrast, have drawn the opposite conclusion and rejected admissibility as a precondition for determining the applicability of *Brady* as long as the information could reasonably have led to admissible evidence.¹⁰³ Nevertheless, courts may be unwilling to speculate on the capacity of undisclosed and inadmissible evidence to

irrelevant to guilt and therefore not admissible "might have been flouted." *Id.* The Court, however, was unwilling to raise this "sporting theory of justice" to the dignity of a constitutional right. *Id.*

98. See *id.* at 88–89.

99. See *Giles v. Maryland*, 386 U.S. 66, 73–74 (1967) (stating that information contained in suppressed police report might have been "admissible and useful"); see also *United States v. Agurs*, 427 U.S. 97, 100 n.3 (1976) (citing *United States v. Burks*, 470 F.2d 432, 434–35 (D.C. Cir. 1972)) (stating that undisclosed proof of a victim's prior criminal record would have been admissible on the issue of self-defense).

100. 516 U.S. 1, 8 (1995).

101. *Id.* at 6 (stating the result of a polygraph is inadmissible; it "is not 'evidence' at all" and it is "mere speculation" whether it could have been used effectively for any purpose).

102. See *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *United States v. Derr*, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993); *Zeigler v. Callahan*, 659 F.2d 254, 269 (1st Cir. 1981).

103. See *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (stating the hearsay statement of the victim may have led to discovery of a witnesses to corroborate information contained in the statement); *Paradis v. Arave*, 240 F.3d 1169, 1176–77 (9th Cir. 2001) (finding the prosecutor's notes, although not admissible, could have been used to contradict a key medical witness and therefore nondisclosure was a *Brady* violation); *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000) (concluding that inadmissible witness statements could not have led defense to discovery of admissible impeachment or exculpatory evidence); see also Gregory S. Seador, Note, *A Search for the Truth or a Game of Strategy? The Circuit Split Over the Prosecution's Obligation to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRACUSE L. REV. 139, 143 (2001) (advocating requiring a prosecutor to disclose inadmissible exculpatory information to the court, which would then decide whether the information may lead the defense to the discovery of admissible evidence).

produce admissible evidence and therefore strictly require that evidence be admissible.¹⁰⁴

Brady did not distinguish between evidence that might directly exculpate a defendant and evidence that might undercut the prosecution's case by impeaching the credibility of a government witness. In *Brady*, the accomplice's undisclosed admission¹⁰⁵ was potentially exculpatory to Brady because it would have been helpful in showing that the accomplice, not Brady, was the actual killer. Current Supreme Court doctrine, however, makes no distinction between exculpatory and impeaching evidence.¹⁰⁶ Exculpatory evidence exonerates a defendant; it relates directly or circumstantially to a substantive issue in the case. Typical examples of exculpatory evidence include a homicide victim's prior criminal record that circumstantially proves self-defense,¹⁰⁷ an eyewitness's prior mistaken identification,¹⁰⁸ and a ballistics report showing that a weapon found on the defendant was not the murder weapon.¹⁰⁹ Impeaching evidence, by contrast, typically would demonstrate that a witness is lying about facts in the case, or is generally unworthy of belief.¹¹⁰ Examples of impeaching evidence include a promise of leniency made to a government witness in exchange for his testimony,¹¹¹ a witness's prior false testimony suggesting a character for untruthfulness,¹¹² and a witness's prior inconsistent statements relating to the facts of the case.¹¹³ Alternatively, examples of general impeaching evidence include a witness's prior criminal record,¹¹⁴ a psychological report on a witness's competency,¹¹⁵ and promises of leniency or rewards in prior cases.¹¹⁶ In addition, the extraordinary lengths to which a prosecutor goes to curry favor with a witness may also be used to reveal an

104. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("A court cannot speculate as to what evidence the defense might have found if the information had been disclosed.").

105. *See Brady v. Maryland*, 373 U.S. 83, 84, 88 (1963).

106. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

107. *United States v. Agurs*, 427 U.S. 97, 100 (1976).

108. *Kyles v. Whitley*, 514 U.S. 419, 441-45 (1995).

109. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir. 1964).

110. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . .").

111. *Giglio v. United States*, 405 U.S. 150, 152-54 (1972).

112. *United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996).

113. *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 556 (4th Cir. 1999).

114. *Perkins v. Le Fevre*, 691 F.2d 616, 619 (2d Cir. 1982).

115. *State v. Hunt*, 615 N.W.2d 294, 300-01 (Minn. 2000).

116. *United States v. Masri*, 547 F.2d 932, 937 (5th Cir. 1977).

impeaching bias.¹¹⁷

D. “Favorable to an Accused”

Under *Brady*, a prosecutor is obligated to disclose evidence that is “favorable” to the defendant.¹¹⁸ Although *Brady* did not define the meaning of favorable evidence, both the Maryland appeals court and the Supreme Court agreed that the extra-judicial statement of the accomplice, by identifying himself as the actual killer, would have been favorable to Brady at sentencing.¹¹⁹ Courts have understood *Brady* to require a prosecutor to divulge all evidence that could reasonably be considered favorable—or “helpful”¹²⁰—to a defendant, meaning evidence that has some relevance to an issue in the case and could reasonably assist a defendant in preparing and presenting his case.¹²¹ Examples of favorable evidence are forensic reports that discredit key prosecution theories,¹²² a memorandum from the Drug Enforcement Agency undermining the government’s principal witness’s integrity,¹²³ polygraph reports casting doubt on the veracity of a key prosecution witness,¹²⁴ and a physician’s report of an examination of an alleged rape victim disclosing no evidence of sexual intercourse.¹²⁵

Some courts have given the concept of favorable evidence a much more limited interpretation. For example, undisclosed evidence that an accomplice was actually an undercover agent for the government was held not favorable,¹²⁶ and undisclosed evidence that a key prosecution witness had recently died also was held not to be favorable to the accused.¹²⁷ According to this restrictive view, only when there is a “substantial basis” for claiming that evidence is

117. See *United States v. Burnside*, 824 F. Supp. 1215, 1265–66 (N.D. Ill. 1993).

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

119. *Id.* at 88–89.

120. See *Giles v. Maryland*, 386 U.S. 66, 101–02 (1967) (Fortas, J., concurring).

121. See Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 394–95 (1984) (noting that since a prosecutor is “an understandably biased party,” it is a “nearly impossible task” for a prosecutor to determine objectively what evidence is favorable to a defendant).

122. *People v. Pilotti*, 511 N.Y.S.2d 248, 253 (N.Y. App. Div. 1987).

123. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1992).

124. *Carter v. Rafferty*, 621 F. Supp. 533, 548 (D.N.J. 1985).

125. *United States v. Poole*, 379 F.2d 645, 647–48 (7th Cir. 1967).

126. *Weatherford v. Bursey*, 429 U.S. 545, 559–60 (1977); *People v. Jenkins*, 360 N.E.2d 1288, 1289–90 (N.Y. 1977).

127. *People v. Jones*, 375 N.E.2d 41, 42 (N.Y. 1978).

favorable must the evidence be disclosed.¹²⁸ Moreover, courts generally accord the prosecutor broad discretion in deciding whether evidence is favorable under *Brady*.¹²⁹

Courts often find that evidence that is not clearly favorable need not be disclosed. For example, a ballistics report that no latent prints of value could be found on a murder weapon was held to be neutral evidence and not required to be disclosed.¹³⁰ Evidence that an eyewitness could not state whether the defendant was one of the masked perpetrators was also neutral and not required to be disclosed.¹³¹ A prosecutor's failure to disclose the names of witnesses who saw nothing was "empty" rather than exculpatory evidence.¹³² Nevertheless, some "neutral" evidence may be so manifestly favorable that it must be disclosed. For example, scientific tests that fail to connect a defendant with items of clothing allegedly worn by the murderer are favorable evidence in that they point to a number of factors that could have linked the defendant to the crime and did not.¹³³

E. "Upon Request"

One of the elements of the holding in *Brady* was the need for a focused request by the defense for favorable evidence.¹³⁴ The importance of such a request was underscored in subsequent Supreme Court decisions.¹³⁵ In *United States v. Agurs*,¹³⁶ the Supreme Court established a two-tiered framework for determining the materiality of undisclosed evidence which depended on whether the defendant made a specific request for evidence, simply made a general request for "all *Brady* material," or made no request at all.¹³⁷ As *Agurs* cautioned, the prosecutor's failure to respond to a specific and

128. *United States v. Agurs*, 427 U.S. 97, 106 (1976); *People v. Consolazio*, 354 N.E.2d 801, 804-05 (N.Y. 1976).

129. *See People v. Fein*, 219 N.E.2d 274, 280 (N.Y. 1966).

130. *People v. Penland*, 381 N.E.2d 840, 843 (Ill. App. Ct. 1978).

131. *United States v. Rhodes*, 569 F.2d 384, 387-88 (5th Cir. 1978).

132. *Commonwealth v. Satterfield*, 364 N.E.2d 1260, 1263-64 (Mass. 1977).

133. *Patler v. Slayton*, 503 F.2d 472, 478-79 (4th Cir. 1974).

134. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *see United States v. Oxman*, 740 F.2d 1298, 1308 (3d Cir. 1984) (stating the Court introduced the request requirement "for no reason discernible in the opinion"), *vacated sub nom. United States v. Plfaumer*, 473 U.S. 922 (1985) (mem.).

135. *See United States v. Agurs*, 427 U.S. 97, 106 (1976); *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972).

136. 427 U.S. at 97.

137. *See id.* at 104-06.

relevant request “is seldom, if ever, excusable.”¹³⁸ Thus, the Court imposed on a defendant who made a “specific request” for evidence an easier burden to establish prejudice.¹³⁹ Under *Agurs*, suppressed evidence that was specifically requested was material if it “might have affected the outcome of the trial”;¹⁴⁰ whereas suppressed evidence that was not specifically requested was material only if it “create[d] a reasonable doubt that did not otherwise exist.”¹⁴¹ The rationale for this dual standard appears to be that, by failing to acknowledge a specific request, the prosecutor engages in active deception by misleading the defense into abandoning potential trial strategies.¹⁴²

The distinction between specific requests, general requests, and no requests produced considerable confusion and uncertainty in the lower courts, and was eliminated by the Supreme Court in *United States v. Bagley*, which established a unitary standard of materiality

138. *Id.* at 106 (“[I]f 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.”).

139. *See id.*

140. *Id.* at 104.

141. *Id.* at 112. The Court observed that the proper standard for suppressed evidence that was unrequested “must reflect our overriding concern with the justice of the finding of guilt.” *Id.* The Court also observed that in order to satisfy his due process duty under *Brady*, a prosecutor must make an accurate prediction about the significance of an item of evidence under a standard that is “inevitably imprecise.” *Id.* at 108. The Court noted that under a “sporting theory of justice,” which *Brady* expressly rejected, a prosecutor might be required to disclose his entire file as a matter of routine practice since any item of evidence might conceivably be relevant on the issue of guilt. *Id.* However, the Court cautioned that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” *Id.* For a discussion of the complex moral and legal judgments attending the prosecutor’s exercise of discretion generally, see Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001).

142. *See United States v. Bagley*, 473 U.S. 667, 683 (1985) (There is a “significant likelihood that the prosecutor’s response to respondent’s discovery motion misleadingly induced defense counsel to believe that [the two government witnesses] could not be impeached.”); *see also* *People v. Vilardi*, 555 N.E.2d 915, 920 (N.Y. 1990) (invoking the state constitution to impose a higher standard on prosecutors in cases where a defendant makes a specific request, because suppression “is more serious in the face of a specific request in its potential to undermine the fairness of the trial”); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1149–50 (1982) (“First, a prosecutor’s failure to respond to a specific request has the feel of misdealing. Second, the failure may lead the defense to believe such evidence does not exist.”) (footnote omitted); Paul G. Nofer, Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley*, 1986 DUKE L.J. 892, 892 (1986) (*Agurs* imposed a lesser burden on the defendant to establish materiality in the specific request context because such conduct by the prosecutor “is fundamentally unfair and amounts to prosecutorial misdealing.”).

for suppressed evidence.¹⁴³ *Bagley* held that suppressed evidence is material if there exists a “reasonable probability that, had evidence been disclosed . . . the result of the proceeding would have been different.”¹⁴⁴ Although this unitary test of materiality is the rule in federal courts, states may apply a more defendant-friendly test when a defendant makes a specific request for favorable evidence.¹⁴⁵ Moreover, even in the federal courts, the specificity of a defense request may encourage the court to apply a lower threshold of materiality in deciding whether nondisclosure violates due process.¹⁴⁶

F. “Material Either to Guilt or Punishment”

Brady held that a prosecutor suppressed evidence in violation of due process when the evidence was material to guilt or punishment.¹⁴⁷ *Brady* did not articulate a standard of materiality governing a prosecutor’s nondisclosure of evidence. Indeed, *Brady*’s use of the term “material” appears to have been employed in an evidentiary sense rather than as a standard of review.¹⁴⁸ After employing different tests of materiality, depending on whether or not a defendant made a specific request for evidence, the Supreme Court in *United States v. Bagley* announced a unitary standard for federal courts in determining whether a prosecutor’s nondisclosure of evidence violates due process.¹⁴⁹ Suppressed evidence is material, the Court stated, only if it could be shown that there was a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹⁵⁰ The burden of establishing a “reasonable probability” of a different outcome rests on the defendant.¹⁵¹ *Bagley*’s standard of materiality was refined in *Kyles v. Whitley*,¹⁵² where the Court stated: “The question is not whether the

143. 473 U.S. at 682.

144. *Id.*

145. See *Vilardi*, 555 N.E.2d at 920 (“[S]uppression, or even negligent failure to disclose, is more serious in the face of a specific request in its potential to undermine the fairness of the trial, and ought to be given more weight than as simply one of a number of discretionary factors to be considered by a reviewing court.”).

146. See *Johnson v. Gibson*, 169 F.3d 1239, 1254–55 (10th Cir. 1999) (“[A] request for specific information, as opposed to a general request for ‘all *Brady* evidence,’ can lower the threshold of materiality necessary to establish a violation.”).

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

148. *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001).

149. 473 U.S. at 682.

150. *Id.*

151. See *id.*; *United States v. Agurs*, 427 U.S. 97, 106 (1979) (indicating that the burden is on the defendant).

152. 514 U.S. 419, 434 (1995).

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.”¹⁵³ *Kyles* also determined that an assessment of the materiality of all the suppressed evidence should be considered collectively, and not item by item.¹⁵⁴ Consistent with *Brady*, the Court noted that the prosecutor’s bad faith in deliberately suppressing evidence ordinarily is not relevant to a determination of materiality.¹⁵⁵

G. “Irrespective of the Good Faith or Bad Faith of the Prosecution”

Brady did not explain the inclusion of language in its holding that made a prosecutor’s moral culpability in suppressing favorable evidence irrelevant for purposes of determining whether a defendant had suffered sufficient prejudice to require a new trial.¹⁵⁶ The Court did note, though, that the critical consideration in reviewing a prosecutor’s nondisclosure was the “avoidance of an unfair trial,”¹⁵⁷ and not the “punishment of society for misdeeds of a prosecutor.”¹⁵⁸ The Court amplified this point in *United States v. Agurs*,¹⁵⁹ noting that a prosecutor who in good faith has overlooked evidence that is highly probative of innocence will be presumed to have recognized its significance and will have violated his constitutional obligation.¹⁶⁰ By the same token, as *Agurs* observed, no purpose would be served by requiring a new trial when a prosecutor willfully believed he was suppressing highly significant evidence, if, in fact, the evidence had no probative value to the defense.¹⁶¹ As the Court observed in *Agurs*: “If

153. *Id.*

154. *Id.* at 436.

155. *Id.* at 437–38; *see also Agurs*, 427 U.S. at 110 (“Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.”). Nevertheless, the Court admonished prosecutors to be “prudent” and err on the side of disclosure. *See Kyles*, 514 U.S. at 439 (“[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.”); *Agurs*, 427 U.S. at 108 (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.”).

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

157. *Id.*

158. *Id.* *But see United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) (suggesting that the standard of materiality should be lowered when prosecutors engage in deliberate withholding of exculpatory evidence in order to “deter conduct undermining the integrity of the judicial system”).

159. 427 U.S. at 110.

160. *Id.*

161. *Id.* The Court did not discuss whether requiring a new trial for deliberate and serious *Brady* violations might serve as a deterrent to future misconduct. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998) (dismissing charges with

the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”¹⁶²

III. DISSOLUTION OF THE “BRADY RULE”

The promise of *Brady v. Maryland* was to make the adversary system—and particularly the criminal trial—less like a sporting event and more like a search for the truth.¹⁶³ However, as the Supreme Court began to develop and refine the so-called *Brady* rule, it became increasingly clear that the protections afforded by *Brady* for those persons accused of crimes were largely illusory. Moreover, for prosecutors, whose natural instincts are to discount any rule that would require them to assist a defendant in defeating the prosecutor’s case, the *Brady* rule became an obstacle to be avoided or subverted. Finally, the absence of any meaningful disciplinary sanctions against those prosecutors who violated the *Brady* rule rendered the rule virtually unenforceable as an ethical matter.

A. Erosion of *Brady* by the Judiciary

Brady v. Maryland presaged a revolution in criminal justice. No longer could a prosecutor hide the truth and require the defendant to seek it out.¹⁶⁴ The prosecutor was characterized by *Brady* as the “architect” of the trial, and assigned the constitutional duty of ensuring that the legal edifice of the trial was constructed solidly, with due regard for the safety of the defendant.¹⁶⁵ Before *Brady*, the architecture of the trial may have been aesthetically pleasing, but in many ways was functionally suspect. Under *Brady*, the traditional adversarial structure would be replaced by a modified design in which the prosecutor’s success would be measured not merely in terms of

prejudice as a sanction for conduct by a prosecutor that “has trampled on [defendants’] constitutional right to *Brady* materials”); see also *United States v. Wilson*, 149 F.3d 1298, 1304 (11th Cir. 1998) (imposing sanctions against a prosecutor for purposes of deterring future misconduct).

162. *Agurs*, 427 U.S. at 110.

163. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH U. L.Q. 1, 8 (1990) (“[T]he Supreme Court began the modern development of constitutional disclosure requirements with our decision in *Brady v. Maryland* . . .”).

164. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”).

165. *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

winning the competition, but winning fairly.¹⁶⁶

Despite its grand promise of transforming criminal discovery, *Brady* received a somewhat deviant reception. In three early post-*Brady* cases—*Miller v. Pate*,¹⁶⁷ *Giles v. Maryland*,¹⁶⁸ and *Moore v. Illinois*¹⁶⁹—*Brady* was either ignored, discounted, or completely marginalized. In *Miller v. Pate*, an appeal from a conviction for the brutal sexual attack and murder of an eight-year-old girl, the Supreme Court condemned as a violation of due process both that the prosecution “deliberately misrepresented” to the jury that the stains on a pair of shorts worn by the defendant contained the victim’s blood, and the deliberate suppression of evidence conclusively proving that the stains were not the victim’s blood, but rather paint.¹⁷⁰ However, the Court cited as the basis for its reversal the same false evidence cases that the Court used to support its *Brady* decision.¹⁷¹ *Brady* was neither discussed nor cited.

In *Giles v. Maryland*, decided the same Term as *Miller v. Pate*, the Court vacated a rape conviction, finding that the prosecutor suppressed prior statements of the State’s two key witnesses that could have substantially impaired their credibility.¹⁷² The plurality cited *Napue v. Illinois*,¹⁷³ one of the precedents supporting *Brady*, as the sole basis for its decision.¹⁷⁴ Interestingly, the plurality chose to bypass as “unnecessary” and “inappropriate” any reference to “broad questions whether the prosecution’s constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial.”¹⁷⁵ *Brady* was not mentioned in Justice White’s lengthy concurring opinion.¹⁷⁶ Justice Fortas’s concurring opinion noted the similarity between a prosecutor’s misrepresentation of evidence, as in *Miller v. Pate*, and the “deliberate withholding of important information . . . in the exclusive possession of the State.”¹⁷⁷ Justice

166. *Id.* at 87–88.

167. 386 U.S. 1, 6–7 (1967).

168. 386 U.S. 66, 74 (1967).

169. 408 U.S. 786, 798 (1972).

170. *Miller*, 386 U.S. at 6.

171. *Id.* at 7. For this “established principle,” the Court cited *Mooney v. Holohan*, 294 U.S. 103, 106–09 (1935); *Napue v. Illinois*, 360 U.S. 264, 269–72 (1959); *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942); and *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957) (per curiam).

172. *See* 386 U.S. at 74, 82.

173. 360 U.S. 264 (1959).

174. *Giles v. Maryland*, 386 U.S. 66, 74 (1967).

175. *Id.* at 73–74.

176. *Id.* at 81–97 (White, J., concurring).

177. *Id.* at 100–01 (Fortas, J., concurring). Fortas also stated, “I believe that deliberate

Fortas observed: "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."¹⁷⁸ The dissent, by contrast, expressly rejected Justice Fortas' claim that a prosecutor has an obligation under due process to disclose to defense counsel materially favorable evidence, suggesting the reference in *Brady v. Maryland* for this principle was dicta and "wholly advisory."¹⁷⁹

Five years later, in *Moore v. Illinois*, the Court squarely addressed for the first time *Brady*'s application to a prosecutor who suppressed favorable evidence that might have exonerated a defendant.¹⁸⁰ *Moore* had the potential to establish *Brady* as a powerful judicial weapon to ensure that prosecutors behave fairly when they bring defendants to trial. Instead, the five-Justice majority accorded *Brady* a narrow, unusually restrictive interpretation. The majority discounted the strong exculpatory evidence that would have substantially assisted the defendant in proving his claims of alibi and misidentification,¹⁸¹ overlooked the prosecutor's dereliction in deceiving the defense into believing it had received the prosecutor's entire file,¹⁸² and gratuitously suggested that a prosecutor had no constitutional duty to "make a complete and detailed accounting to the defense of all police investigatory work on a case."¹⁸³ The four dissenting Justices saw the case quite differently. Analyzing the

concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentation." *Id.* at 99; see also *Babcock, supra* note 142, at 1150 ("In terms of truth-seeking, there often is no difference between the jury's hearing perjury and its failing to hear significant favorable evidence.").

178. *Giles*, 386 U.S. at 100.

179. *Id.* at 117 n.9 (Harlan, J., dissenting).

180. 408 U.S. 786, 787 (1972).

181. *Id.* at 795-98. The prosecution represented to the court that it presented its entire file to defense counsel and that defense counsel made no further request for disclosure. *Id.* at 794. Despite this representation, the prosecutor withheld from defense counsel the following items: (1) a statement made by one of its key witnesses that would have revealed that the witness could not have met the defendant when he testified he met him; (2) a statement by a witness that the defendant was not the person who committed the crime; (3) a statement by an eyewitness that a photograph of the defendant did not resemble the perpetrator; (4) a statement by a key witness that gave a description of the perpetrator that was different than the defendant's appearance; and (5) a diagram of the scene of the murder by one of the eyewitnesses that contradicted another witness's description of the shooting. *Id.* at 791-93.

182. See *id.* at 795. The prosecutor "guaranteed defense counsel and the court that he would supply defense counsel with statements made either to the police or to the State's Attorney by witnesses who were called to testify at trial." *Id.* at 808 (Marshall, J., dissenting). Based on this representation, defense counsel's motion for discovery was denied. *Id.*

183. *Id.* at 795.

evidence of guilt and the exculpatory evidence that the prosecutor willfully suppressed, the dissent forcefully demonstrated that the concealed statements “were not merely material to the defense, they were absolutely critical.”¹⁸⁴ *Moore*’s conclusion was inescapable: *Brady*’s promise of civilizing criminal discovery by ensuring fair dealing from prosecutors was insubstantial and ephemeral.¹⁸⁵

That *Moore* was not an aberration was underscored four years later in the seminal case of *United States v. Agurs*,¹⁸⁶ which circumscribed *Brady*’s potential to reform criminal discovery by a new, complex, and virtually unmanageable analytic framework. *Agurs* reviewed a murder conviction in the District of Columbia during which the prosecutor failed to disclose to the defense the victim’s prior criminal record for violent assaults, evidence of which would have supported the defendant’s claim of self-defense.¹⁸⁷ The prosecution argued on appeal that it had no duty under *Brady* to disclose this evidence absent a specific request from the defense.¹⁸⁸ Recognizing the uncertainty in the lower courts concerning *Brady*’s requirement that the defense make a specific request for favorable evidence, *Agurs* considered whether a prosecutor has any constitutional duty to “volunteer exculpatory matter to the defense” in the absence of a specific request, and if a prosecutor had such a duty, what standard to apply.¹⁸⁹

Under *Agurs*, *Brady* applied to three distinct situations, and the Court articulated three different standards of materiality that reviewing courts should apply depending on the nature and

184. *Id.* at 806 (Marshall, J., dissenting).

185. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 224–25 (1979) (giving an “inside the chambers” discussion of the vote in the *Moore* case). According to the authors, the original vote to uphold *Moore*’s conviction was seven to two. *Id.* at 224. After Justice Harry Blackmun circulated his majority opinion, Justice Thurgood Marshall circulated his dissent, analyzing the evidence and suggesting that the conviction was a “miscarriage of justice.” *Id.* Justice Lewis Powell and Justice Potter Stewart quickly switched their votes; Marshall needed one more vote to take away Blackmun’s majority. *Id.* at 225. Marshall was sure he could persuade Justice William Brennan to provide the fifth vote, particularly because Brennan had announced the opinion in *Brady v. Maryland*. *Id.* Marshall went to talk to Brennan and “returned shaken.” *Id.* Although Brennan understood that Marshall’s position was correct, Brennan was trying to cultivate a good relationship with Blackmun and if Brennan switched his vote, “Blackmun would be personally offended.” *Id.* Moreover, “if [Brennan] voted against Blackmun now, it might make it more difficult to reach him in the abortion cases or even the obscenity cases.” *Id.* “Brennan had his priorities. His priority in this case was Harry Blackmun.” *Id.*

186. 427 U.S. 97 (1976).

187. *Id.* at 100–01.

188. *Id.* at 101.

189. *Id.* at 107.

seriousness of the prosecutor's dereliction.¹⁹⁰ First, when a prosecutor knowingly uses perjured testimony, a court should apply a test that would be most protective of a defendant's right to due process.¹⁹¹ Second, when a prosecutor suppresses exculpatory evidence that has been specifically requested by the defense, a court should apply a test that would be somewhat less protective of a defendant's right to due process than in the case of false testimony.¹⁹² Third, when a prosecutor suppresses exculpatory evidence that has not been specifically requested by the defense, a court should apply a test that would provide even less protection to a defendant's due process right.¹⁹³

The Court conceded that the tests are "inevitably imprecise,"¹⁹⁴ and observed, somewhat wistfully, that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."¹⁹⁵ Nevertheless, the Court emphasized, a prosecutor has no constitutional duty to disclose any evidence unless the evidence that was suppressed reaches a sufficiently high degree of prejudice to undermine the "justice of the finding of guilt."¹⁹⁶ *Agurs* repeated the ceremonial language routinely used by the Court to describe a prosecutor's mission to serve justice: "[A prosecutor] is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'"¹⁹⁷ Nonetheless, to the extent that the Court applied the concept of "materiality" prospectively and emboldened prosecutors not to provide "open file" discovery,¹⁹⁸ the decision, as a practical matter tacitly encouraged prosecutors to conceal favorable evidence and effectively insulated prosecutors from accountability, even for gross and willful misconduct.

Plainly, the Court's three tests of materiality were not only

190. *Id.* at 103–12.

191. *Id.* at 103 (stating a conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"). The Court pointed out that such conduct involved "a corruption of the truth-seeking function of the trial process." *Id.* at 104.

192. *Id.* at 104 ("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.").

193. *See id.* at 112 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.").

194. *Id.* at 108 ("[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete . . .").

195. *Id.*

196. *Id.* at 112–13.

197. *Id.* at 111 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

198. *Id.* at 109 ("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.").

imprecise, but were also speculative, backward-looking, and confusing. If the verdict appeared to a reviewing court to be based on sufficient evidence, the impact of a prosecutor's suppression of unused and untested evidence would not only be difficult to evaluate retrospectively, but in the context of a guilty verdict, most likely viewed as not material. Moreover, implicit in *Agurs* was the acknowledgement that a prosecutor had considerable leeway to suppress substantially favorable evidence as long as the prosecutor anticipated that the suppressed evidence, even if it were subsequently discovered, would not impair the justice of prosecuting a clearly guilty defendant for a clearly provable crime. Finally, by placing the burden of establishing the constitutional violation on the defendant, the Court reversed the well-settled rule that requires the beneficiary of a constitutional error—i.e., the prosecutor—to demonstrate the harmlessness of his violation.¹⁹⁹ By shifting the burden, the Court afforded the prosecutor an added perverse incentive to conceal evidence.²⁰⁰

Whatever constitutional life remained in the so-called *Brady* rule after *Agurs* was substantially eradicated nine years later in *United States v. Bagley*,²⁰¹ in which the Court established a new standard of materiality that in practice rendered suppression of favorable evidence by prosecutors a routine and rational act.²⁰² Charged with narcotics and firearms offenses, the defendant specifically requested from the prosecutor any evidence of deals, promises, or inducements made to government witnesses in exchange for their testimony.²⁰³ Although the government had paid two key witnesses for their testimony, the prosecutor suppressed this information and the defendant was convicted.²⁰⁴ On appeal, the Ninth Circuit Court of Appeals reversed the conviction finding that the prosecutor's failure to respond to the specific request violated *Brady*; and, using a harmless error analysis, determined that the error was not harmless

199. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring reversal unless a prosecutor proves the error harmless beyond a reasonable doubt).

200. See *State v. Laurie*, 653 A.2d 549, 552 (N.H. 1995) (holding the federal standard "impose[s] too severe a burden" on criminal defendants, and that New Hampshire's Constitution shifts to the prosecutor the burden of establishing beyond a reasonable doubt "that the undisclosed evidence would not have affected the verdict").

201. 473 U.S. 667 (1985).

202. See Sundby, *supra* note 3, at 644 (suggesting that under current *Brady* doctrine, "an ethical prosecutor arguably should never be in the position of turning over *Brady* material prior to trial" (emphasis omitted)).

203. *Bagley*, 473 U.S. at 669–70.

204. *Id.* at 670–71.

beyond a reasonable doubt.²⁰⁵ The Ninth Circuit also concluded that the *Brady* violation impaired the defendant's right to confront the government witnesses, requiring automatic reversal.²⁰⁶

The Supreme Court reversed, but made two alterations to the *Brady* rule. First, not surprisingly, the Court agreed that the *Brady* rule encompassed both impeachment as well as exculpatory evidence.²⁰⁷ Of far greater significance, however, was the Court's reformulation of the *Agurs* standard of materiality used to determine whether a conviction violates due process.²⁰⁸ After reviewing the *Agurs* framework, the Court suggested that the *Agurs* standard had been reformulated in two prior cases—*United States v. Valenzuela-Bernal*²⁰⁹ and *Strickland v. Washington*²¹⁰—and that the revised standard was “sufficiently flexible” to cover every case of a prosecutor's suppression of evidence, regardless of whether the defense made a specific request.²¹¹ Under the new standard of materiality, “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.”²¹² A reasonable probability, according to the Court, is “a probability sufficient to undermine confidence in the outcome.”²¹³ *Bagley*, instead of preserving a standard of materiality that reflected the strong moral authority of *Brady*, adopted a standard that gave prosecutors far greater discretion to suppress favorable evidence without violating due process.

The Court applied this new formulation in three subsequent decisions: *Kyles v. Whitley*,²¹⁴ *Strickler v. Greene*,²¹⁵ and *Banks v. Dretke*.²¹⁶ *Kyles* and *Banks* reviewed capital murder convictions in which prosecutors engaged in flagrant misconduct, including eliciting false testimony, coaching witnesses to give false testimony, and

205. *Id.* at 673–74.

206. *Id.* at 674.

207. *Id.* at 676 (“This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.”).

208. *See id.* at 682.

209. 458 U.S. 858, 874 (1982).

210. 466 U.S. 668, 694 (1984).

211. *Bagley*, 473 U.S. at 681–83 (The government suggested that a materiality standard more favorable to the defendant should be adopted in specific request cases, but the Court rejected this suggestion).

212. *Id.* at 682.

213. *Id.* (quoting *Strickland*, 466 U.S. at 694).

214. 514 U.S. 419, 421–22 (1995).

215. 527 U.S. 263, 280 (1999).

216. 540 U.S. 668, 703 (2004).

suppressing important evidence that would have made a different result “reasonably probable.”²¹⁷ The *Brady* violations in *Kyles* and *Banks* were so flagrant and inexcusable that reversal was required even under the Court’s new prosecutor-friendly standard of materiality.²¹⁸ *Strickler*, a capital murder conviction, also involved the suppression of important evidence including several critical documents that, as the Court noted, would have seriously undermined the credibility of a key prosecution witness.²¹⁹ However, given the ample other evidence of the defendant’s guilt, there was no “reasonable probability” of a different result.²²⁰

B. Subversion of Brady by Prosecutors

The following sections describe how prosecutors have increasingly sought to avoid and subvert the requirements of *Brady*. Prosecutors “play the odds” that their suppressions will not be discovered or will be found not material, engage in tactics that thwart the ability of courts and defense counsel to discover *Brady* violations, and affirmatively conceal *Brady* violations by carefully coaching the testimony of witnesses.

1. “Playing the Odds”

Predictably, prosecutors under the current standard of materiality are permitted “to withhold with impunity large amounts of undeniably favorable evidence” in the rational belief that an appellate court reviewing the conviction will conclude that there is no “reasonable probability” that the evidence would have changed the result.²²¹ To be sure, this mindset exists not only with prosecutors who are trying to “outwit and entrap [their] quarry,”²²² but also by ethical prosecutors who attempt to balance their obligation to seek a conviction and at

217. *Banks*, 540 U.S. at 675–76 (“When police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.”); *Kyles*, 514 U.S. at 421, 441, 454 (“[F]airness’ cannot be stretched to the point of calling this a fair trial.”).

218. *Banks*, 540 U.S. at 675–76; *Kyles*, 514 U.S. at 454. Indeed, from the evidence in the record, it is strongly arguable that both *Kyles* and *Banks* were innocent. See *supra* note 18 for cases of wrongful convictions in which the prosecutor’s suppression of exculpatory evidence contributed substantially to the conviction.

219. *Strickler*, 527 U.S. at 265, 282. See *infra* notes 226–27 and accompanying text for a discussion of prosecutors suppression of evidence which would have seriously undermined the credibility of a key prosecution witness.

220. *Strickler*, 527 U.S. at 296.

221. *United States v. Bagley*, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

222. *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

the same time fulfill their constitutional obligation under *Brady*.²²³ Needless to say, such a prosecutorial mindset corrupts the truth-finding process and is antithetical to core values in the administration of justice that command prosecutors to serve justice and treat defendants fairly.²²⁴

The dissenters in *Bagley* predicted that under the new standard, prosecutors deciding whether or not to disclose favorable evidence to the defense would increasingly “play the odds” that their suppression of evidence, even if discovered, would be found by an appellate court reviewing the conviction to be not material.²²⁵ This prediction has been borne out in countless cases where prosecutors have suppressed important items of evidence and courts have permitted this conduct. Thus, prosecutors will likely play the odds when they possess exculpatory evidence that might be valuable to the defense—confident that the evidence of guilt will be viewed retrospectively by an appellate court to be sufficiently substantial so that the prosecutor’s suppression does not create a “reasonable probability” that the verdict would be different. A good example is *Strickler v. Greene*,²²⁶ a capital murder trial in which a key prosecution eyewitness, Anne Stoltzfus, initially told the police that she had only “muddled memories” about a kidnapping in a mall and could not identify the perpetrators, the victim, or the automobile.²²⁷ At trial, however,

223. Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 554, 559, 565 (1987) (articulating that prosecutor’s “naturally assume[] that defendants are guilty,” and it therefore “becomes easy for the prosecutor to overlook and ignore evidence that does not fit his conception of the proper outcome”).

224. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198 (1988). Ethical codes uniformly recognize a prosecutor’s role as a “minister[] of justice.” *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2004) (describing the prosecutor as a “minister of justice”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (2004) (stating that a prosecutor must “seek justice”); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3-1.2(c) (1992), reprinted in PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & REGULATIONS 1135 (John S. Dzienkowski ed., West Group 2001) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

225. *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (“[T]he 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.”).

226. 527 U.S. 263 (1999).

227. *Id.* at 265, 273–74. Stoltzfus first spoke to the police two weeks after the crime. *Id.* at 273. She told Detective Claytor that she could not identify the black female victim, nor the two white male perpetrators, but could identify the white female perpetrator. *Id.* Stoltzfus told Detective Claytor that “I have a very vague memory that I’m not sure of,” and that “I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load . . .” *Id.* at 274–75.

Stoltzfus gave astonishingly detailed testimony about the event.²²⁸ She gave a detailed description of all three perpetrators,²²⁹ the victim,²³⁰ and even remembered the license plate number of the van.²³¹ Denying suggestions that she had learned these details from news reports, Stoltzfus answered, “I have an exceptionally good memory.”²³²

The process by which Stoltzfus’ memory improved so remarkably was revealed in a series of documents prepared by the lead detective in the case, Detective Claytor, which were never disclosed to the defense.²³³ These documents were based on interviews between Detective Claytor and Stoltzfus in which her memory continued to expand over time because, she claimed, of “the associations that [Detective Claytor] helped [her] make.”²³⁴

The Supreme Court concluded that, although the prosecutor suppressed several items of favorable evidence that would have severely impeached Stoltzfus, there was other ample evidence of Strickler’s involvement.²³⁵ Therefore, the petitioner failed to

228. *Id.* at 270–74. She testified about seeing the perpetrators in a music store, described their appearance and behavior in detail, thought they looked “revved up” and “very impatient,” remembered bumping into one of them, and “thought she felt something hard in the pocket of his coat.” *Id.* at 270–71. She left the store, but again encountered the threesome, one of whom bumped into Stoltzfus and asked directions to the bus stop. *Id.* at 271. Stoltzfus followed them and later saw the man “tearing out of the Mall entrance.” *Id.* She saw the victim blowing her horn a long time, and the petitioner “started hitting her on the head”; Stoltzfus became upset. *Id.* at 272. Stoltzfus stated that “[t]he driver looked ‘frozen’ and mouthed an inaudible response.” *Id.* Next, “Stoltzfus started to drive away and realized ‘the only word that it could possibly be, was help.’” *Id.*

229. *Id.* at 270 n.5. Stoltzfus testified that Strickler:

[W]ore a grey T-shirt with a Harley Davidson insignia on it. . . . [Co-defendant] Henderson “had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren’t just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort.” The woman “had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face.”

Id. (citations omitted).

230. *Id.* at 271. She testified that this woman was “‘beautiful,’ ‘well dressed and she was happy, she was singing’” *Id.* (alteration in original).

231. *Id.* at 272 n.7.

232. *Id.* at 272. Stoltzfus testified that she had very close contact with the petitioner and “he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention.” *Id.* at 272–73.

233. *Id.* at 273–75, 282. Of the eight documents either prepared by Claytor or received by him from Stoltzfus, it is undisputed that at least five of those documents “were known to the Commonwealth but not disclosed to trial counsel.” *Id.* at 282. The prosecutor claimed that three of these documents were in his open file, but defense counsel maintained otherwise. *Id.* at 275 n.11.

234. *Id.* at 274.

235. *Id.* at 290.

demonstrate a “reasonable probability that his conviction or sentence would have been different had [the Stoltzfus] materials been disclosed.”²³⁶ Justice Souter, joined by Justice Kennedy, dissented, arguing that “the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus” would have been “sufficient to undermine confidence that the death recommendation would have been the choice.”²³⁷

Prosecutors also “play the odds” when they suppress favorable evidence in the rational belief that an appellate court will find the evidence to be “cumulative” of other evidence already presented. A good example is *Barker v. Fleming*,²³⁸ a robbery case, in which the prosecutor suppressed several items of evidence that, as the appellate court acknowledged, would have substantially discredited a key prosecution witness Raul Abundiz, a “jailhouse snitch,” who testified that the defendant confessed to him that he committed the robbery.²³⁹ The court appeared to go out of its way to minimize the materiality of the suppressed evidence, finding that “the cumulative impeachment evidence is unlikely to have been the difference between conviction and acquittal.”²⁴⁰

In concluding that the suppressed evidence was not material, the court failed to accord sufficient weight to several key factors. First, this was the second trial; the first ended in a hung jury based on the victim’s equivocal identification and the absence of any other corroborating evidence.²⁴¹ Second, the court acknowledged that the suppressed evidence would not only have “highlighted Abundiz’s dishonest nature,”²⁴² but also have prevented the defense from demonstrating that the alleged conversation between Abundiz and the

236. *Id.* at 296.

237. *Id.* at 304 (Souter, J., dissenting).

238. 423 F.3d 1085 (9th Cir. 2005). The case attracted considerable media attention and came to be known as the “clown robber” case because the perpetrator wore makeup. *Id.* at 1089.

239. *Id.* at 1090.

240. *Id.* at 1100; see also John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 621–27 (2005) (critically evaluating the evidence at the first trial from the standpoint of how defense counsel could have made effective use of the suppressed evidence).

241. *Barker*, 423 F.3d at 1089–90. Indeed, the court found the victim’s identification at the second trial to be extremely flawed. *Id.* at 1100. The court acknowledged that her identification was “not airtight[,] [h]er view was obstructed by the robber’s makeup and, at times, by a handkerchief.” *Id.* Her description to the police “became more precise after she talked with co-workers who knew and already distrusted [the defendant].” *Id.* Likewise, “she did not see any of his tattoos,” yet stated “that his hands were covered with markings and makeup.” *Id.*

242. *Id.* at 1096.

defendant in which the defendant supposedly confessed never in fact could have occurred.²⁴³ Although acknowledging that the suppressed impeachment evidence casting doubt on whether Barker could have confessed to Abundiz “is qualitatively different than the evidence introduced,”²⁴⁴ the court, nonetheless, concluded that, although the suppressed evidence prevented the defense from “telling this tale,” it would merely invite the jury to speculate.²⁴⁵ The court ultimately concluded that although the victim’s identification was weak and although the new corroborating witness’s “proclivity for lying had already been firmly established,”²⁴⁶ “we remain confident in the verdict despite the potential damage the withheld evidence would have wrought.”²⁴⁷

2. *Sandbagging Tactics*

In addition to “playing the odds,” prosecutors have engaged in various tactics that are intended to subvert the *Brady* rule. One of the most insidious tactics used by prosecutors is orchestrating a scheme whereby a prosecution witness testifies that he has made no deal with the prosecutor concerning his testimony. However, unbeknownst to the judge or jury, the prosecutor has in fact entered into an agreement with the witness’s attorney to reward the witness for his testimony and extracted a promise from the witness’s attorney that he would not tell his client about the agreement. The witness, therefore, would be able to testify that there was no deal in place without perjuring himself because he would not personally be informed of the arrangement.

For example, in *Hayes v. Brown*, the prosecutor reached an agreement with the attorney for a key witness in a murder case to give that witness transactional immunity and dismiss other pending charges in exchange for his testimony.²⁴⁸ However, seeking to keep the promise away from the judge and jury, the prosecutor obtained a promise from the witness’s attorney that he would not tell his client about the deal; and, in that way, the witness could honestly testify

243. *Id.* at 1095 (“[I]t takes little imagination to see how a competent attorney could have implied that such a deal [between Abundiz and the prosecution to testify against Barker] existed. It takes even less imagination to see how evidence calling into question whether Barker and Abundiz talked on June 14 would have helped Barker impeach Abundiz.”).

244. *Id.* at 1097.

245. *Id.* at 1099.

246. *Id.* at 1096.

247. *Id.* at 1100.

248. 399 F.3d 972, 977 (9th Cir. 2005) (en banc).

without perjuring himself because he would not be personally informed of the deal.²⁴⁹ In response to defense counsel's inquiry whether there has been any negotiated settlement in return 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," and that there were "absolutely no promises and no discussions in regard to any pending charges."²⁵⁰

The prosecutor took the position on appeal that there was no due process violation because the witness did not commit perjury.²⁵¹ The Ninth Court of Appeals scathingly rejected this argument: "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."²⁵² Citing the line of Supreme Court decisions involving the prosecutor's presentation of false testimony or the failure to correct false testimony, the court roundly condemned the prosecutor's scheme as "covert subornation of perjury."²⁵³

Some prosecutors seek to insulate their witnesses from attacks on their credibility through other nefarious schemes intended to subvert the *Brady* rule. In *Silva v. Brown*, for example, the prosecutor made a secret deal with the attorney for a key witness to forgo having the witness psychiatrically evaluated prior to his testimony.²⁵⁴ The attorney for the witness, an accomplice in a murder who had suffered severe brain damage years earlier, had planned to have his client psychiatrically evaluated after his arraignment because he was either unable to cooperate in his defense or was insane.²⁵⁵ Because the psychiatric evaluation would "supply ammunition to the defense," the prosecutor struck a bargain with the witness's lawyer under which his client would not be examined and in return, the prosecutor would

249. *Id.*

250. *Id.* at 979–80.

251. *Id.* at 980.

252. *Id.* at 981.

253. *Id.* at 978, 981. As the court observed: "The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury." *Id.* at 981. For other cases involving this scheme, see *Willhoite v. Vasquez*, 921 F.2d 247, 252 (9th Cir. 1990) (holding that due process is violated when there is a reasonable probability that if the inducement had been offered by the prosecutor to the defense, the result of the trial would have been different) and *People v. Steadman*, 623 N.E.2d 509, 510, 512 (N.Y. 1993) (holding that a prosecutor's failure to disclose an agreement in exchange for testimony which was not a harmless error results in a new trial).

254. 416 F.3d 980, 984 (9th Cir. 2005).

255. *Id.*

dismiss the murder charges in exchange for his testimony.²⁵⁶

The appellate court reversed the defendant's conviction, finding that 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 material impeachment evidence under *Brady*.²⁵⁷ Knowing that the prosecutor made a deal to foreclose the witness's psychiatric evaluation would have had a powerful impact on the jury's assessment of the witness's testimony. Indeed, "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."²⁵⁸

3. Coaching Testimony

Some prosecutors are motivated to engage in improper coaching of witnesses in order to prevent the revelation of materially favorable evidence that the prosecutor has withheld from the defense. Improper coaching, the "dark secret[]" of the U.S. adversary system,²⁵⁹ is typically used by lawyers in preparing witnesses for trial in order to eliminate discrepancies in testimony and avoid embarrassing details. But coaching is also used by prosecutors to insulate *Brady* violations from being discovered. Plainly, a prosecutor, who is willing to violate his constitutional and ethical duty to disclose favorable evidence, is also willing to shape his witnesses' testimony to conceal the violation. Indeed, in the two most recent decisions in which the Supreme Court vacated convictions based on the prosecutor's suppression of exculpatory evidence,²⁶⁰ the implication of witness-coaching was transparent.

A good example of coaching a witness to hide the existence of suppressed evidence is *Walker v. City of New York*, in which the prosecutor almost certainly coached a cooperating witness to give

256. *Id.*

257. *Id.* at 991. The court also noted, "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." *Id.*

258. *Id.* at 988.

259. 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.").

260. *Banks v. Dretke*, 540 U.S. 668, 677, 685, 705 (2004) (stating the suppressed transcript of pretrial practice sessions shows how the prosecutor "intensively coached" and "closely rehearsed" the testimony of witnesses); *Kyles v. Whitley*, 514 U.S. 419, 443 & n.14, 454 (1995) (finding a clear implication of witness coaching from suppressed evidence as well as fact that testimony at subsequent a trial was much more precise than at an earlier trial).

false testimony in order to conceal from the defense information that would have undermined the witness's credibility.²⁶¹ In *Walker*, the prosecutor debriefed and prepared for trial a cooperating witness in an investigation of the robbery of an armored truck and murder of the truck driver.²⁶² At the initial proffer session, the witness identified two individuals as having participated in the crime.²⁶³ The prosecutor subsequently learned, however, that one of these alleged accomplices could not have committed the crime because he was in prison on the date of the robbery.²⁶⁴ Nevertheless, the prosecutor elicited testimony from the cooperator before the grand jury and at trial where he did not mention a second accomplice.²⁶⁵ Although the decision by the Court of Appeals condemned the prosecutor's failure to disclose the stark inconsistency in the witness's story, the court did not discuss the witness's failure to mention the existence of a second perpetrator.²⁶⁶ However, the implication of coaching by the prosecutor is obvious.

C. *Marginalizing of Brady by Disciplinary Bodies*

Making prosecutors accountable for violations of *Brady* has not been a success.²⁶⁷ To be sure, bar associations and grievance committees have the power to discipline prosecutors for violations of ethical rules.²⁶⁸ However, most commentators agree that professional discipline of prosecutors is extremely rare.²⁶⁹ The absence of

261. 974 F.2d 293, 295, 301 (2d Cir. 1992).

262. *Id.* at 294–95.

263. *Id.*

264. *Id.* at 295.

265. *Id.*

266. *See id.* at 294, 301.

267. Prosecutors enjoy absolute immunity from civil liability for suppressing exculpatory evidence. *E.g.*, *Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994).

268. *See, e.g.*, Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1088–89 (1994).

269. *See* DWYER ET AL., *supra* note 18, at 175 (stating that even when cases are reversed because of a prosecutor's misconduct, "nothing happens to the people who broke their oaths and the law in pursuit of a conviction"); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1596 (2003) (noting that existing rules of ethics fail to regulate large areas of prosecutors' professional conduct); Rosen, *supra* note 27, at 697–98 (discussing the absence of ethical remedies against prosecutors); 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, 898 (1997) (concluding that disciplinary processes are almost completely ineffective against prosecutors); Yaroshefsky, *supra* note 16, at 288 (arguing that prosecutors who intentionally suppress evidence "are rarely, if ever, disciplined"); Fred C. Zacharias, *The Professional Discipline*

significant discipline of prosecutors is particularly noteworthy in cases in which prosecutors intentionally suppress evidence that leads to a reversal of a defendant's conviction and a stinging rebuke by a court of the prosecutor's misconduct. Although one would realistically expect disciplinary agencies to proceed aggressively against such unscrupulous conduct, such is not the case. Moreover, of all the ethical rules relating to the conduct of a prosecutor, the ethical rule governing a prosecutor's suppression of evidence is the most explicit and easiest to enforce.²⁷⁰ However, even when faced with this "most dangerous misconduct," disciplinary bodies typically look the other way.²⁷¹

There are a variety of reasons for the hands-off approach: the existence of internal controls by prosecutor's offices, the ability of courts to supervise prosecutorial excesses, the deference by bar associations to executive power, limited resources, and lack of expertise in criminal procedural issues.²⁷² Although there may be some basis to credit each of these reasons, they do not explain the stark disparity between the numerous and often egregious violations by prosecutors, and the infrequency of discipline.

of *Prosecutors*, 79 N.C. L. REV. 721, 755, 778 (2001) (stating that "prosecutors are disciplined rarely," but "the traditional lamentations regarding the absence of bar discipline are somewhat overblown, but also contain a large measure of truth"). On the effectiveness of discipline by the U.S. Justice Department's Office of Professional Responsibility, see DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS. POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE 331 (Scribner 1996) ("The systemic failure of this tiny, extremely passive unit to confront directly the misconduct of Justice Department officials must be considered one of the most serious lapses in the department's recent history."); see also *United States v. Hasting*, 461 U.S. 499, 522 (1983) (Brennan, J., concurring in part and dissenting in part) ("Prior experience, for example, might have demonstrated the futility of relying on Department of Justice disciplinary proceedings."); Greg Rushford, *Watching the Watchdog: Veteran Justice Department Ethics Officer Faces Questions About His Own Actions*, LEGAL TIMES, Feb. 5, 1990, at 1 (criticizing the effectiveness of the Office of Professional Responsibility). Occasionally an offending prosecutor is punished by disciplinary bodies. See *In re Peasley*, 90 P.3d 764, 766-67, 781 (Ariz. 2004) (en banc) (discussing a county prosecutor disbarred for deliberately presenting a witness's false testimony in two death penalty trials); Jeffrey Toobin, *Killer Instincts: Did a Famous Prosecutor Put the Wrong Man on Death Row*, THE NEW YORKER, Jan. 17, 2005, at 54 (discussing Mr. Peasley's conduct and disbarment).

270. See *supra* note 28 and accompanying text.

271. See Yaroshefsky, *supra* note 16, at 288 ("Despite this well documented and all too recurrent violation of professional responsibility, prosecutors who engage in such tactics are rarely, if ever, disciplined."); Armstrong & Possley, *supra* note 8, at 13. After studying 381 murder convictions which were reversed because of prosecutorial suppression of evidence or subornation of perjury, authors found that not one of the prosecutors who broke the law in these most serious charges were ever convicted or disbarred and most of the time they were not even disciplined. *Id.*

272. See Yaroshefsky, *supra* note 16, at 289-96.

For example, commentators have examined numerous instances of deliberate suppression of evidence by prosecutors discussed in many of these cases cited in this article.²⁷³ These studies have included statistical surveys and interviews with personnel in bar grievance agencies. As virtually every writer has concluded, few if any of these prosecutors have been disciplined, and indeed, very few prosecutors have even been investigated by disciplinary bodies. In fact, some of these disciplinary offices have reported that they are not aware of any proceeding ever being instituted against a prosecutor for suppression of evidence, notwithstanding the existence of appellate decisions criticizing prosecutors for their misconduct.²⁷⁴

Of the many instances of egregious misconduct by prosecutors in suppressing exculpatory evidence, the most disturbing examples are those cases involving defendants who were falsely accused and convicted and later exonerated.²⁷⁵ One would naturally expect that a prosecutor who abetted the conviction of an innocent person by suppressing exculpatory evidence would be a prime candidate for severe disciplinary action. Such is not the case, as too many examples prove. For example, there is absolutely no question that the prosecutor in *People v. Ramos* deliberately withheld exculpatory evidence from the defense that resulted in the wrongful conviction and imprisonment for seven years of an innocent man.²⁷⁶ The appellate court reversed the defendant's conviction for numerous *Brady* violations, and excoriated the prosecutor for her misconduct.²⁷⁷ The disciplinary committee conducted an investigation after the reversal by the appellate court and closed its investigation without imposing discipline.²⁷⁸ Interestingly, during the discovery process in a civil rights action brought against the city, it was revealed that the same District Attorney's office had been cited seventy-two times from 1975–1996

273. See sources cited *supra* note 269; see also Weinberg, *supra* note 10; Yaroshefsky, *supra* note 16, 281–82.

274. See Weeks, *supra* note 269, at 881 (noting several cases of prosecutorial misconduct in which disciplinary action was not even considered).

275. See *supra* note 18 and accompanying text (collecting cases and suggesting these cases are merely a tiny fraction of the total number).

276. *People v. Ramos*, 614 N.Y.S.2d 977, 980 (N.Y. App. Div. 1994).

277. *Id.* at 984. The suppressed evidence included proof that the child's sexually provocative behavior explained the evidence relied on by the prosecution to suggest the child was abused; statements from the victim exonerating the defendant or inconsistent with his guilt; and statements from several prosecution witnesses that would have severely discredited their testimony. *Id.* at 980–83. In addition, the prosecutor elicited testimony at trial that was calculated to reinforce the false or inconsistent testimony of her witnesses. *Id.* at 980–81.

278. See Yaroshefsky, *supra* note 16, at 280–82.

for misconduct, including the reversal of eighteen cases for suppressing exculpatory evidence.²⁷⁹

IV. CODIFYING *BRADY*

Criminal discovery allows a defendant to acquire relevant information about the prosecution's case, thereby enhancing the truth-finding process and minimizing the danger that an innocent defendant will be wrongfully convicted. Given the prosecutor's domination of the criminal justice system, the prosecutor controls access to information relevant to a defendant's guilt and has the ability to withhold information that might prove a defendant's innocence.²⁸⁰ However, the defendant's ability to acquire relevant information under current discovery rules is extremely limited and, indeed, may resemble a game of "blindman's buff [sic]."²⁸¹ And compounding the restrictiveness of pretrial discovery rules in general is the defendant's inability to obtain exculpatory information due to the prosecutor's ability to manipulate and abuse the disclosure requirements under *Brady* and its progeny.²⁸² As one reflects on the development of the law of prosecutorial disclosure since *Brady v. Maryland*, it is increasingly obvious that there exists a close nexus between a defendant's limited discovery in criminal cases and the enhanced opportunities for prosecutorial suppression of evidence. Because the power to control evidence is the power to conceal it, broadening the discovery rules in criminal cases might insure greater compliance by prosecutors with their disclosure obligations under *Brady v. Maryland*.

279. *Id.* at 281–82.

280. See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1205 (9th ed. 1999) (describing the prosecutor's domination of the criminal justice system, including investigative manpower of police, investigative legal authority of grand jury and grand jury's subpoena power, early on scene arrival by police when evidence is fresh, and the natural inclination of witnesses to cooperate with police and refuse to cooperate with the defense).

281. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). It is ironic that civil litigation, where only money is involved, provides extensive pretrial discovery requirements for the parties, whereas in criminal litigation, where a defendant's liberty and even life are at issue, pretrial discovery is so restrictive. The argument for restricting discovery in criminal cases has been that a defendant armed with such information will take steps to bribe, frighten, or harm witnesses. See *State v. Tune*, 98 A.2d 881, 884 (N.J. 1953).

282. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 327 (2001) ("To the extent that a prosecutor has exclusive knowledge and control of such evidence, the prosecutor can obstruct the defendant's access to it and thereby impede the discovery of the truth.").

Discovery rules, in contrast to the ethics codes, do not define the nature and scope of a prosecutor's disclosure duty under *Brady*. For example, Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, contains modest requirements of prosecutorial disclosure, but does not require a prosecutor to divulge significant kinds of favorable information that might enhance a defendant's ability to prepare and present his case.²⁸³ Whereas most local court rules of criminal procedure do not impose obligations on prosecutors to comply with *Brady*, there have been a few exceptions. For example, as a result of pervasive violations of *Brady* by federal prosecutors in Massachusetts, the federal courts adopted Local Rule 116.2 to ensure that prosecutors complied with *Brady*'s disclosure requirements.²⁸⁴ The local rule requires prosecutors to disclose, under a limited time frame, any information that could "cast doubt" on the defendant's guilt, the admissibility and credibility of evidence, and the degree of the defendant's culpability under the federal guidelines.²⁸⁵ The local rule also requires the prosecutor to inform all law enforcement agencies participating in the investigation of the local rule's discovery requirements, and to obtain any information subject to disclosure.²⁸⁶ The Massachusetts Local Rule 1.3 further imposes sanctions for noncompliance, including dismissal.²⁸⁷

Other federal courts have imposed similar disclosure requirements on prosecutors that exceed the due process requirement of *Brady*. Recognizing that *Brady*'s materiality standard is virtually impossible to discern before trial,²⁸⁸ these courts have reasoned that

283. FED. R. CRIM. P. 16. Under Rule 16, a prosecutor is required to disclose statements by the defendant, the defendant's prior criminal record, inspection and copying of documents and tangible items, and summaries of expert testimony. *Id.* Not required to be disclosed are identities of witnesses, statements by witnesses, rewards or other incentives to witnesses, information relating to bias, prejudice, mental competency, criminal records of witnesses, inconsistent or contradictory examinations or scientific tests, or the failure of a witness to make a positive identification of the defendant. *Id.*

284. See *United States v. Mannarino*, 850 F. Supp. 57, 59, 71 (D. Mass. 1994) (finding that prosecutors had consistently, for many years, shown an "obdurate indifference to . . . disclosure responsibilities," and had engaged in "sloppy," "negligen[t]," "lame," and "insensitiv[e]" conduct); see also FED. R. CRIM. P. 57(a) (providing authority for district courts to adopt rules governing pretrial procedure as long as local rule does not conflict with federal law).

285. See Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 104-06 (2003) [hereinafter *Proposed Codification*] (describing the background for enactment of Massachusetts Local Rule 116.2 and its provisions).

286. *Id.* at 106.

287. *Id.*

288. *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999); see also

“just because a prosecutor’s failure to disclose evidence does not violate a defendant’s due process rights does not mean that the failure to disclose is proper.”²⁸⁹ Thus, in *United States v. Acosta*, the federal district court ordered prosecutors “to timely disclose before trial all evidence or information known that tends to negate the guilt of the accused or mitigate the offenses charged.”²⁹⁰ This standard is similar to the ethical standard in that it requires timely pretrial disclosure without regard to the materiality of the evidence.²⁹¹

In light of the development of local rules imposing automatic discovery obligations on prosecutors, it has been suggested that Federal Rule of Criminal Procedure 16 be amended to incorporate these changes and make them applicable to all federal prosecutors.²⁹² The proposal would require that within fourteen days of a defendant’s request, the prosecutor must disclose all favorable evidence known to him or any law enforcement officer who participated in the investigation or prosecution of the events underlying the crimes charged.²⁹³ Favorable evidence includes “all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) adversely impact the credibility of government witnesses or evidence; c) mitigate the offense; or d) mitigate punishment.”²⁹⁴

V. CONCLUSION

Reflecting on the evolution of *Brady v. Maryland*, one is struck by the stark dissonance between the grand expectations of *Brady*, that the adversary system henceforth would be transformed from a “sporting contest” to a genuine search for truth, and the grim reality that criminal litigation continues to operate as a “trial by ambush.” The development of the *Brady* rule by the judiciary depicts a gradual

United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) (recognizing that the “cumulative ‘materiality’ standard [is] extremely difficult if not impossible to discern before trial”).

289. *Acosta*, 357 F. Supp. 2d at 1239; see also *Sudikoff*, 36 F. Supp. 2d at 1199 (noting that absence of prejudice to a defendant does not condone a prosecutor’s suppression).

290. *Acosta*, 357 F. Supp. 2d at 1231. The district court noted that “‘favorable’ evidence and the ‘negate or mitigate’ standards are essentially identical.” *Id.* at 1234.

291. *Id.* at 1233. The district court addressed the potential conflict between the pretrial disclosure requirement and the Jencks Act, which requires the government to produce statements of witnesses only after they have testified at trial. *Id.* at 1234–36. In the event of a conflict, the government may either produce the evidence or seek a protective order from the court. *Id.* at 1236.

292. See *Proposed Codification*, *supra* note 284, at 95.

293. *Id.* at 111.

294. *Id.*

erosion of *Brady*: from a prospective obligation on prosecutors to make timely disclosure, to the defense of materially favorable evidence, to a retrospective review by an appellate court into whether the prosecutor's suppression was unduly prejudicial. The erosion of *Brady* has been accompanied by increasing prosecutorial gamesmanship in gambling that violations will not be discovered or, if discovered, will be allowed, and tactics that abet and hide violations. Finally, the absence of any legal or ethical sanctions to make prosecutors accountable for violations produces a system marked by willful abuse of law, cynicism, and the real possibility that innocent persons may be wrongfully convicted because of the prosecutor's misconduct. Indeed, more than any other rule of criminal procedure, the *Brady* rule has been the most fertile and widespread source of misconduct by prosecutors; and, more than any other rule of constitutional criminal procedure, has exposed the deficiencies in the truth-serving function of the criminal trial.

One proposal that might improve the truth-finding process by reducing the incidence of *Brady* violations is to expand the discovery rules to require prosecutors to make timely disclosures to the defense of favorable information known to them or other law enforcement officials. Whereas *Brady* has been transposed into an explicit ethical requirement in the professional responsibility codes, there has been no parallel development in the procedural discovery codes. In response to flagrant misconduct by prosecutors, however, some courts have imposed strict pretrial disclosure requirements on prosecutors, and local court rules have been enacted to codify such requirements. Amending the Federal Rules of Criminal Procedure to impose strict and explicit disclosure requirements on prosecutors might be one way to restore the promise of *Brady v. Maryland*.