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EDUCATING PROSECUTORS AND SUPREME COURT JUSTICES ABOUT *BRADY V. MARYLAND*

By Bennett L. Gershman*

Connick v. Thompson,¹ by any reckoning, is a deeply disturbing, even unconscionable decision.² The majority opinion by Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, vacated a \$14 million jury award to John Thompson, who spent 18 years in prison (14 years isolated on death row) and was a few weeks from being executed for crimes he did not commit. He lost much of his life because a team of four prosecutors in the New Orleans District Attorney Harry Connick's office violated *Brady v. Maryland*³ by deliberately hiding evidence that would have proven Thompson's innocence. As one of the prosecutors told Thompson: "I'm going to fry you. You will die in the electric chair."⁴ The jury heard testimony that Connick's office had one of the worst records in the United States for concealing exculpatory evidence from defendants,⁵ and an

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1. 131 S. Ct. 1350 (2011).

2. Commentary on the case has been highly critical. See, e.g., Editorial, *Failure of Empathy and Justice*, N.Y. TIMES, Apr. 1, 2011, at A26; Lincoln Caplan, *The D.A. Stole His Life, Justice Took His Money*, N.Y. TIMES, July 3, 2011, at 11; Editorial, *A wrong decision by the Supreme Court on civil rights*, L.A. TIMES, Apr. 6, 2011, at 16; Editorial, *When Prosecutors Err*, WASH. POST, Apr. 8, 2011, at A16; Editorial, *A Civil Rights Divide*, N.Y.L.J., May 2, 2011, at 22; Dahlia Lithwick, *Cruel but Not Unusual*, SLATE, Apr. 1, 2011, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html; Elkan Abramowitz & Barry A. Bohrer, *'Brady' Obligations in the Twenty-First Century*, N.Y.L. J., May 3, 2011, at 1; Tony Mauro, *Stevens Criticizes Ruling on Immunity Analysis For Prosecutors*, THE LEGAL INTELLIGENCER, May 5, 2011, available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202493002606>; Vivian Berger, *No Recompense for John Thompson's Stolen Years*, NAT'L L.J., June 20, 2011.

3. 373 U.S. 83 (1963).

4. *Connick v. Thompson*, 131 S. Ct. at 1374 n. 7 (Ginsburg, J., dissenting).

5. *Id.* at 1384 (Ginsburg, J., dissenting) ("The jury learned of several *Brady* oversights in Thompson's trials and heard testimony that Connick's Office had one of

office culture that was deliberately indifferent to the rights of defendants, especially in training and supervising prosecutors on compliance with *Brady*.⁶ Indeed, the jury's verdict in Thompson's civil rights lawsuit, affirmed by the Fifth Circuit Court of Appeals, was based on Connick's failure to train and supervise his assistants on *Brady*.⁷

Moreover, this was not the first time the Court reviewed unconstitutional conduct by Connick's prosecutors. In *Kyles v. Whitley*, decided in 1995, the Court reversed a capital murder conviction that was prosecuted at the same time as Thompson's case.⁸ In *Kyles*, the Court found that prosecutors in Connick's office had concealed several pieces of exculpatory evidence that would have proven the defendant's innocence.⁹ Around the time of Thompson's and Kyles's prosecutions, the Louisiana Supreme Court reversed several convictions obtained by Connick's office for *Brady* violations.¹⁰ The jury found not only that Connick failed to train and supervise his assistants on compliance with *Brady*, but that Connick *enabled* prosecutors in his office to conspire about how to violate *Brady*, and how to get away with it.¹¹

No one disputed that prosecutors in Connick's office violated *Brady* in prosecuting Thompson for armed robbery and capital murder. Connick conceded that his assistants failed to disclose to Thompson a swatch of fabric taken from the robbery victim's

the worst *Brady* records in the country.").

6. See *infra* notes 18-41 and accompanying text.

7. The theory of Thompson's civil rights lawsuit under 42 U.S.C. § 1983 was that Connick was liable for failing to train assistants in his office concerning their *Brady* obligations and that this failure showed a "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."

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

9. The Court also noted that prosecutors probably engaged in improper witness-coaching to cover up their suppression. *Id.* at 443. The prosecutors also probably planted false evidence. *Id.* at 446.

10. *State v. Hammler*, 312 So. 2d 306 (La. 1975); *State v. Carney*, 334 So. 2d 415 (La. 1976); *State v. Falkins*, 356 So. 2d 415 (La. 1978); *State v. Curtis*, 344 So. 2d 396 (La. 1980); and *State v. Perkins*, 423 So. 2d 1103 (La. 1982).

11. Justice Scalia dissented in *Kyles*, joined by Justices Kennedy and Thomas. Scalia's opinion seems so disconnected to the massive evidence in the record of outrageous misconduct by the prosecutors as to defy logic, and his opinion is skewed in the majority opinion. It would appear that Justice Scalia wishes that *Brady* did not exist, and that District Attorney's offices – even ones like Connick's – should not be "micromanaged" by the judiciary. See *Connick*, 131 S. Ct. at 1363. However, *Brady* is the law, and the judiciary does have a responsibility to protect the constitutional rights of criminal defendants.

clothing that was stained by the perpetrator's blood; the blood was tested and established that the perpetrator blood was type B.¹² Thompson's blood is type O.¹³ The prosecutors failed to disclose the swatch or the test results.¹⁴ The jury also learned that in Thompson's murder trial, the prosecutors exploited the nondisclosure in the robbery case by deliberately switching the order of the robbery and murder trials to obtain the robbery conviction first – made much more likely in view of the suppressed blood evidence – and to improve their chances of getting a murder conviction and death sentence, ultimately a successful strategy.¹⁵ Additionally, the jury learned that prosecutors in the murder trial suppressed several items of exculpatory evidence that would have proven Thompson had been misidentified.¹⁶ From all of this evidence, the jury was entitled to find, as it did, that Connick, as the policy maker for the District Attorney's office, was deliberately indifferent to the need to train prosecutors about their disclosure obligations, and that the lack of training caused the violation of Thompson's constitutional rights.¹⁷

The jury learned the following about the level of training of prosecutors in Connick's office with respect to *Brady*, and about their resulting understanding and compliance with *Brady*:

Connick acknowledged that his understanding of *Brady* was deficient.¹⁸

Connick acknowledged that he once violated *Brady* by withholding a lab report and was indicted by the U.S. Attorney for doing it.¹⁹

12. *Connick v. Thompson*, 131 S. Ct. 1350, 1371 (2011) (Ginsburg, J., dissenting).

13. *Id.*

14. *Id.*

15. *Id.* (Ginsburg, J., dissenting) The strategy of the prosecutors was twofold: first, getting the robbery conviction would deter Thompson from testifying at the murder trial because the robbery conviction could be used to impeach his credibility, and second, the armed robbery conviction could be used at the penalty phase of the capital murder trial to support the prosecution's argument for the death penalty.

16. *Id.* at 1371 (Ginsburg, J., dissenting) (noting that among the items suppressed was evidence that the perpetrator was six feet tall with "close cut hair," Thompson is five feet eight inches tall, and at the time of the murder styled his hair in a large "Afro").

17. *See Canton v. Harris*, 489 U.S. 378, 388 (1989).

18. *Connick*, 131 S. Ct. at 1378 (Ginsburg, J., dissenting).

19. *Id.*

Connick demonstrated his lack of understanding of *Brady* by suggesting at trial that the inadvertent failure to disclose exculpatory evidence was not a *Brady* violation.²⁰

One of Thompson's prosecutors, Eric Dubelier, admitted that he never reviewed police files but relied on the police to alert him to any *Brady* information.²¹

Another of Thompson's prosecutors, Jim Williams, stated that evidence that could be used to impeach a witness to show he was lying was not covered by *Brady*.²²

Thompson's expert opined that the testimony of high-ranking officials in Connick's office exposed glaring errors in understanding and applying *Brady*.²³

Dubelier's and Williams's testimony at the civil rights trial further exposed their lack of understanding of evidence that would be considered "favorable" to the accused under *Brady*.²⁴

Connick conceded that training in his office with respect to *Brady* was inadequate, and that he had instituted no procedures to monitor compliance with *Brady*.²⁵

Because of a "huge turnover" in Connick's office, many of his prosecutors "were coming fresh out of law school" and attorneys with little experience quickly advanced to supervisory positions.²⁶

The lead prosecutors in Thompson's case, Dubelier and Williams, "were two of the highest ranking prosecutors in the office, yet neither man had even five years experience as a prosecutor."²⁷

20. *Id.* See *infra* Appendix, *Brady* Training Program, Class 1. The *Brady* Rule.

21. *Connick*, 131 S. Ct. at 1378 (Ginsburg, J., dissenting). See *infra* Appendix, *Brady* Training Program, Class 1. Prosecutor's Knowledge – Actual and Constructive.

22. *Id.* (Ginsburg, J., dissenting). See *infra* Appendix, *Brady* Training Program, Class 1. The *Brady* Rule.

23. *Id.* at 1378-79 (Ginsburg, J., dissenting).

24. *Id.* at 1379 (Ginsburg, J., dissenting). Dubelier, for example, testified that the description of the perpetrator as six feet tall with close cut hair was "not inconsistent with Thompson's appearance" (Thompson was five feet eight inches tall with hair styled in a large "Afro"). See *infra* Appendix, *Brady* Training Program, Class 1. Favorable Evidence.

25. *Id.* at 1379.

26. *Id.*

27. *Connick v. Thompson*, 131 S. Ct. 1350, 1379 (2011)

Dubelier and Williams testified “that they did not recall any *Brady* training in Connick’s office.”²⁸

Connick relied on supervisory prosecutors like Dubelier and Williams to ensure compliance with *Brady*, but Connick did not ascertain whether the supervisory prosecutors themselves understood the importance of training new prosecutors about *Brady*.²⁹

Connick never communicated to his assistants the importance of disclosing evidence that could establish a defendant’s innocence.³⁰

Michael Riehlmann, one of the prosecutors who knew about but never disclosed the *Brady* violations in Thompson’s case, could not recall ever being instructed or trained about his *Brady* obligations.³¹

Bruce Whittaker, another of the Thompson prosecutors, testified that it was possible for “inexperienced lawyers just a few weeks out of law school with no training” to bear responsibility for whether evidence was *Brady* material and had to be disclosed.³²

Prosecutors would go to Connick with *Brady* questions, but Connick acknowledged that he “stopped reading law books. . .and looking at opinions” when he was elected District Attorney.³³ Further, as Thompson’s expert testified, Connick’s supervision regarding *Brady* was “the blind leading the blind.”³⁴

A survey of prosecutors in Connick’s office “revealed that more than half felt they had not received the training they needed to do their jobs.”³⁵

“Louisiana did not require continuing legal education at the time of Thompson’s trials.”³⁶

28. *Id.* at 1379-80.

29. *Id.* at 1380.

30. *Id.*

31. *Id.*

32. *Connick*, 131 S. Ct. at 1380.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1381.

The Office policy manual contained four sentences on *Brady* that were inaccurate, incomplete, and outdated. The manual omitted any reference to impeachment evidence as *Brady* material that prosecutors are obligated to disclose.

The manual omitted any reference to several significant developments in the Court's *Brady* jurisprudence.³⁷

During the period of Thompson's trials, the Louisiana Supreme Court issued dozens of opinions discussing *Brady* and at least four decisions in which it reversed convictions because of *Brady* violations by Connick's office.³⁸

When asked about his office's prosecution in the *Kyles* case, which involved numerous *Brady* violations, Connick testified that "he was satisfied with his Office's practices, and saw no need to make any changes."³⁹

Connick resisted any effort to hold offending prosecutors accountable for their misconduct because he felt it would "make [his] job more difficult."⁴⁰

Connick "never disciplined or fired a single prosecutor for violating *Brady*."⁴¹

Despite this evidence, the Supreme Court held that the Office's training in *Brady* was not deficient, and that prosecutors were adequately trained about *Brady*.⁴² In fact, the Court ruled

37. *Id.* The Office manual's reference to *Brady* states in full:

In most cases, in response to the request of defense attorneys, the Judge orders the state to produce so-called *Brady* material – that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce *Brady* material is ongoing and continues throughout the trial. Failure to produce *Brady* material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State.

Also, important *Brady* cases decided by the Court during the relevant period (and not mentioned) in the the Connick Office Manual included *United States v. Bagley*, 473 U.S. 667 (1985), *Weatherford v. Bursey*, 429 U.S. 545 (1977), and *United States v. Agurs*, 427 U.S. 97 (1976).

38. *Supra* note 9.

39. Connick, 131 S. Ct. at 1382 (Ginsburg, J., dissenting).

40. *Id.*

41. *Id.*

42. *Id.* at 1357 ("it was undisputed at trial that the prosecutors were familiar

that no such training was even necessary. According to the majority, prosecutors are lawyers, and lawyers are presumed to know the law. Lawyers do not require the kind of specialized training in constitutional law, for example, that a police officer might need when faced with a difficult, “split-second” decision on whether to shoot at a fleeing felon.⁴³ The majority also found that Connick was not on notice that there were deficiencies in his office with respect to educating his assistants on *Brady*. According to the majority, the several reversals by the Louisiana Supreme Court of convictions by Connick’s office based on violations of *Brady*, as noted above, “could not have put Connick on notice that the office’s *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here.”⁴⁴ According to the majority’s reasoning, the basis for the *Brady* reversals by the Louisiana Supreme Court did not involve nondisclosure of scientific evidence, as did Thompson’s case.⁴⁵ For these decisions to alert Connick to the need to educate his prosecutors on *Brady*, the *Brady* violation would have had to involve the exact same type of nondisclosure of scientific evidence.⁴⁶

But the lowest, most disheartening part of the majority’s opinion was its observation that there is no “obvious need for specific legal training” of prosecutors in interpreting and applying *Brady*.⁴⁷ As noted above, the overwhelming evidence at trial, accepted by a jury and affirmed by the Court of Appeals, showed that Connick’s office utterly disregarded the requirements of *Brady*. The majority rejected all of this evidence, and invented a version of Connick’s office that bears no resemblance to reality. According to the majority, “it is undisputed . . . that the prosecutors in Connick’s office were familiar with the general

with the general *Brady* requirement”); *Id.* at 1363 (“it is undisputed here that the prosecutors in Connick’s office were familiar with the general *Brady* rule”).

43. *Connick*, 131 S. Ct at 1361-63. The reference to police training is found in *Canton v. Harris*, 489 U.S. 378, 390 (1989).

44. *Id.* at 1360.

45. *Id.*

46. Presumably, if one of those Louisiana decisions reversed a conviction based on the nondisclosure by one of Connick’s prosecutors of a specific type of blood evidence - type A, for example - the majority might have asserted (with a straight face) that this decision could not have put Connick on notice that his office’s training was inadequate because the *Brady* violation at issue in Thompson’s case involved types B and O blood evidence, and therefore the nondisclosure cited by the Louisiana Supreme Court is “not similar to the violation at issue here.”

47. *Id.* at 1361.

Brady rule.”⁴⁸ Moreover, held the Court, under Connick’s “regime of legal training and professional responsibility,” prosecutors understood the *Brady* rule, and understood how to go about implementing *Brady*’s disclosure requirements.⁴⁹

Given the abundant proof of a pervasive culture of ignorance and inattention to *Brady* in Connick’s office,⁵⁰ the majority’s assertion that Connick’s training of prosecutors was adequate and appropriate is either mind-boggling or disingenuous. According to the majority’s simplistic syllogism, lawyers are trained in the law, prosecutors are lawyers, and therefore prosecutors know the law, including the *Brady* rule. Elaborating on this flawed reasoning, the majority asserted that prosecutors do not need *Brady* training because they are equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.⁵¹ After all, explained the majority, “all attorneys [including prosecutors] must graduate from law school or pass a substantive examination.”⁵² Even more impressively, the majority asserted, attorneys in most jurisdictions, including prosecutors, must “satisfy continuing-education requirements,”⁵³ although the majority failed to note that Louisiana did not require any continuing legal education at the time of Thompson’s trials.⁵⁴ Moreover, the majority asserted, prosecutors in Connick’s office received “train[ing] on the job,” and were informed of “court decisions and instructional memoranda” and were “[kept] . . . abreast of relevant legal developments.”⁵⁵ There was no evidence that any of this so-called “training” included *Brady*, and indeed, the evidence was to the contrary.⁵⁶ Finally, the majority observed,

48. *Id.* at 1363.

49. *Id.* The majority also asserted that prosecutors in Connick’s office received “on the job” training, and attorneys in the office “circulated court decisions and instructional memoranda.” *Id.* The majority did not say whether the on the job training and circulation of court decisions and instructional materials had anything to do with *Brady*.

50. *See supra* notes 7-66 and accompanying text.

51. *Connick*, 131 S. Ct. at 1361.

52. *Id.* The majority did not explain how this assertion was relevant to the conduct of prosecutors in Connick’s office.

53. *Id.* at 1362.

54. *Id.* at 1362, 1381.

55. *Id.* at 1362. There is no evidence that any of these materials or instruction dealt with *Brady* issues.

56. The Court had decided several important *Brady* cases during the relevant time period, but there was no evidence that Connick’s prosecutors were familiar with

Connick's prosecutors had to satisfy character and fitness standards and were subject to "an ethical regime designed to reinforce the professional standards."⁵⁷ Thus, the majority concluded, "in light of this regime of legal training and professional responsibility," *Brady* violations are neither the "obvious consequence" of a failure of training, nor does a prosecutor making *Brady* decisions present the same "highly predictable' constitutional danger" as an untrained police officer.⁵⁸

It is hard to take the majority's explanation seriously. Anyone even remotely familiar with *Brady*'s ethical rule requiring a prosecutor to disclose exculpatory evidence to the defense has to view this portion of the majority's opinion as absurdly disconnected to the reality of *Brady* litigation in the U.S., and certainly to its implementation in Connick's office. The majority does not understand the difficult challenges a prosecutor faces when analyzing evidence and making *Brady* decisions. The majority's glib assertion – "Well, they're lawyers, and lawyers should know the law"⁵⁹ – suggests that these Justices do not even appreciate the Court's own history in struggling with *Brady* questions. Indeed, given the Court's many contested decisions on difficult *Brady* questions,⁶⁰ one would think that the Court would be sensitive to the complexities of *Brady*, and the difficulties facing prosecutors in making *Brady* determinations.⁶¹ One would not expect the Court to be so self-confident and cavalier about the ability of prosecutors to know the law of *Brady* and apply it correctly.

Finally, although Justice Scalia's concurring opinion, joined by Justice Alito, did not focus heavily on *Brady* training, it did make several references to the inevitability of *Brady* "mistakes" and "supposed gaps and deficiencies" in training.⁶² To be sure, the

any of these cases. *See id.* at 1381 n.16 (dissenting opinion).

57. *Id.* at 1362. The majority cites to no evidence that attorneys in Connick's office had a clue about prevailing ethical standards in general, or specific ethical standards dealing with *Brady*. *See infra* Appendix, *Brady* Training Program, Required Reading, Professional Norms.

58. *Id.* at 1363. This statement is a reference to *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).

59. *Connick*, 131 S. Ct. at 1362.

60. *See infra*, note 60 and accompanying text.

61. *See infra* Appendix, *Brady* Training Program.

62. *Connick*, 131 S. Ct. at 1366-67 (Scalia, J., concurring).

flagrant conduct of Thompson's prosecutors, as well as the flagrant *Brady* violations in several of the Court's recent decisions, were clearly not "mistakes."⁶³ Further, Justice Scalia's bold assertion that there was no *Brady* violation in Thompson's case, reveals a misguided understanding of *Brady*, and a warped understanding of a prosecutor's ethical responsibilities. Scalia suggested that prosecutors can avoid their *Brady* obligation by intentionally remaining ignorant of the existence of exculpatory evidence, as he suggests the prosecutors did in *Connick*.⁶⁴ If nothing else, Scalia's gambit – which might be called "I've Got a Secret," or "Don't Ask, Don't Tell" – can only encourage prosecutors to subvert their *Brady* obligation by deliberately failing to collect or test potentially exculpatory evidence.⁶⁵ Under Scalia's perverse gamesmanship, if a prosecutor chooses not to learn about exculpatory evidence, then the prosecutor is not obligated to disclose what he doesn't know. But as the dissent points out, Scalia's view of *Brady* is not the law.⁶⁶ Nor is it consistent with professional ethical standards.⁶⁷

Further belittling the need for a training program for *Brady*, the majority asserted that *Connick* could not be shown to be "deliberately indifferent" to protecting Thompson's constitutional rights training because the cases only involved one "single *Brady* violation." Once again, the majority misrepresented the record to reach its bizarre result. First, the exculpatory blood evidence suppressed by prosecutors in the robbery trial was not the only evidence that Thompson's prosecutors suppressed. During the

63. See *infra* Appendix, *Brady* Training Program, Relevant Supreme Court Decisions and accompanying text.

64. *Connick*, 131 S. Ct. at 1369 (Scalia, J., concurring) ("the best kept secret of this case [is] there was probably no *Brady* violation at all – except for Deegan's").

65. For a discussion of *Brady* gamesmanship by prosecutors, See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

66. Whether a prosecutor has actual knowledge is irrelevant since a prosecutor is charged with constructive knowledge of evidence in the possession of all entities involved in the investigation and prosecution of the case. See *infra* Appendix, *Brady* Training Program, Class 1. Actual and Constructive Knowledge.

67. See ABA Standards for Criminal Justice, Standard 3-3.11(c) (3d ed.1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."). See also commentary ("A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.").

civil trial, the jury learned that the prosecutors suppressed several other items of exculpatory evidence in Thompson's murder trial.⁶⁸ Second, to characterize the violation as an isolated deviation is disingenuous. Surely when a group of four prosecutors, with a fifth prosecutor aware of the violation, knowingly hides a critical piece of evidence that could prove a defendant's innocence – a blood swatch containing the perpetrator's blood and then exploits that suppression to make it easier to obtain a murder conviction (which also involved the suppression of exculpatory evidence), and thereafter prevents the defendant from discovering the evidence by removing it from the property room, such conduct cannot honestly be labeled a "single" violation. The Court shockingly marginalizes the conduct and minimizes the five prosecutors' joint and individual culpability.

But even accepting the majority's misleading characterization, there is still no basis for the majority's assertion, without any explanation, that a single *Brady* violation may not be sufficient to prove that Connick acted with deliberate indifference by failing to train his assistants on *Brady*. The majority cites the oft-quoted footnote in *Canton v. Harris*,⁶⁹ to justify its assertion that a single constitutional violation cannot demonstrate deliberate indifference based on failure-to-train liability, i.e., that a pattern of constitutional violations is necessary.⁷⁰ In fact, the *Canton* Court actually suggested that in a limited class of cases a single violation could suffice for §1983 liability.⁷¹ *Canton* posed the hypothetical of a city that arms its police force with firearms but does not train the police on the constitutional limits of using deadly force to capture fleeing felons.⁷² In such cases, one unlawful killing is sufficient to establish liability because given the "known frequency" of the police attempting to arrest fleeing felons, it is "highly predictable" that police will violate constitutional rights without specific training in the use of firearms.⁷³ Contrary to the Court's holding

68. *Supra* note 9.

69. *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).

70. *See Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997).

71. 489 U.S. at 390 n.10.

72. *Id.*

73. One could persuasively dispute whether the actions of a team of five police officers, without constitutional justification, in firing their guns at several persons seated in a moving vehicle, should be characterized as a "single violation." *See* Joseph Goldstein, *Police Trial Begins for Officers in Bell Shooting; Two Offer to Retire*, N.Y. TIMES, Oct. 25, 2011, at A24 (five police officers involved in shooting at driver and

in *Connick*, the same predictability exists with *Brady*, whose application is required in almost every prosecution, and whose violation can predictably have disastrous results.⁷⁴

Moreover, the *Canton* hypothetical is a dubious example to use to analyze failure-to-train liability. First, the example is so extreme as to be totally unrealistic; no police department anywhere in the United States fails to train its police officers on the permissible use of deadly force in apprehending fleeing felons. Indeed, the likelihood of police officers not trained in the use of firearms is infinitely less likely than the failure of a policy maker like *Connick* to train his employees to comply with *Brady*. Moreover, according to the majority, police need training because they “must sometimes make split-second decisions with life-or-

passengers seated inside moving vehicle).

74. See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, at 3 (reporting that of 11,000 homicide convictions between 1963 and 1999, 381 of those convictions were reversed for *Brady* violations); CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 2-3 (2007) (examining 2,130 California cases raising claims of prosecutorial misconduct over ten-year period ending in 2006, and finding misconduct in 443 of those cases, with *Brady* violations the most common form of misconduct); JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 5 (2000), available at http://www2.law.columbia.edu/instructional/services/liebman/liebman_final.pdf (noting that prosecutorial suppression of exculpatory evidence accounted for 16% to 19% 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) (finding that thirty-five of 350 wrongful capital convictions resulted from prosecutorial suppression of exculpatory evidence). Most of the post-*Brady* decisions of the United States Supreme Court addressing a prosecutor’s nondisclosure of exculpatory evidence occurred in capital cases.

See STEVE WEINBERG, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? 3-4 (2003) (citing a study of over 11,000 cases in which allegations of misconduct by prosecutors were reviewed by the appellate courts and noting that in twenty-eight cases involving thirty-two defendants misconduct by prosecutors, including suppression of exculpatory evidence, led to the conviction of innocent persons); *United States v. Jones*, 620 F. Supp. 2d 163, 170 (D. Mass. 2009) (noting that “in response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court “adopt a rule defining ‘exculpatory evidence’ in order to provide guidance to counsel in making appropriate disclosures”); Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 281-282 (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); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 688 n.18 (2006) (citing several cases in which innocent persons were convicted based in part on the prosecutor’s suppression of exculpatory evidence).

death consequences.”⁷⁵ In reality, it is unreasonable to believe that intensive training in the constitutional limits on using firearms will be helpful when police have to make split-second decisions on whether to shoot to kill. Presumably police faced with an imminently dangerous situation will not be able to review training manuals or study constitutional law. Prosecutors, on the other hand, have considerable time to study the facts and get the law correct when they decide whether constitutional and ethical rules require disclosure of evidence. Prosecutors don’t have to make “split-second decisions” about *Brady*. Thus, training obviously can assist a prosecutor in making a correct, and certainly an informed, decision.

Finally, prosecutors need to be educated that it is highly predictable—even obvious—that a mistake in analyzing a case file and deciding whether to disclose exculpatory evidence may have profound consequences on a defendant’s ability to effectively defend himself and receive a fair trial. Prosecutors well know, to use the majority’s terminology with respect to police conduct, that a decision not to disclose *Brady* evidence can have “life-or-death consequences,” as it literally did in Thompson’s case.

The majority’s failure to appreciate the kinds of *Brady* questions that prosecutors typically confront appears to be the result of several misunderstandings. First, the majority’s reasoning fails to take into account the fact that *Brady* questions are pervasive and recurrent, involve complex fact-specific balancing, and require an enhanced understanding of various legal rules that both restrict and enlarge the disclosure duty. Second, the majority apparently did not understand the inherent tensions in *Brady* that make even the most honest and conscientious ones resist making *Brady* disclosures.⁷⁶ Third, the majority did not seem to appreciate that the likely consequence of an incorrect *Brady* determination—a material nondisclosure would likely be the wrongful conviction of an innocent person.

To be sure, the kinds of *Brady* violations reviewed by the Court in several recent decisions – *Kyles v. Whitley*,⁷⁷ *Banks v. Dretke*,⁷⁸ *Youngblood v. West Virginia*,⁷⁹ *Cone v. Bell*⁸⁰ – were

75. *Id.*

76. See *infra* Appendix, *Brady* Training Program, Class 2. Cognitive Biases.

77. 514 U.S. 419 (1995).

78. 540 U.S. 668 (2004).

79. 547 U.S. 867 (2006).

relatively easy *Brady* cases. In each of these cases, intelligent and responsible prosecutors could certainly recognize each required disclosure under *Brady*. However, the fact that prosecutors did not disclose the evidence in those cases – and those cases are merely a tiny fraction of disclosure violations by prosecutors nationwide—suggests that *Brady* violations are widespread, that *Brady* can easily be evaded, and that educating prosecutors about compliance with *Brady* is important. To characterize the Court’s *Brady* jurisprudence as “nuances,” as the majority does, marginalizes *Brady* and its progeny.⁸¹ Nor, as the majority suggests, do these cases represent “gray areas”⁸²—areas too sophisticated or unusual to be the subject of training. These cases, in fact, illustrate clear-cut situations in which prosecutors deliberately neglected their *Brady* obligations.⁸³

80. 129 S. Ct. 769 (2009).

81. *Connick v. Thompson*, 131 S. Ct. 1350, 1363 (2011).

82. *Id.* at 1365.

83. *Connick v. Thompson*, Oral Argument, Oct. 6, 2010, at 12-15 (2010 WL 3907898 (U.S.)).

A clue to the majority’s attitude concerning the need and extent of educating prosecutors about complying with *Brady* – the central issue in *Connick* – may be gleaned from examining portions of the oral argument dealing with *Brady* training. The issue was addressed by several Justices, who repeatedly pressed Mr. Thompson’s lawyer, J. Gordon Cooney, to articulate the specific types of training prosecutors would need in order to ensure compliance with *Brady*. The questions included the following:

Justice Alito: Yes, if you could—could you just say as succinctly as possible what you would tell assistant district attorneys if you were the district attorney for this jurisdiction, and you with the benefit of hindsight, having seen this case, what kind of – what would you tell them they should do with respect to *Brady*?

Justice Alito: I really would appreciate it if you’d get to my question. *Brady* requires that exculpatory evidence be turned over. Now, do you – do you think the assistant prosecutors didn’t even know that?

Justice Alito: Okay. Now, you phrase – you are the instructor. You phrase the lesson that you think is required by *Brady* that has to be given to them.

Chief Justice Roberts: You are the – you’re the new D.A. and you are putting up – I need to instruct my people. What – what do they instruct on? I know they instruct on *Brady* under your view. What else?

Chief Justice Roberts: Well, we are – we are looking at specifics where they are going to violate the Constitution. I think that’s a good thing, to tell them they have an obligation to protect the innocent. But we are worried about violations of our constitutional requirements. We know *Brady* is one. What is the next one? What is day 2 in the course?

Surely, there are dozens of ways to structure a rigorous and comprehensive *Brady* training program in terms of coverage, intensity, and format. Thompson's lawyer tried to offer one during oral argument in the Supreme Court but the Justices apparently weren't interested.⁸⁴ The Brady Training Program, sketched out in the Appendix, is one such approach. It covers the *Brady* jurisprudence and recurring *Brady* issues comprehensively in four sessions. It responds to the *Connick* majority's myopic understanding of the need for a *Brady* training program and the contents of that program. It provides a blueprint for thinking about how easy and effective it would be to educate prosecutors to carry out their professional obligations in a responsible and ethical way.

FINAL THOUGHTS

The majority's discourse in *Connick* on educating prosecutors about *Brady* was unfortunate: superficial, simplistic, and unrealistic. *Brady* determinations by prosecutors frequently represent difficult questions that require a careful examination of

Justice Alito: I mean, with respect, I really don't, as a young district – assistant district attorney, that you have told me anything that's going to be really helpful to me other than, you know, follow the law, which you certainly should do, in dealing with my obligation to turn over physical evidence, which is what's involved here.

Several points should be noted. First, these questions appear to minimize and understate the type of training program that prosecutors would need to understand the *Brady* rule and make intelligent *Brady* decisions. Moreover, it is difficult for any attorney to compress into a few sentences the substance of an effective *Brady* training program accurately and intelligently, just as it would be difficult for any attorney to articulate in a few sentences the components of a judicial training program dealing with prohibited conflicts of interest. Justice Alito asks the lawyer to “phrase the lesson that you think is required by *Brady*” Chief Justice Roberts asks: “They instruct on *Brady*. What else. What is Day 2 in the course?” When Thompson's lawyer attempts to provide a thoughtful response that prosecutors initially should be instructed to closely examine the file and think in advance of what evidence might be favorable, Justice Alito interjects: “[Y]ou haven't told me anything that's helpful except follow the law.” Regrettably, the questions from these Justices – rhetorical, confusing, argumentative, perhaps disingenuous – suggest that these Justices do not understand whether a *Brady* training program is necessary, and what it should look like.

84. *Id.* at 13. Thompson's attorney, J. Gordon Cooney, stated:

I think at a minimum it has two pieces, Your Honor. It has basic instruction about how to go about fulfilling the *Brady* obligation, and how do you go about looking through the file to make sure you know what's there, making sure you have documents that are in the possession of the police. Thinking in advance, as this Court talked about in the *Agurs* case, about what the evidence is going to be at trial and looking thoughtfully at that evidence to determine whether or not the evidence was favorable to the accused and needs to be produced.

the evidence in the case file, a solid understanding of the several and often difficult-to-apply *Brady* rules, and a mindset that struggles to maintain an objective and neutral stance and avoid the understandable advocate's impulse against disclosure. And despite the majority's unwillingness to recognize the practical consequences of *Brady* determinations, it is obvious that a prosecutor's decision on whether to disclose exculpatory evidence may cause a possibly-innocent defendant to be prosecuted, convicted, and punished.⁸⁵ Despite the majority's cavalier attitude about a lawyer's ability to know the law, it is also obvious that educating prosecutors about *Brady* is indispensable to preventing constitutional violations.

Connick is a regrettable decision, for John Thompson, of course, as well as for those who are concerned about the capacity of prosecutors to behave responsibly, and the availability of civil remedies to offer relief to those persons wrongfully prosecuted and convicted when they don't. *Connick* is not the first case in which the Supreme Court has closed off avenues of relief for defendants who were victims of serious and deliberate misconduct by prosecutors.⁸⁶ Sanctions that theoretically could be imposed on prosecutors for misconduct have been foreclosed, especially by Supreme Court decisions enhancing the prosecutor's broad immunity from civil liability.⁸⁷ Ironically, it might have been easier for John Thompson to seek criminal charges against his prosecutors for attempted murder than it was for him to sue them civilly.

However, it is also possible that the majority's decision may have a positive, albeit an unintended effect. Indeed, it may be that in the context of examining the conduct of one of the worst district attorney's offices in the country, the majority's paean to lawyer competence and ethics may have a beneficial result. The majority's astonishingly perverse and unrealistic view of lawyer

85. *Supra* note 66.

86. *See, e.g.*, *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (absolute immunity applies to administrative functions of district attorneys and chief supervisory prosecutors for failing to institute training and supervision programs for assistants); *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976) (absolute immunity afforded prosecutors for advocacy activities such as soliciting a witness's false testimony and suppressing exculpatory evidence).

87. *See* Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Amicus, HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW ONLINE (2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf.

competence—especially the majority’s assurance that young and inexperienced prosecutors fresh out of law school are equipped with the tools to know and implement their constitutional and ethical disclosure obligations under *Brady v. Maryland*—may actually encourage prosecutor’s offices and individual prosecutors to reflect about the need for *Brady* training. If that happens, then John Thompson’s tragic ordeal will not be lost.

APPENDIX

Brady Training Program

Course Syllabus

Required Reading

1. Relevant Supreme Court Decisions

There are at least twenty Supreme Court decisions discussing in various contexts a prosecutor’s *Brady* disclosure obligation, i.e., what constitutes suppression of evidence, standards for finding prejudice, disclosure of exculpatory and impeachment evidence, solicitation and failing to correct false testimony, using false evidence, and *Brady*’s application to lost and destroyed evidence. The most important of these decisions should be included as part of the training materials.

The list of required reading should include the following Supreme Court cases: *United States Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 473 U.S. 667 (1985), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Banks v. Dretke*, 540 U.S. 668 (2004), *Strickler v. Greene*, 527 U.S. 263 (1999), and *Cone v. Bell*, 129 S. Ct. 1769 (2009).

2. Professional Norms

The relevant professional norms should be part of a training program. Training materials should include the ABA rules specifically dealing with *Brady* disclosure, including both the ABA Model Rules,⁸⁸ and the ABA Prosecution Standards.⁸⁹ Also

88. ABA Model Rule of Professional Conduct 3.8(d) (2008) (“The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”).

89. ABA Standards for Criminal Justice, Standard 3-3.11(a) (3d ed. 1993) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which

included should be the familiar ethical rule, and commentary, that articulates the prosecutor's overriding duty to serve the cause of justice.⁹⁰ It should be noted that the Supreme Court has recognized these ethical rules as an important component in a prosecutor's ethical duty under *Brady*.⁹¹

Class 1 – Legal Principles of *Brady* Jurisprudence

1. *Brady* Rule

The *Brady* rule, now nearly fifty years old, is essentially unchanged, although its implementation has changed considerably. Although the rule has been modified somewhat—a specific request for *Brady* evidence is no longer necessary to trigger the prosecutor's duty of disclosure—the standard of materiality has changed from what used to be a rule requiring a prosecutor to make a prediction concerning the relevance of the evidence, to a retrospective judgment about whether an appellate court will find a reasonable probability that the nondisclosure materially prejudiced the defendant's right to a fair trial. *Brady* disclosure covers both exculpatory evidence and impeachment evidence. Under *Brady*, the good faith or bad faith of the prosecutor is irrelevant. It should be noted that the yardstick for disclosure stated by Connick, and endorsed by Justice Scalia—“Disclose only what the law requires”⁹²—does not represent the Supreme Court's recommended approach to *Brady*, nor for that matter, to the ethical standard requiring a prosecutor “to serve justice.”⁹³

tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused”).

90. ABA Model Rules, Rule 3.8, comment (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); ABA Standards, Standard 3-1.2 (b) (“The duty of the prosecutor is to seek justice, not merely to convict”);

91. See *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure”).

92. See transcript of Oral Argument, *supra* note 83, at 13 (noting that when questioned about the deficiencies in *Brady* training in Connick's office, when Thompson's lawyer criticized Connick's policy to disclose what the law requires and “nothing more,” Justice Scalia retorted: “Why wouldn't you start with that rule? The rule is perfectly lawful; my goodness.”).

93. *Supra* notes 86-89.

2. Favorable Evidence

A prosecutor is required to disclose materially favorable evidence. There is no obligation to disclose the entire case file, although some prosecutors do in fact maintain an open file policy.⁹⁴ Determining whether certain evidence is favorable may be a difficult task, especially since the prosecutor may not know the theory of the defense, and the extent to which specific evidence in the prosecutor's file is favorable. There are many useful cases discussing the favorability requirement, including some by the Supreme Court.⁹⁵

3. Admissible Evidence

Admissibility of the evidence may be a precondition to disclosure.⁹⁶ However, this limitation should be tempered with the qualification, recognized by several courts, that if the inadmissible evidence may reasonably lead to admissible evidence, then its inadmissibility should not be a bar to disclosure.⁹⁷ It should be noted that the U.S. Department of Justice requires disclosure of exculpatory and impeachment information regardless of whether the information subject to disclosure would itself constitute admissible evidence.⁹⁸

4. Prosecutor's Knowledge – Actual and Constructive

Brady limits a prosecutor's disclosure duty to information about which the prosecutor knows. In most of the cases – and the Thompson case is illustrative – the prosecutor actually knows that the evidence is favorable but decides not to disclose. Situations arise, however, when the information is by other law enforcement personnel, or other government agencies not part of the investigation. The rule is clear that a prosecutor's knowledge extends beyond his actual knowledge and includes constructive knowledge of evidence about which a prosecutor “should know,” including evidence possessed by police involved in the case, and

94. See, e.g., *Strickler v. Green*, 527 U.S. 263 (1999).

95. See, e.g., *Moore v. Illinois*, 408 U.S. 786 (1972); *Weatherford v. Bursey*, 429 U.S. 545 (1977).

96. See, e.g., *Giles v. Maryland*, 386 U.S. 66 (1967); *Wood v. Bartholomew*, 516 U.S. 1 (1995).

97. See, e.g., *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007); *Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003).

98. See U.S. Dep't of Justice, U.S. Attorneys Manual, § 9-5.001(C)(3) (2006).

other government agencies involved in the investigation.⁹⁹ A prosecutor should examine all the police carefully, as well as alert the police to disclose all information relevant to the case. Indeed, for *Brady* the police are considered an “arm of the prosecutor,”¹⁰⁰ and have a derivative duty under *Brady* to turn over to the prosecutor potentially exculpatory evidence.¹⁰¹ A prosecutor has an affirmative duty to examine the personnel files of law enforcement officers the prosecutor intends to call as witnesses, and the criminal and corrections records of witnesses upon whose testimony the prosecutor is relying.¹⁰²

5. Defendant's Knowledge

A prosecutor in general has no duty to disclose information which the defense already knows about. Some courts go further and hold that a prosecutor is not obligated to make disclosures of information that the defense with reasonable diligence could have obtained. However, this extension should be tempered with the realization that even though information might be theoretically available to the defense, it might not be available in fact for purposes of *Brady* compliance. This might be the case where public records are theoretically available, but there may have been no reason for the defense to have looked for the record, or cases in which the prosecution overwhelms the defense with massive amounts of documents which are virtually impossible to read and digest in the limited time available for pretrial preparation.

6. Materiality of Undisclosed Evidence

A prosecutor's suppression of evidence violates due process when the defendant shows that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.¹⁰³ The test is not whether the defendant would more likely than not have received

99. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 436-38 (1995); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

100. See *Walker v. Lockhart*, 763 F.2d 942, 958 (8th Cir. 1985).

101. See *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6th Cir. 2009) (“[V]irtually every other circuit has concluded either that the police share in the state's obligations under *Brady*, or that the Constitution imposes on the police obligations analogous to those recognized in *Brady*”).

102. See, e.g., *United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996); *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997).

103. See *United States v. Bagley*, 473 U.S. 667, 666 (1985).

a different verdict with the evidence, but whether in its absence he received a fair trial, that is, “a trial resulting in a verdict worthy of confidence.”¹⁰⁴ Materiality is analyzed by weighing the significance of the witnesses and the evidence withheld and the strength of the prosecution’s case. A prosecutor’s good or bad faith in suppressing evidence is typically irrelevant to the materiality analysis. Evidence that exculpates a defendant probably stands a better chance of being found material than evidence that impeaches the credibility of a witness. Materiality is determined in terms of the suppressed evidence considered collectively, not item by item.¹⁰⁵

7. Materiality of False Testimony

The *Brady* rule encompasses a prosecutor’s use of false testimony, either by soliciting the testimony from a witness, or failing to correct a witness’s false testimony. The Court has not explained whether a prosecutor’s nondisclosure of information under *Brady* and a prosecutor’s use of false testimony involve separate claims, and need to be pleaded separately. In any event, the Court has emphasized that a prosecutor using false testimony may be a more serious violation of due process than suppressing exculpatory evidence in that false testimony involves an actual corruption of the truth-finding process. The test for determining whether a conviction based on a prosecutor’s knowing use of false testimony violates due process is whether “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹⁰⁶

8. Significance of Request for *Brady* Evidence

Although *Brady* appeared to require a defense request for favorable evidence, the requirement was subsequently eliminated. Nevertheless, some courts continue to recognize under *Brady* a distinction between suppressed evidence that has been requested and suppressed evidence that has not been requested.¹⁰⁷ Moreover, a prosecutor should also be alert to state rules of disclosure that might impose on prosecutors a higher standard of disclosure when the defense makes a specific request

104. See *Kyles v. Whitley*, 514 U.S. at 434.

105. *Id.* at 436-37.

106. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

107. See *Johnson v. Gibson*, 164 F.3d 496, 510 (10th Cir. 1998).

for evidence than the standard under *Brady*.¹⁰⁸

9. Timing and Late Disclosure of *Brady* Evidence

When must a prosecutor disclose *Brady* evidence? The Supreme Court has not answered the question, although the Court has noted that the disclosure duty is “ongoing.”¹⁰⁹ Most courts hold that *Brady* does not require pretrial disclosure.¹¹⁰ The U.S. Department of Justice requires prosecutors to disclose information “promptly after it is discovered,” and to disclose impeachment information “at a reasonable time before trial.”¹¹¹ Local court rules may also impose specific time obligations for disclosure.¹¹² The test for determining whether *Brady* information was untimely is whether the delayed disclosure prevented the defendant from using the material effectively in preparing or presenting its case.¹¹³

10. Lost and Destroyed Evidence

A prosecutor’s disclosure duty includes a duty to preserve such evidence from loss or destruction. Otherwise the disclosure duty could easily be circumvented by destroying the evidence. A prosecutor’s duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect’s defense, and must be of such nature that a defendant would be unable to obtain comparable evidence.¹¹⁴ Moreover, there is no denial of due process from the loss or destruction of potentially useful evidence unless the defendant can show that the failure to preserve evidence was in bad faith.¹¹⁵

108. See *People v. Vilardi*, 555 N.E.2d 915 (N.Y. 1990) (describing the test for reversal following prosecutor’s suppression of evidence that was specifically requested is whether there is a “reasonable possibility” that undisclosed evidence would have influenced the jury’s verdict).

109. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

110. See *United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001).

111. See U.S. Dep’t of Justice, U.S. Attorneys Manual § 9-5.001(D)(1)(2) (2006) 244, fn 11.

112. See *infra* note 111.

113. Several convictions have been reversed for untimely disclosure. See, e.g., *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001); *DiSimone v. Phillips*, 461 F.3d 181 (2d Cir. 2006).

114. See *Cal. v. Trombetta*, 467 U.S. 479 (1984).

115. See *Ariz. v. Youngblood*, 488 U.S. 51, 58 (1988).

11. Work Product

Whether the prosecutor's work product must be disclosed under *Brady* appears to be an open question that the Supreme Court has not addressed. Most courts have held that *Brady* does not require a prosecutor to disclose to the defense "opinion work product" that encompasses the prosecutor's mental impressions or legal theories.¹¹⁶ However, if a prosecutor's opinion and mental impressions do contain underlying exculpatory facts, then disclosure of those facts may be required under *Brady*.¹¹⁷

Class 2 – Procedural and Systemic Issues

1. Procedural Framework

Brady disclosure is not automatic. Prosecutors typically are required to provide *Brady* evidence upon request. Some prosecutors disclose *Brady* evidence early in the proceedings, along with their disclosure of other discovery materials. Most federal and state jurisdictions do not mandate disclosure within a specific time period, nor do they specify any due diligence requirements upon prosecutors.¹¹⁸ Prosecutors can disclose in one of several ways: prosecutors may furnish a defendant with all evidence specifically required by the discovery rules; prosecutors may disclose their entire case file, and all potential *Brady* evidence; and prosecutors may seek the court's assistance in determining whether and to what extent to comply with *Brady*. The *Brady* duty is a continuing one, and a prosecutor is obligated to disclose *Brady* evidence when he learns about it.

2. Judicial Involvement in *Brady* Determination

May a defendant obtain pretrial judicial inspection of a prosecutor's file to determine whether a prosecutor is withholding *Brady* information? Although the Supreme Court has suggested this possibility,¹¹⁹ there are obvious practical difficulties since a judge is less oriented to the facts and possible defenses than the

116. See, e.g., *Morris v. Ylst*, 447 F.3d 735, 742-43 (9th Cir. 2006); *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000).

117. See *Morris*, 447 F.3d at 742.

118. See generally, LAURAL L. HOOPER ET AL., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES, REPORT TO THE ADVISORY COMM. ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (Federal Judicial Center, 2004).

119. See *United States v. Agurs*, 427 U.S. 97, 110 (1976).

attorneys and might not be able to make an informed decision. However, if a prosecutor entertains a genuine doubt as to whether certain information should be disclosed, or a defendant makes a preliminary showing that obviously favorable material is being withheld, it may be appropriate for the court to review the material *in camera*.¹²⁰

3. Post-Conviction Disclosure

If a prosecutor discovers *Brady* evidence after a defendant's conviction, does a prosecutor have a duty of disclosure? Whether the *Brady* duty extends to evidence discovered after the trial is unclear. Courts appear to disagree on whether the appropriate analytical approach is under *Brady*, or a claim for wrongful imprisonment, or deprivation of liberty without due process. The ABA Model Rules impose an ethical duty on prosecutors to rectify wrongful convictions.¹²¹ When a prosecutor learns of "new, credible, and material evidence" that creates a "reasonable likelihood" that a defendant is innocent, a prosecutor must promptly disclose that evidence to the defendant and the court, as well as conduct an investigation. When a prosecutor learns of "clear and convincing evidence" that shows that a convicted defendant is innocent, the prosecutor "shall seek to remedy the conviction." The commentary indicates that a prosecutor's "independent judgment, made in good faith," that the evidence is not of such nature as to trigger the disclosure obligations, even if erroneous, does not constitute a violation of the Rule.

4. Application of *Brady* to Guilty Pleas

The Supreme Court has ruled that a prosecutor is not required to disclose to a defendant contemplating whether to plead guilty information the defense could use at trial to impeach government witnesses.¹²² The Court has not ruled on whether a prosecutor is required to disclose exculpatory information. Several courts have held that a prosecutor may not withhold exculpatory information from a defendant during plea negotiations on the ground that such information is critical to enable a defendant to make an intelligent decision on whether to

120. See *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998).

121. See ABA Model Rules of Professional Conduct, Rule 3.8 (g), (h), and comment 9.

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

plead guilty.¹²³

5. Innocence and Wrongful Convictions

Prosecutors should be made aware of the consequences of a *Brady* violation, namely, that nondisclosure of exculpatory evidence may result in the conviction of an innocent person, as in the case of John Thompson. Prosecutors should be instructed that the *Brady* rule is unique in many ways. Of all the procedural rules that prosecutors must observe, the *Brady* rule alone imposes on prosecutors a positive duty of fairness. Prosecutors should be told how easy it is to avoid and evade *Brady*'s requirements, the considerable challenge facing the prosecutor in disclosing evidence that might impair the prosecutor's chances of winning a conviction, and the consequences to the accused, the prosecutor, and the cause of justice in violating the rule.

6. Cognitive Biases

In connection with the previous point, prosecutors might be alerted to their considerable discretion in deciding what items of evidence might be plausibly subject to disclosure, and whether in fact to make the disclosure. It might be useful to acquaint prosecutors with the increasing body of literature discussing the various cognitive biases that might impact on a prosecutor's disclosure decision.¹²⁴ Prosecutors should be alerted that these biases often operate unconsciously, and may impede the ability of prosecutors to maintain the neutrality and objectivity that compliance with *Brady* requires. However, as noted above, the Supreme Court has observed that a prudent prosecutor should resolve doubts in favor of disclosure.¹²⁵

Class 3 – Specific Types of *Brady* Evidence

1. Eyewitness Misidentifications

123. See, e.g., *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006); *Matthew v. Johnson*, 201 F.3d 353, 364 (5th Cir. 2000).

124. See Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006).

125. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure").

Evidence of eyewitness misidentifications is a staple of the *Brady* cases.¹²⁶ Numerous cases of mistaken identifications have resulted in the conviction of innocent persons, and several of these cases, including decisions by the Supreme Court, have focused on the prosecutor's nondisclosure of evidence that would have exposed erroneous identifications. Prosecutors should be familiar with the fact that eyewitness misidentifications account for the large majority of wrongful convictions, and the increasing body of research addressing the reasons why eyewitnesses make mistakes.

2. Cooperation Agreements – Explicit and Tacit

Cooperation agreements between the prosecutor and his witness, which typically confers advantages to the witness, are commonplace. Prosecutors are required to disclose these agreements so that a jury can determine whether a witness's testimony was influenced by the agreement. Several of the *Brady* cases in the Supreme Court involve the failure of the prosecutor to disclose the nature or extent of a cooperation agreement, and even involve actions of prosecutors in hiding the existence of such agreements.¹²⁷ Prosecutors also have been found to violate *Brady* by conferring benefits on a witness tacitly.

3. Scientific Tests and Reports

Scientific evidence can be the most powerful evidence used by prosecutors to get convictions, but also may be the most powerful evidence to exonerate a wrongfully accused defendant, as in the *Connick* case. There are numerous instances in which prosecutors violated *Brady* by failing to disclose exculpatory scientific evidence.¹²⁸ Prosecutors should be aware of the methods, standards, and protocols of the laboratories and experts opining on the scientific evidence, and should also be aware that nondisclosure of deficiencies or errors may violate *Brady*.

126. See, e.g., *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995).

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

128. See, e.g., *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1999) (expert report); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) (ballistics evidence); *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *Miller v. State*, 809 P.2d 1317 (Okla. Crim. App. 1991) (forensic chemist's report); *McCarty v. State*, 765 P.2d 1215 (Okla. Crim. App. 1988) (forensic chemist's report).

4. Physical Evidence

Discovery statutes typically require prosecutors to disclose to defendants physical evidence connected with the criminal charge. As we saw in *Connick*, physical evidence which might be critical to guilt or innocence may be hidden, intentionally or inadvertently. This is another instance where the prosecutor has to ensure that police and other investigative agencies disclose to the prosecutor all of the relevant physical evidence acquired during the investigation that either incriminates, exonerates, or may even be neutral. Indeed, seemingly neutral physical evidence may be relevant to enable defense to investigate and present its case effectively.¹²⁹

5. Third-Party Guilt

Claims by defendants that a third party committed the crime are not infrequent, and prosecutors occasionally have information pointing to guilt of a third party, and disclosure of this information may be required. There are many cases, including several decisions by the Supreme Court, in which a prosecutor possessed evidence pointing to the guilt of a third party.¹³⁰

6. Witness Background and Impeachment

A witness's criminal history is considered favorable information that a prosecutor is required to disclose. The information can be used to impeach the credibility of a prosecution witness. Thus, records of a witness's arrest, conviction, and conduct in prison are typically the kinds of information that prosecutors must disclose. The failure of prosecutors to disclose this information has resulted in the reversal of convictions.

7. Defective Investigation

Disclosure of the defects in a criminal investigation might be favorable information that a prosecutor must disclose. The fact that investigators did not pursue certain courses of action, interview certain witnesses, or seek to obtain certain types of

129. It may be that the failure to find forensic evidence linked to the defendant in a place where it would likely be found under the prosecutor's theory might be viewed as favorable and possibly material exculpatory and therefore might be subject to disclosure.

130. See, e.g., *Moore v. Illinois*, 408 U.S. 786 (1972); *Kyles v. Whitley*, 514 U.S.419 (1995).

scientific or other evidence in particular cases might be considered exculpatory evidence.¹³¹

8. False Evidence

Use by a prosecutor of false evidence, either through a witness's false testimony or the use of other false evidence, violates due process. The nondisclosure by the prosecutor of this evidence is a frequent basis for reversing convictions under *Brady*.¹³²

Class 4 – Application: Specific *Brady* Problems for Analysis and Discussion

Problem 1

Defendant Thomas has been charged with sale of drugs to Detective Musgrove, an undercover officer assigned to the narcotics unit in the sheriff's office. Seated in a parked vehicle to observe and back up Musgrove's purchase is Detective Franklin. According to Musgrove, he approached Thomas, whom he knew from the streets as a drug dealer with a long record of drug convictions, and purchased a quantity of cocaine from him for \$100 dollars. Thomas denies the sale, and claims an alibi. He also alleges that he and Musgrove knew each other, and that Musgrove had once asked Thomas to sell drugs for him, and Thomas refused, thereby, according to Thomas, providing Musgrove with a motive to seek retribution. As the prosecutor prepares the case for trial, he is informed by Musgrove that he is under investigation by federal law enforcement authorities for threatening, shaking down, and otherwise co-opting local drug dealers. He advises the prosecutor that he is innocent and there is no basis for the charges. Assume that the prosecutor did not know that Musgrove was under investigation at the time he prosecuted Thomas and that Thomas is convicted. Assume further that after Thomas was convicted, Musgrove was indicted, tried, and convicted of conspiracy to obstruct justice.

Does the prosecutor have an obligation under *Brady v. Maryland* to disclose to the defense that Musgrove is under federal investigation? If so, when should the prosecutors disclose?

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

132. See, e.g., *Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 669 (2004); *Napue v. Illinois*, 360 U.S. 264 (1959); *Youngblood v. West Virginia*, 547 U.S. 867 (2006).

Does Thomas have a remedy under *Brady v. Maryland*?

Problem 2

Defendant D has been charged with forcible rape. According to the testimony of the complainant V, she was on the side of a road after her car broke down, when D drove up and offered to help her. It was a chilly winter evening, and D told her to wait in his car to stay warm. After looking at her car and checking the engine, he told her she probably needed to be towed, and there was a service station down the road. He then drove a short distance away, stopped, held a knife to her throat, bound her wrists behind her back, and raped her. When he produced the knife, she cut her finger when she held up her hand to ward off the attack, and bled on her clothes and car seat. After the attack, he threatened to kill her if she called the police, but drove her to a friend's home, where the police were called. The police took a statement from V and brought her to a hospital. The examining doctor saw a cut on her finger which was consistent with being cut with a sharp object, and bruising on her wrists which was consistent with binding by a rope. Two weeks later, V was shown a series of photographs by the police and identified D. The police arrested D and searched his car where they found a knife, a rope, and blood on the front seat. A forensic chemist performed serology tests on the knife and the car seat. In her report, the forensic chemist concluded that the blood type on the knife and the car seat was different than V's blood type. The prosecutor did not disclose the chemist's report to the defense. The prosecutor in its case-in-chief chose not to introduce any evidence of blood stains. Assume the prosecutor's reason for neither introducing the chemist's report nor calling the chemist as a witness was because she believed the chemist was incompetent—he had twice failed proficiency tests, used inappropriate tests in analyzing the blood, used an insufficient number of samples, failed to follow proper procedures.

Did the prosecutor's failure to disclose the chemist's report violate *Brady v. Maryland*?

Problem 3

Defendant D was charged with capital murder. The prosecution's theory of guilt was that D and his girlfriend G hitched a ride in a van driven by V. The three drove to a campsite where they planned to camp out for the night. During the night,

D killed V by hitting him several times in the head with a rock, and then dumping his body down an embankment. G then cleaned the van and burned some bloody clothing and blankets. D and G then drove the van through several states using V's credit card to make purchases. Along the way, they picked up a hitchhiker H to whom D confessed to killing V. H fled, notified the police, and D and G were arrested. D confessed to police that he murdered V. G made a cooperation agreement with the prosecutor and testified against D. D also testified, claiming that G killed V after he tried to rape her. D testified that he falsely confessed to the murder to protect G, whom he thought was pregnant with his child. G was heavily cross-examined. She contradicted herself in several places and admitted she lied in the past. Following her testimony, a legal intern in the prosecutor's office, who participated in the trial preparation and interviews of witnesses, including G, prepared a status report for the prosecutor in which she wrote: "G perjured herself at trial. Awaiting the transcripts to determine exactly what she said." This report was never disclosed to the defense. After D was found guilty and sentenced to death, G pleaded guilty to "grand theft auto." The plea agreement with G originally specified that G's representation that she had not inflicted any injuries on V had to be truthful. This condition was deleted before D's trial.

Does *Brady v. Maryland* require the prosecutor to disclose the intern's status report?

Problem 4

Defendants Art and Bill, 18 and 20 years old respectively, were charged with robbery and murder. The principal witness against them was Hal, a teenager who knew the defendants from the neighborhood. According to Hal's testimony presented during the prosecution's case-in-chief, Hal was riding his bicycle when he saw Art and Bill accost Mike as he left a senior citizens home. Mike started running away, and Art and Bill gave chase, at one point passing Hal and asking to use his bicycle, and when Hal refused, they took it and finally caught up with Mike. Art and Bill started to beat Mike, repeatedly kicking him in his face and side, and struck him several times in the head with the bicycle. Hal also saw Art and Bill take Mike's wallet. After Hal retrieved his bicycle, he was ordered by Art and Bill to say nothing. Hal eventually was questioned by the police, and he reported the event, leading to the arrests of Art and Bill. Hal identified the

defendants in court. Cross-examination of Hal suggested that the police initially suspected Hal of being involved in the attack. A detective testified that Hal was merely a witness, although certain aspects of the interrogation of Hal raised doubts about this assertion. The defense called several witnesses: one witness testified that he saw Hal hitting Mike with his bicycle, and another witness testified that he saw Hal running away with several other youths, none of whom was Art or Bill; and another who testified to an alibi for Art and Bill. Two alibi witnesses also testified for the defense. Sally, Bill's girlfriend, testified that she was at her home with Bill at the time of the attack. Sally's sister, Jan, corroborated this account. The prosecutor had in its file an investigative report of an interview with Jan four days before the trial. According to the investigative report, Jan stated that Hal had been bragging to people about what he and his friends had done to Mike, and also that Hal told another acquaintance, Frank, that he implicated Art and Bill so that he would not get into trouble. Jan was interviewed by the defense a month before the trial. The defense did not elicit these statements of Hal's.

Does *Brady v. Maryland* require the prosecution to disclose to the defense the investigative report containing Jan's interview?

Problem 5

Defendant D paid C \$50,000 to burn down his warehouse so that D could recover the insurance proceeds. C attempted to set fire to the premises, but the fire did not ignite. Three years later, C was charged with narcotics violations by state authorities. During debriefing by state investigators, C disclosed his involvement in the arson, which information was transmitted to federal authorities, and D was indicted for attempted arson. At D's trial, C testified that he had been given immunity for his testimony against D. C also told the jury that his testimony against D would have no bearing on his state narcotics charges, asserting that the cases had nothing to do with each other. He did acknowledge that an investigator involved in the federal arson case had arrested him on the state narcotics charge. However, it appears that C did in fact expect leniency and a forthcoming plea agreement in connection with the state charges against him, with the agreement of the state prosecutor. The state prosecutor also expected that C's cooperation in the federal case would be considered in the state plea agreement. Proceedings on the state charges were adjourned several times pending resolution of the

federal matter.

Did the federal prosecutor violate *Brady v. Maryland* when C stated that his testimony against D would have no bearing on his state charges?

Problem 6

V was shot twice in the chest as he was getting into his car in the parking lot of a shopping center by an assailant who fired the shots from the roof of the shopping center. The prosecution's evidence convicting D of the murder was largely circumstantial. Two eyewitnesses saw a man jump from the roof and run towards a nearby park. They described him as young, wearing a grey or blue cap, and a brownish coat. One of these witnesses said his pants were wet, but could not identify D as the man. The other witness believed D "looked something like" the man he saw. V was D's supervisor in the post office mail room, and witnesses testified to a heated relationship between them, and that D was given a poor performance review the week before V's death. The murder weapon was found in a park adjacent to a creek. A witness testified that he had loaned D the weapon the previous year and had asked for it back but D said it had been stolen. D was arrested within hours of the shooting. His shoes and trousers were wet. The police found a tan raincoat and a gray cap under a bush in the park. Assume that the prosecution asked the FBI crime lab to scientifically test the gun, coat, cap, shoes, and clothing worn by defendant. Tests to establish whether the hat and coat found under the bush had been associated with D, or a firearm, or with paint samples taken from the shopping center were negative. There were no fingerprints on the murder weapon. Soil samples taken from D's shoes did not match the escape route, nor was tar found on D's shoes able to be matched with tar on the shopping center roof.

Does *Brady v. Maryland* require the prosecutor to disclose to the defense the results of these tests?

Problem 7

B, a ten-year-old boy, was transferred from residential treatment facility R to residential treatment facility Y. While at Y, B accused staff member D of sexually assaulting him during several encounters. D was charged and tried, where the evidence consisted mostly of B's accusations and D's denials. An intake

note written by Y's Director of the Program for Emotionally Disturbed Boys indicated that B alleged that he was abused by staff members at his former facility R where he had stayed for several months prior to Y, that B expressed concern that he would be assaulted at Y, and that Y would need to take special precautions to protect staff members from false accusations if B was admitted.

Does *Brady v. Maryland* require the prosecutor to disclose this intake note to the defense?

Problem 8

Dan, along with Ed and Fred, were charged with robbing an auto supply store and killing the clerk. At Dan's capital murder trial, Sally, who had a child with Dan, testified that Dan told her he robbed an auto store with Ed and Fred and killed someone. Ed testified that he would plead guilty to a lesser degree of murder – murder in the second degree—and testified for the government that he drove Dan and Fred to the store in his blue Ford, and waited outside. Fred also testified for the government that he would plead guilty to the non-capital charge of murder in the first degree, and testified that when he left the store Dan had taken the clerk to a back room, and when Dan exited the store he stated that he “took care of the person.” The bullet that killed the clerk was fired from a revolver recovered from the ground next to an apartment complex where Dan lived with his girlfriend. Assume that the prosecutor possessed the following items of evidence which were not disclosed to Dan's lawyer: (1) a statement to the police from witness W who left the auto store and saw three men sitting in a blue car, and after viewing a photo spread, identified Mike as one of the men in the car (the prosecutor did not charge Mike, believing that W had misidentified him); (2) a police report of an interview with Mike's girlfriend who stated that Mike's gun was used to kill the clerk in the auto store robbery; (3) that Sally had a history of poor mental health and drug use; and (4) that Fred perjured himself when he testified that he planned to plead guilty to first degree murder when in fact he pleaded guilty to second degree murder.

Does *Brady v. Maryland* require the prosecutor to disclose these items to the defense?