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# Between *Brady* Discretion and *Brady* Misconduct

Bennett L. Gershman\*

## ABSTRACT

The Supreme Court's decision in *Brady v. Maryland* presented prosecutors with new professional challenges. In *Brady*, the Supreme Court held that the prosecution must provide the defense with any evidence in its possession that could be exculpatory. If the prosecution fails to timely turn over evidence that materially undermines the defendant's guilt, a reviewing court must grant the defendant a new trial. While determining whether evidence materially undermines a defendant's guilt may seem like a simple assessment, the real-life application of such a determination can be complicated. The prosecution's disclosure determination can be complicated under the *Brady* paradigm because the prosecutor's office is burdened with arguably conflicting obligations. On the one hand, the prosecution must build its case against the accused in an adversarial system of justice. On the other hand, the prosecution must assess each part of its investigation as to how and whether the defense could use the evidence. If the defense could possibly use the evidence, the prosecutor must then determine whether that evidence must be turned over under *Brady* or whether the prosecutor has the discretion not to disclose.

This paper discusses prosecutorial *Brady* dilemmas through eight hypotheticals. The hypotheticals are not unusual types of difficult problems that prosecutors face when building their cases. The problems include issues related to possible prosecution witness impeachment material, lab reports that do not clearly support the defendant's guilt, codefendant testimony and plea agreements, and conflicting eye witness accounts. After presenting the hypotheticals, the paper works through each of the problems and posits a conclusion about whether the prosecution has a *Brady* obligation to disclose the information to the defense.

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## INTRODUCTION

*Brady v. Maryland*<sup>1</sup> tests the prosecutor's integrity. Prosecutors know that principles of due process and professional ethics require disclosure of materially favorable evidence in the prosecutor's possession to the defendant.<sup>2</sup> Prosecutors know that doubts about whether the evidence should be disclosed should be resolved in the defendant's favor,<sup>3</sup> and that the prosecutor's good-faith and honest belief that the evidence is not favorable or material is irrelevant.<sup>4</sup> Still, courts recognize that *Brady* has not displaced the adversary system,<sup>5</sup> and that a prosecutor is permitted to exercise considered judgement, or discretion, in assessing the value of evidence to the defense.<sup>6</sup> This paper examines the scope of a prosecutor's discretion under *Brady* to disclose evidence to the defense and the factors that guide that discretion.

Below are eight problems in which a prosecutor must decide whether *Brady* requires the disclosure of evidence to the defense. The problems are not clear-cut. A responsible prosecutor seeking to enforce her *Brady* duty would have to struggle with these problems. A prosecutor would have to analyze the evidence carefully and attempt to predict how the defense could use this evidence effectively, either in preparing or presenting its case. Then, the prosecutor must weigh various factors that are relevant to the pros-

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

2. *Id.* at 87 ("We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2018) ("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 . . .").

3. *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

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

5. *See United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

6. *People v. Fein*, 219 N.E.2d 274, 278 (N.Y. 1966). As the New York Court of Appeals noted in *People v. Fein*:

[T]he public prosecutor—an experienced trial lawyer—must have *some* area in which he is permitted to judge, in the context of the entire case, the value of evidence to the defense in terms of its potential impact on the jury; he must have *some* discretion in determining which evidence must be turned over to the defense.

*Id.*

ecutor's exercise of *Brady* discretion.<sup>7</sup> Of course, prosecutorial offices that operate under an "open file" discovery policy simplify their disclosure task. Open file discovery policies constrain the prosecutor's discretion much more than traditional discovery policies.<sup>8</sup> I assume in this discussion that no open file policy exists. I also assume that the prosecutor in this discussion is sensitive to her role to serve justice, understands the need to protect the defendant's right to a fair trial, and is cognizant of the need to protect the community from lawbreakers.<sup>9</sup>

### *Problem 1*

Tom was charged with the sale of drugs to Musgrove, an undercover agent in the sheriff's department assigned to the narcotics unit. According to Musgrove, he knew Tom from the street as a drug dealer with a record of drug arrests and convictions. Musgrove, in his capacity as an undercover agent, approached Tom and purchased \$100 of cocaine from Tom. Tom denies the sale. He claims that several months earlier, Musgrove asked Tom to sell a large quantity of drugs for him and Tom refused. According to Tom, his refusal to sell the drugs for Musgrove provided Musgrove with a motive to set him up for the current drug charge. As the state prosecutor is preparing her case for trial, Musgrove tells her that he is under investigation by the U.S. Attorney's Office for shaking down local drug dealers. Musgrove denies any wrongdoing. The U.S. Attorney's Office refuses to discuss the investigation with the state prosecutor. Tom goes to trial. The prosecutor does not disclose to the defense that Musgrove is under federal investigation for narcotics offenses. Tom is convicted of selling drugs based on Musgrove's testimony. After Tom's conviction, Musgrove is indicted, tried, and convicted of conspiracy to obstruct justice by federal authorities.

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7. In discussing these problems, I assume the prosecutor has reviewed the case file thoroughly and has interviewed the police investigators, complainants, and witnesses. Nevertheless, the prosecutor's task is complicated by the fact that the prosecutor can make only a rough judgment as to how the evidence might be used by defense in challenging the prosecutor's case. See *Agurs*, 427 U.S. at 108 ("[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete . . .").

8. *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999) ("[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.").

9. This is not the approach of some prosecutors. See generally Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

Did the prosecutor have an obligation to disclose that Musgrove was under federal investigation?

*Problem 2*

Dan was charged with forcible rape. According to Veronica's testimony, she was on the side of a road in a rural community after her car broke down when Dan drove up and offered to help her. It was a chilly winter evening and Dan told her to wait in his car to stay warm. After examining her car and checking the engine, Dan told her she probably needed to be towed. He told her there was a service station down the road. Veronica testified that Dan drove her a short distance away, then stopped his car, held a knife to her throat, bound her wrists, and raped her. Dan cut Veronica's finger when she held up her hands to ward off the attack. She bled on her clothes and the car seat. Veronica testified that after the attack, Dan threatened to kill her if she called the police. Veronica called the police, however, once Dan drove her to a friend's home. The police took a statement from Veronica and brought her to a hospital. The examining doctor saw a fresh cut on her finger, which was consistent with being cut with a sharp object. The doctor also saw recent bruising on her wrists, which was consistent with being bound by a rope.

Two weeks later, the police showed Veronica a series of photographs and she identified Dan. The police arrested Dan and searched his car, where they found a knife, a rope, and blood stains on the front seat. A forensic chemist performed serology tests on the knife and the car seat. His report concluded that the blood on the knife and the blood stains on the car seat did not match Veronica's blood. The prosecutor concluded that the report was untrustworthy because the chemist was incompetent. The chemist had twice failed proficiency tests, used inappropriate testing in analyzing the blood, used an insufficient number of samples, and failed to follow proper laboratory protocols. The prosecutor, in her case-in-chief, presented evidence of the blood stains on the knife, car seat, and Veronica's clothes, but did not call the chemist or introduce his report.

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

*Problem 3*

Don was charged with capital murder. The prosecution's theory of the case was that on the night of the murder, Don and his

girlfriend Glenda hitched a ride from Vern in a van. The three went to a campsite where they planned to camp out for the night. The prosecution's theory was that during the night, Don killed Vern by hitting him several times in the head with a rock and dumped his body down an embankment. The prosecution postulated that Glenda cleaned the van and burned some bloody clothing and blankets. Don and Glenda then drove the van through several states and used Vern's credit card to make purchases. The stolen credit card led to Don and Glenda's arrests for Vern's murder. Don confessed to murdering Vern. Glenda made a cooperation agreement with the prosecution and testified against Don. Don also testified and claimed that Glenda killed Vern after Vern tried to rape her. He testified that he falsely confessed to murdering Vern to protect Glenda, whom he thought was pregnant with his child. Glenda was heavily cross-examined. Her testimony contradicted itself several times and it appeared that she was coached.

A legal intern in the prosecutor's office who participated in the trial preparation and witness interviews, including Glenda, prepared a status report for the prosecution in which she concluded: "I don't believe Glenda's story. I think she's lying." The intern's report was not disclosed to the defense. Don was found guilty and sentenced to death.

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

#### *Problem 4*

Defendants Art and Bill, who were 18- and 20-years-old respectively, were charged with the robbery and murder of Mike. The principal witness against them was Hal, a teenager who lived in the same neighborhood as the defendants. 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 7/11 store. Mike started running away, and Art and Bill gave chase. According to Hal's testimony, when they caught up with Mike, Art and Bill began beating Mike, repeatedly kicking him in his face and side. Hal said Art and Bill took Mike's wallet. Hal said Art and Bill ordered him to say nothing about what happened. The police eventually questioned Hal and he reported what he saw, which led to Art and Bill's arrests. Hal identified the defendants in court. Hal's cross-examination suggested that the police initially suspected Hal of being involved in the attack. A detective testified that he believed Hal was merely a witness, although certain aspects of Hal's interrogation raised doubts about this assertion.

The defense called several witnesses. One witness testified that he saw Hal hitting Mike. Another witness testified that he saw Hal running away from the attack with several other youths, none of whom was Art or 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 Sally's account. According to an investigative report contained in the prosecution's file, the police conducted an interview with Jan four days before the trial. The investigative report reveals that Jan said Hal was bragging to people about what he and his friends had done to Mike.

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

### *Problem 5*

Devlin and Sal were indicted by a federal grand jury for conspiracy to commit arson. The prosecutor's theory of the case was that two years before the indictment, Devlin paid Sal \$50,000 to burn down his warehouse. The prosecution believed Devlin wanted to use the fire to recover insurance proceeds. When questioned by the FBI, Sal initially professed ignorance. However, after months of negotiations with federal prosecutors, Sal entered into a plea agreement whereby he agreed to plead guilty to conspiracy to commit arson and give truthful testimony against Devlin. The prosecutor told Sal he would not make any specific promises for Sal's testimony. The prosecutor told Sal, however, that when witnesses tell the truth and a prosecutor is able to get a conviction based on that testimony, prosecutors usually take the witness's cooperation into account when making sentence recommendations. The prosecutor said he would consider Sal's truthful testimony when making Sal's sentencing recommendation.

Sal testified at Devlin's arson trial that Sal agreed to plead guilty and that the prosecution had given no promises for his testimony. Sal also testified that he hoped the prosecutor would consider his testimony when he faced sentencing. Sal's sentencing was adjourned several times pending resolution of Devlin's trial. After Devlin's conviction, Sal, who faced a statutory guideline of 20 years in prison on his conspiracy plea, was sentenced to five years' probation.

Did the prosecutor violate *Brady* when he did not correct Sal's statement that the prosecutor made no promises for Sal's testimony against Devlin?

*Problem 6*

Dave was charged for Wally's murder. The prosecution believed an assailant shot Wally twice in the chest as Wally was getting into his car in a post office parking lot. The assailant fired the shots from the roof of a shopping center. Dave, 22-years-old, was arrested within hours of the shooting. At the time of arrest, Dave's shoes and trousers were wet. The police found a tan raincoat and a gray cap under a bush in a park near where the shooting occurred.

The prosecution's evidence supporting Dave's conviction for the murder was largely circumstantial. Two eyewitnesses saw a man jump from the roof of the shopping center and run to the nearby park. They described him as young and as wearing a gray or blue cap and a brownish coat. One of the witnesses said the assailant's pants had been wet, but could not identify Dave as the assailant. The other witness believed Dave "looked something like" the man he saw. Wally had been Dave's supervisor in the post office mail room. Witnesses testified to a heated relationship between them and that Wally gave Dave a poor performance review the week before Wally's death. The murder weapon was found in a nearby park. A witness testified that he had loaned Dave the gun found in the park the previous year. The witness also testified that he had asked for it back, but Dave said the gun had been stolen.

The prosecution asked the FBI crime lab to conduct scientific tests of the gun, coat, cap, shoes, and clothing. The tests could not establish whether the hat and coat found under the bush were associated with Dave. The crime lab could not lift any fingerprints from the gun, nor could it match soil samples taken from Dave's shoes with the killer's escape route. Lastly, the crime lab could not match tar found on Dave's shoes with tar on the shopping center roof.

Does *Brady* require the prosecutor to disclose the results of these scientific tests?

*Problem 7*

Dolby was charged, tried, and convicted for sexually assaulting Billy. Sometime before, administrators had transferred Billy, an 11-year-old, from a residential treatment facility called Redhill, where Billy resided for several months, to Grove, another residential treatment facility. While at Grove, Billy accused staff member Dolby of sexually assaulting him. The evidence presented at trial consisted of Billy's accusation and Dolby's denial. Prior to admitting Billy to Grove, Grove's Director of Programs, who was responsible for overseeing Grove's programs for emotionally disturbed

boys, interviewed Billy and his parents. The Director wrote an intake note which stated the following: that Billy had alleged that he was sexually abused by staff members at Redhill; that Redhill investigated Billy's allegations and found them to be false; that Billy had expressed concern to Grove's Director because he feared he would be assaulted at Grove; and the Director's opinion that Grove needed to take special precautions to protect staff members from false accusations if Billy was admitted.

Does *Brady* require the prosecutor to disclose this intake note?

### *Problem 8*

Drago and Ed were charged with robbing an auto supply store and shooting the clerk to death. Drago was charged as the shooter. Ed made a deal with the prosecution to testify against Drago. At Drago's capital murder trial, Sally, who had a child with Drago, testified that Drago told her he robbed an auto supply store with Ed and shot someone there. Ed pleaded guilty to the non-capital charge of murder in the second degree. Ed testified that he drove Drago to the store in his blue Ford and waited outside in the car while Drago entered the store. Ed testified that Drago was in the store for two or three minutes, then ran out of the store, and that Drago stated that he "took care of the clerk." The police recovered the gun that fired the bullet that killed the clerk from a drain next to the apartment complex where Drago resided with Sally. Assume that the prosecutor has a statement from a witness named Wendi that as she was leaving the auto supply store, she saw two men sitting in a blue car. The police report states that after viewing a photo array, Wendi identified a person named Martin as one of the persons in the car. Martin has one prior drug conviction and bears a resemblance to Drago. There is no evidence that Martin knew Drago or Ed. The prosecutor did not disclose Wendi's identification of Martin, believing that Wendi had misidentified him.

Does *Brady* require the prosecutor to disclose Wendi's statement?

### DISCUSSION

None of these problems present a clear-cut case for disclosure. None of the problems involve the kinds of *Brady* issues that typically require remedial action by a court. *Brady* issues that typically require remedial action involve evidence that the prosecutor suppressed evidence which is clearly exculpatory or that clearly undermines the credibility of an important prosecution witness. In

several of the problems, the evidence of guilt is sufficiently strong so that a reviewing court would likely not lack confidence in the jury's verdict. Since the reviewing court would not lack confidence in the jury's verdict, the court would probably view the prosecutor's nondisclosure as immaterial.<sup>10</sup> When a court finds that prosecutorial nondisclosure was immaterial, the court cannot take remedial action. In some of the problems, however, the evidence of guilt is much less compelling. In cases where evidence of guilt is less compelling, the undisclosed evidence is more likely to have an impact on the reviewing court's confidence in the verdict.

A prosecutor's discretion in deciding whether to disclose evidence before trial is often complicated. The prosecutor typically does not know in advance of trial how the prosecution's witnesses will perform, how other evidence of guilt will unfold, and how the defense will challenge the prosecution's case.<sup>11</sup> In many cases, the prosecutor really cannot know whether the evidence in question would create a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>12</sup> Because of the uncertainties related to the impact of evidence disclosure, the prosecutor should not inform her *Brady* discretion, in most cases, on "playing the odds."<sup>13</sup> In other words, a prosecutor should not base *Brady* discretion on a prospective evaluation of the materiality of the evidence before she knows its real value.<sup>14</sup> Indeed, if a prosecutor bases disclosure on her own materiality of the evidence assessment, she would only disclose evidence if she believes the evidence could reasonably cause a jury to acquit the defendant. Such a prosecutorial conclusion and disclosure is quite an implausible prospect.<sup>15</sup>

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10. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

11. *Agurs*, 427 U.S. at 108 ("[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete . . .").

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

13. *Id.* at 701 (Marshall, J., dissenting) ("[T]he [*Brady*] standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds . . .").

14. This situation is analogous to a situation in which a prosecutor at trial weighs the commission of error or misconduct against a prediction that the evidence of guilt is so strong that any error or misconduct will be viewed by an appellate court as harmless. See Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 470–71 (1983).

15. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGEORGE L. REV. 643, 653–54 (2002) (suggesting, tongue in cheek, that after prosecutor discloses exculpatory evidence that presum-

Every problem contains information that a defense lawyer would like to have in advance of trial, either for preparing or presenting its case. In most of the problems, the evidence is favorable to the defense. The prosecutor, in administering *Brady* responsibly, would need to make a careful, informed, and objective analysis. As noted above, a prosecutor should resolve any doubts in favor of disclosure. However, a prosecutor is not required to seek out evidence for the defense,<sup>16</sup> or disclose evidence that is of little or no evidentiary value.<sup>17</sup> Moreover, since a trial is an adversarial contest, a prosecutor is not obligated to disclose evidence that a competent defense lawyer could obtain with reasonable diligence.<sup>18</sup> Finally, a prosecutor knows that she has substantial discretion under *Brady* and that there are no bright lines or fixed rules.<sup>19</sup> How should a prosecutor exercise discretion? What are the factors that should guide that discretion? The Supreme Court hasn't given direct answers to these questions. The remainder of this paper, however, explores each problem from above in an attempt to resolve the questions of *Brady* discretion or violation through applying available Supreme Court rulings.

### *Problem 1: Is It Evidence?*

In Problem 1, the prosecutor possesses information that might affect the credibility of his principal witness. The prosecutor learns that the undercover officer, who claims to have purchased drugs from the defendant, is himself under investigation by another prosecutor's office in an unrelated narcotics investigation. Should the prosecutor disclose this information to the defense? Could a prosecutor reasonably believe that a jury would consider this information to support the defense theory that the agent may have had a vendetta against the defendant, and therefore had a motive to give false testimony?

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ably undermines prosecutor's confidence in a guilty verdict, the prosecutor may then continue to zealously seek a conviction).

16. *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990) (“[*Brady*] does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case.”); *In re Littlefield*, 851 P.2d 42, 51 (Cal. 1993) (“[T]he prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense.”).

17. *United States v. Agurs*, 427 U.S. 97, 106 (1976) (stating that only when there is “substantial basis” for claiming evidence is favorable must the evidence be disclosed).

18. *United States v. Georgiou*, 777 F.3d 125, 141 (3d Cir. 2015).

19. *Agurs*, 427 U.S. at 108 (noting that *Brady* articulates an “inevitably imprecise standard”).

Assume in this problem that an experienced prosecutor, in analyzing the information, considers how the defense could use information about the prosecution's witnesses. How the defense could use information in the prosecution's possession is a critical question for any responsible prosecutor making a *Brady* disclosure decision. The prosecutor might speculate that if the defense knew that the agent was under investigation, the defense might have a stronger reason to vigorously investigate the witness. The defense could ascertain why the agent is suspected of wrongdoing and try to expose on cross-examination that the agent is lying about the defendant's drug sale.

However, the prosecutor almost certainly would conclude that the defense would not be able to use this information to impeach the officer's testimony. The Rules of Evidence require a judge to exclude any reference to the officer's alleged misconduct in an unrelated drug case because such information would be considered inadmissible character evidence.<sup>20</sup> Moreover, a prosecutor is under no duty to investigate the background of its witnesses, including police witnesses, in order to ascertain whether any negative or derogatory information about that witness exists.<sup>21</sup> Indeed, after the alert from the agent himself, the prosecutor in this problem did seek to ascertain the status of the case. The prosecutor in the problem checked whether there was anything in the agent's background that might affect his truthfulness as a witness.<sup>22</sup>

Even if we assume that the agent is under criminal investigation, there is no basis to characterize the information as "evidence" within the meaning of *Brady*. Assuming the defense could not have used the information either in questioning the witness or in argu-

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20. FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). Even if this information showed that the agent was untruthful, or was charged with criminal conduct relating to his untruthfulness, it still could not be used to impeach his credibility. See FED. R. EVID. 608(b) ("By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.").

21. See *People v. Jordan*, 133 Cal. Rptr. 2d 434, 443 (Ct. App. 2003) ("The rule proposed . . . would require the People to catalog the testimony of every witness called by the defense at every criminal trial in the county, cull from that testimony complaints about peace officers and disclose these complaints to the defense whenever the People called the peace officer as a witness at another trial.").

22. It is also possible that a defense lawyer may be able to investigate witnesses called by the prosecution to try to learn about any derogatory information. While this may be a daunting task for overwhelmed and underfunded defense lawyers, it still may be doable.

ment to the jury, the information could have had no direct impact on the outcome of the trial.<sup>23</sup>

Thus, since information about the investigation of the agent would not be admissible, the prosecutor could conclude that disclosure would have made no difference with respect to how the defense prepared or presented its case. The information could not have affected the jury's verdict. The prosecutor's decision not to disclose the information is well within the prosecutor's proper exercise of *Brady* discretion.

### *Problem 2: Is the Evidence Reliable?*

Problem 2 tests a prosecutor's objectivity and integrity. Problem 2 contains a very strong case against Dan for raping Veronica. She made a prompt complaint and identified Dan from a lineup. A doctor corroborated her knife wounds. A knife, rope, and blood stains were discovered in Dan's car. The combination of the evidence strongly corroborates Veronica's account. The prosecutor, however, faces a damaging piece of evidence: a chemist retained by the prosecution conducted serology tests on the blood found on the knife and car seat, and concluded that the blood type did not match Veronica's. But the prosecutor has good reason to disbelieve the chemist's conclusions. The prosecutor has a valid basis to believe the chemist is unqualified and the tests unreliable.

On the other hand, the test results are favorable and tend to exculpate the defendant. The prosecutor has decided neither to call the chemist nor introduce his reports. The prosecutor, in enforcing her *Brady* duty, has to make a decision about what information she must disclose to the defense. The prosecutor has three options: (1) disclose the test results and the chemist's incompetency; (2) disclose only the test results; or (3) disclose neither the test results nor the chemist's incompetency.

The most transparent approach, of course, would be for the prosecutor to disclose both the test results and the chemist's incompetency. The defense would then be in a position to call the chemist at trial and introduce his report into evidence. In that scenario, the defense should be prepared to respond to the prosecutor's expected attack on the chemist's qualifications and the report's unreliability. The defense would also be in a position to call its own serology expert. A defense decision to call its own serology expert

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23. See *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (stating that polygraph results were not evidence because disclosure could have had no direct effect on the outcome of trial).

would have its own risks, however. The retention of its own expert could expose that the defense believed that the prosecution's expert really was unqualified and the tests unreliable.

If the prosecutor disclosed the report, but hid the evidence that the chemist was incompetent, the defense would readily seek to use the evidence without knowing that the chemist was incompetent and the tests unreliable. The defense would likely be blindsided by the prosecutor's gambit; the defense would probably present what it believed to be clearly exculpatory evidence, and then face a challenge by the prosecutor to its admissibility. In addition, if it did not know about the expert's incompetency in advance, the defense could reasonably rely on the prosecution's expert and not call its own expert. One might view disclosure of the reports but not the expert's incompetence as an example of a prosecutor's *Brady* gamesmanship. Gamesmanship of this type is arguably conduct that undermines the prosecutor's role to serve justice.

Finally, in exercising his discretion, the prosecutor might decide to disclose neither the chemist's reports nor evidence of the chemist's incompetency. The prosecutor might make this decision on the basis of several factors. First, the prosecutor might believe the evidence of guilt is so overwhelming that the chemist's reports and incompetence would not be material. As noted above, however, a conclusion of materiality should rarely be a factor in a prosecutor's discretionary decision about whether to disclose. Secondly, the prosecutor may conclude he is not obligated to disclose the chemist's reports and incompetence because the incompetence arguably renders the reports non-exculpatory. There is no basis, however, for the prosecutor to conclude that the evidence is not exculpatory—it clearly is. Thirdly, the prosecutor may conclude that disclosure of the incompetent chemist's reports and history might actually subvert the defendant's right to a fair trial. If the chemist lacks the qualifications to be a reliable expert and the tests are unreliable, then a prosecutor might reasonably conclude no disclosure is appropriate, given the very strong rape prosecution. The prosecutor could conclude no disclosure in this case is appropriate because the constitutional and ethical rules of disclosure are intended to protect a defendant's right to a fair trial. The purpose of disclosure is arguably perverted if a guilty defendant uses the rules to obtain unreliable evidence that thwarts the ends of justice. Finally, the prosecutor might further contend that if the defense really believed the blood in the car did not match the victim's blood, it could have retained its own expert to prove the fact.

In exercising *Brady* discretion, the safest course for a prosecutor would be to follow the first option and make a full disclosure of the chemist's background and conclusions. The prosecutor would then let the defense decide how to use the evidence. The prosecutor could argue against the admissibility of the test results at trial. If the defense called the chemist and the judge allowed him to testify, the prosecutor could impeach the expert's qualifications and the reliability of the report. While the full disclosure option exposes the prosecution to additional hurdles in court, that route arguably aligns the closest with the prosecutor's role as an arbiter of justice. The second option is arguably the most troubling because the prosecution's disclosure tactic tricks the defense into believing the report is significant evidence that impeaches the victim's credibility. Further, the partial disclosure would likely lead the defense not to call its own expert. The option in which the prosecutor discloses the chemist's report, but conceals evidence of the chemist's incompetency, is ethically questionable. Even though the decision may be ethically questionable, however, it probably would not be a sufficient basis to reverse the conviction. A reviewing court would likely conclude that since the defense had the reports and could use the reports in whatever way it chose, the prosecution had fulfilled its *Brady* duties.

Finally, would a reviewing court also sustain the prosecutor's exercise of discretion under the third option in not disclosing the expert, his report, and his lack of qualifications? The answer, in all likelihood, would be "yes." As discussed above, a reviewing court would likely conclude that the evidence of guilt is so strong that there is no reasonable probability that disclosure of the reports and the chemist's incompetence would have changed the verdict.

In sum, Problem 2 presents an instance in which a prosecutor has to make a difficult good-faith determination. The prosecution must manage seemingly exculpatory evidence that is so unreliable that disclosing it would arm the defense with evidence that could subvert a fair prosecution. If the prosecutor does not make a full disclosure of the expert's report and lack of qualifications, the prosecutor's conduct could arguably reflect conduct of an interested advocate. The prosecutor would make a partial disclosure decision in her own self-interest, similar to a fox guarding a henhouse. Whether this critique is applicable in this case, however, is unclear.

### *Problem 3: Is the Evidence Work Product?*

Problem 3 involves an aspect of *Brady* jurisprudence that remains unsettled: whether a prosecutor is required to disclose infor-

mation that may be favorable to a defendant, but constitutes an attorney's opinions, mental impressions, summaries of interviews with witnesses, notes and communications with other law enforcement officials, and legal theories. Such material that either side of the case develops is typically entitled to the so-called "work product" privilege.<sup>24</sup> Recall that in this problem, the defendant is charged with capital murder. The evidence against the defendant appears to support a strong case for his guilt. The defendant confessed, and his girlfriend Glenda—likely an accomplice—testified to the defendant's guilt. After the prosecution's debrief of Glenda, however, an intern on the prosecution's legal team prepared a status report that concludes the girlfriend is not telling the truth. The prosecutor does not disclose the intern's report to the defense.

Problem 3 presents an unclear *Brady* issue. Significantly, the problem does not make clear exactly why the intern came to that conclusion. If Glenda had reported certain facts that were exculpatory or made statements that were inconsistent with her testimony, or were contradicted by other evidence, such information would be favorable to the defense and would require disclosure. The prosecutor would have no discretion to conceal such evidence; *Brady* mandates disclosure. If, however, the intern concluded that Glenda's account was not credible based on the intern's own observations and judgments, then disclosure of that opinion is arguably subject to the prosecution's discretion. The intern could have arrived at the conclusion that Glenda was dishonest either because of the manner in which she related her story, or because her recitation of facts were embellished, or because of the witness's self-interest in entering into the cooperation agreement and testifying against Don. The intern's opinions based on her own analysis of Glenda could be considered work product and privileged from disclosure.

The Supreme Court has not decided whether opinion work product is within the scope of the *Brady* rule. Some lower courts that have considered the question have held that opinion work product typically is not disclosable to the defense for impeachment

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24. See generally *Hickman v. Taylor*, 329 U.S. 495 (1947) (finding an adverse party generally may not compel discovery of materials prepared by or for an attorney in the course of legal representation). The Supreme Court has not decided whether a prosecutor's "work product" must be disclosed under *Brady*. See *Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000). Lower courts have addressed whether *Brady* extends to a prosecutor's work product. See *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) (finding *Brady* does not extend to prosecutor's work product because it "would greatly impair the government's ability to prepare for trials"); *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000) (same).

purposes.<sup>25</sup> Otherwise, these courts conclude, prosecutors might not memorialize in writing opinions that may be at variance with the prosecutor's theory of the case or that may contain negative comments about a witness's account or credibility.<sup>26</sup> According to these courts, a finding of mandatory *Brady* disclosure for opinion work product would result in inefficient, unfair, and sharp practices in the preparation of a case for trial.<sup>27</sup> Moreover, as noted above, the *Brady* rule was not intended to displace the adversary system. If the rules of disclosure required a prosecutor to disclose trial strategies, opinions about witnesses, and legal theories, the rules would seriously undercut the role of the adversary system and impede a prosecutor's ability to prepare for trial.

Thus, until the Supreme Court provides a more definitive ruling on whether *Brady* includes a prosecutor's work product, a prosecutor has broad discretion to withhold opinions and impressions that relate to the theory of the case, witness preparation, and contested trial issues.

*Problem 4: Does the Defendant Know, or Should the Defendant Know, About the Evidence?*

Problem 4 involves a prosecutor's nondisclosure of information favorable to the defense from an alibi witness that the defense calls at trial. This problem highlights a recurring issue that courts have often addressed: whether a prosecutor suppresses information within the meaning of *Brady* if the defense already knows about the information or with reasonable diligence could discover it.<sup>28</sup> The issue raises the question of how much discretion a prosecutor has not to disclose evidence that the prosecutor reasonably believes the defense already knows or that the defense has sufficient access to the evidence to easily learn about it.

In this problem, Hal is the prosecution's principal eyewitness. Hal testified that Art and Bill viciously beat up Mike and stole Mike's wallet. Recall that the police initially suspected Hal and there was some basis to believe that Hal may have participated in the assault. Eyewitnesses testified that Hal was involved in assault-

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25. See, e.g., *Morris*, 447 F.3d at 742; *Williamson*, 221 F.3d at 1182.

26. See *Williamson*, 221 F.3d at 1182.

27. *Id.*

28. *United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating *Brady* applies to situations "involv[ing] the discovery, after trial, of evidence which had been known to the prosecution but unknown to the defense"); *Giles v. Maryland*, 386 U.S. 66, 96 (1967) ("Any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.") (White, J., concurring).

ing Mike and that they saw Hal run away from the attack with other youths. A police report in the prosecutor's files contained an interview with Jan, an alibi witness for one of the defendants. In the interview, Jan stated that Hal had been bragging to people about what he and his friends had done to Mike. Jan's statement is clearly favorable to the defense because it can be used to impeach Hal. Jan, however, is a defense witness. Can the prosecutor assume that Jan made the same statement to defense counsel that she made to the police investigator about Hal implicating himself in the assault? Is the prosecutor's assumption reasonable? And even if it is reasonable for the prosecutor to believe that the defense may know about Jan's statement, is there any reason why the prosecutor should not disclose it anyway?

On one hand, decisions interpreting *Brady* typically indicate that a prosecutor is required to disclose favorable evidence which is unknown to the defense.<sup>29</sup> On the other hand, a prosecutor has no duty to disclose evidence that the defense already knows or should know.<sup>30</sup> Even if a defendant has no actual knowledge of the evidence, a prosecutor has not suppressed evidence for purposes of *Brady* if the defense, with reasonable diligence, could have discovered the evidence.<sup>31</sup> Nevertheless, even though evidence theoretically may be available to the defense, it does not necessarily follow that the evidence is available in fact for purposes of determining whether *Brady* applies.

The prosecution must embark on a fact-intensive analysis to determine whether the defense knows or should reasonably know about particular evidence. Consider, for example, a scenario where favorable evidence was contained in a public record. Could a prosecutor avoid disclosure obligations simply by assuming that a defendant has access to that public record? Even before arriving at the conclusion that the defense has access to the public record, the prosecution is assuming that the defendant *already knows* that a

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29. See *Agurs*, 427 U.S. at 103; *Giles*, 386 U.S. at 96.

30. *Smith v. State*, 541 S.W.2d 831, 838 (Tex. Crim. App. 1976) (finding to permit a defendant who knew of the existence of the suppressed evidence later to claim error "would be to allow one to take a free ride during the trial and if he is not satisfied with the result he can always get a new trial").

31. *United States v. Perdomo*, 929 F.2d 967, 973 (9th Cir. 1991) ("*Brady* does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence."); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." (citations omitted)).

public record exists and contains favorable information.<sup>32</sup> The question posed by Problem 4 is similar: would a reasonably diligent defense attorney know that the witness possesses favorable evidence apart from the alibi evidence already imparted by the witness? If the prosecutor maintained an open file policy, the additional defense-favorable evidence would presumably be available to the defense. Absent an open file policy, is Jan's evidence reasonably available for purposes of *Brady*? Is it within a prosecutor's *Brady* discretion to refuse to disclose the evidence?

Whether even the most diligent defense attorney would be able to learn about all information that a defense witness might possess is questionable. Some defense witnesses might not remember certain facts, or might be reluctant to reveal some information, or might simply be uncooperative. Most prosecutors know that defense lawyers might not be alert to the importance of asking defense witnesses about matters unrelated to the witness's primary role in the case. Prosecutors should not believe, however, that defense counsel must go on fishing expeditions with every defense witness to try to learn everything contained in the witness's mind.

The defense lawyer certainly should review available documents and be charged with knowledge of the documents' content. In the absence of documentary evidence, however, the prosecutor should expect certain obvious limits to what a defense lawyer knows to ask a live witness about. A prosecutor can properly use discretion to weed out farfetched claims of ignorance. The prosecutor can also use discretion to prevent defense lawyers from blindsiding the prosecutor with claims that the defense does not know of evidence that any reasonably competent lawyer should know. On the other hand, a prosecutor seeking justice should not take advantage of a defense lawyer's reasonable ignorance. As the Supreme Court observed, "A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."<sup>33</sup>

In Problem 4, the information that the defense has about Jan relates to her role as an alibi witness. Arguably, defense counsel does not have reason to ask Jan questions about Hal's role in the case or whether Hal may have made statements to other persons

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32. *Amado v. Gonzalez*, 758 F.3d 1119, 1136–37 (9th Cir. 2014) (finding no requirement that prisoner exercise "due diligence" in trying to discover public records of prosecution's key witness); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995) (finding defense had no reason to know that government witness's affidavit had been filed in court prior to guilty plea).

33. *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

about the case. Under the analysis above that concludes the defense counsel in Problem 4 cannot reasonably know to question Jan about Hal's involvement, the prosecutor should not conceal Jan's statement under the guise of discretion.

*Problem 5: Has Evidence Been Suppressed?*

Problem 5 involves a *Brady* issue that has divided the lower courts: whether a prosecutor is required to disclose a cooperation and plea agreement with a witness. Significant to Problem 5's analysis is that there was no explicit agreement between the prosecutor and the witness that the witness will receive a substantial benefit for providing favorable testimony for the prosecutor. The prosecutor, however, led the witness to believe that the witness would receive favorable treatment if he helped the prosecution. Further, the witness, after testifying, did in fact receive a substantial sentence reduction for cooperating.<sup>34</sup>

Problem 5 presents what is a so-called "tacit promise." A tacit promise may be prosecutorial subterfuge to avoid *Brady* disclosure. The prosecutorial strategy in Problem 5 arguably permits a witness to testify truthfully that the prosecutor made no promises that the witness would receive favorable treatment for his testimony. The strategy also allows the prosecutor to represent that he made no promises to the witness for the testimony. Certainly, a prosecutor has broad authority to condition a witness's cooperation on giving truthful testimony without making any specific promise about benefits the witness might receive for his testimony. If, however, a review of the circumstances suggests that the witness had reason to believe that the prosecution would consider the witness's cooperation favorably, the conviction could face remedial action. The conviction could face remedial action even if the prosecutor did not verbalize or memorialize his intent to help the witness. A court reviewing the arrangement might conclude that the prosecutor made an implicit or tacit promise to the witness, which, under *Brady*, the prosecutor must disclose.<sup>35</sup>

The facts of any case, of course, are critical when analyzing whether the prosecution made a tacit promise. In this problem, the

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34. Compare *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009) ("Like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness."), with *Shabazz v. Artuz*, 336 F.3d 154, 163–65 (2d Cir. 2003) (finding a tacit agreement not covered by *Brady* where prosecutor does not explicitly promise anything to witness prior to witness's testimony).

35. *Douglas*, 560 F.3d at 1186 ("A deal is a deal—explicit or tacit. There is no logic that supports distinguishing between the two.").

prosecutor spoke generally to Sal about the consequences of Sal's plea and cooperation. The prosecutor told Sal that he would consider Sal's testimony as a basis for making his sentence recommendation. The prosecutor told Sal that although he would not promise Sal any specific benefit, if Sal testified truthfully, the prosecutor would consider the testimony in making a sentence recommendation. Recall that in the problem, the prosecutor added that when a witness tells the truth and a prosecutor obtains a conviction based on the testimony of that witness, prosecutors usually take that cooperation and testimony into account when making a sentence recommendation. Did the prosecutor communicate to Sal his implicit intent to help Sal? Did Sal reasonably understand the prosecutor's statements as a tacit promise? Does the prosecutor have discretion to conceal the details of the arrangement?

In addition to the prosecutor's general statements, the prosecutor also successfully requested that the court adjourn Sal's sentence several times until Devlin's trial completed. Sal's delayed sentencing leaves the unmistakable impression that the prosecutor wanted Sal's sentence to remain uncertain until the conclusion of Devlin's trial. If Sal's sentence remained uncertain, Sal would continue to believe that he needed to help the prosecutor to get the prosecutor to reward him. Indeed, the prosecutor rewarded Sal handsomely, and recommended that Sal receive a sentence of probation, even though he faced a statutory maximum sentence of 20 years incarceration.

A court might find that the prosecutor has no discretion to conceal statements that might reasonably communicate to a witness that the prosecutor intends to reward the witness's cooperation at sentencing. Courts have held that "[a] deal is a deal," however it is disguised.<sup>36</sup> Under the view that a deal is a deal, no matter how the deal is disguised, the prosecutor in such a case would have no discretion to argue that no deal was made, even a tacit deal. To satisfy *Brady* obligations, the prosecutor would need to alert the defense, court, and jury that the prosecutor made a tacit promise to the witness. The witness would then have to testify that he understood from the prosecutor's statements that he would receive a benefit for his testimony.

*Problem 6: Is the Evidence Favorable?*

Problem 6 involves the prosecution of Dave for the shooting murder of Wally. The prosecution's case rested entirely on circum-

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36. *Id.*

stantial evidence. When Dave 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 a park near the shooting. Recall that two witnesses saw a man jump from the roof of a shopping center and run to a nearby park. The witnesses described the shooter as young and wearing a gray or blue cap and a brownish coat. One witness could not identify Dave as the shooter, but said the shooter's pants had been wet. The other witness said Dave "looked something like" the man he saw jump from the roof. The gun used to kill the deceased was at one time in Dave's sole possession. Additionally, the facts suggest that Dave had a motive to kill the deceased.

The prosecution successfully admitted the gun, coat, hat, pants, and shoes belonging to Dave into evidence. The collection of circumstantial evidence provides a strong case connecting Dave to the murder. The prosecutor had the items scientifically tested, but the results of the tests were inconclusive. Is the prosecutor required to disclose these inconclusive test results or does the prosecutor have discretion to conceal the results? A prosecutor reviewing the test results evidence could reasonably conclude that because the tests do not connect Dave to the murder, they are not favorable evidence. The prosecutor could conclude, rather, that the test results are neutral evidence. If the test results are neutral evidence, the prosecutor, in the exercise of *Brady* discretion, may properly decide there is no obligation to disclose the test results.

The determination that the prosecutor could justifiably conceal the inconclusive test results may be troubling. To be sure, if a particular item of evidence, like a gun, does not contain identifiable fingerprints, most courts would probably conclude that the absence of the defendant's fingerprints on a gun is not necessarily favorable to the defendant. Since the information is not necessarily favorable to the defendant, then the prosecutor may reasonably consider the evidence not covered by *Brady* disclosure requirements.<sup>37</sup> Problem 6, however, is different in an important way. Problem 6 presents a fact pattern where many scientifically tested evidentiary items, any one of which could have linked the defendant to the crime, did not in fact connect him to the crime at all. The cumulative array of proof that did not identify the defendant might lead a prosecutor to reasonably conclude that the absence of any connection is not neutral, but actually favorable.

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37. See *Commonwealth v. Corliss*, 23 N.E.3d 92, 101–02 (Mass. 2015).

Indeed, a prosecutor could certainly anticipate that a defense lawyer challenging the prosecution's case would aggressively exploit these negative test results. At trial, the defense lawyer should disassociate the defendant from each of the items of circumstantial evidence that the prosecution introduces. The defense lawyer could make the logical argument that although any one of the multiple scientifically tested items could have matched to the defendant, none of them did. Thus, the defense should argue, the items could reasonably be connected to someone other than the defendant as the real murderer.

The key in Problem 6 is that the collection of physical evidence did not result in any conclusive connections to the defendant. Notably, the case would be significantly different if the test results positively identified a person other than the defendant. If the testing resulted in a positive identification of another shooter, then the prosecutor would have no discretion to withhold the results.<sup>38</sup> The gray area in Problem 6 arises from the inconclusive test results that do not identify any potential shooter at all. The cumulative nature of the test results' failure to identify the defendant as the shooter suggests that the prosecutor should consider the evidence as favorable to the defendant. In sum, *Brady* likely requires disclosure in Problem 6. Prosecutorial suppression of the test results evidence in Problem 6 would be an abuse of *Brady* discretion.

### *Problem 7: Is the Evidence Admissible?*

Problem 7 involves the nondisclosure of an intake note that could impeach the testimony of Billy, an 11-year-old boy who alleges he was sexually assaulted at a treatment facility for emotionally disturbed children. The note, written by the director of the facility, indicates that Billy alleged that he was sexually abused by staff members at his previous treatment facility. The director noted that Billy expressed a concern that Billy would be sexually assaulted at the new facility, too. The director noted that the new facility would have to take special precautions to protect its staff members from false accusations by Billy. The note is arguably exculpatory because it suggests that Billy made false accusations against caretakers in the past.

The note, however, presents important evidentiary problems. The note appears to consist of a statement that contains double

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38. See, e.g., *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 845-47 (4th Cir. 1964) (finding prosecutor's failure to disclose a ballistics report showing defendant's gun did not fire the murder bullet violated due process).

hearsay: first, the note itself, which is written by the director, is hearsay; and second, the director refers to statements made by persons at the previous facility that indicate that Billy's accusations were false. The prosecution could argue a hearsay exception for the admissibility of the note as a business record.<sup>39</sup> No hearsay exception appears available, however, to admit the staff personnel statements contained in the note. If the prosecutor has a valid evidentiary basis for concluding that the note is not admissible, does the prosecutor have the discretion to conceal the note from the defense?

The Supreme Court has not definitively decided whether a piece of evidence's admissibility is a precondition that triggers a prosecutor's disclosure duty.<sup>40</sup> Several courts have taken the position that unless the information is admissible, then the prosecution need not disclose the information.<sup>41</sup> Other courts have drawn the opposite conclusion and have rejected admissibility as a criterion for determining the applicability of *Brady*.<sup>42</sup> The courts that do not require admissibility for mandatory *Brady* disclosure consider whether the inadmissible evidence would have led to admissible evidence<sup>43</sup> or would be useful to the defense in structuring its case.<sup>44</sup> As long as the inadmissible evidence would have led to admissible evidence or would have been useful to the defense, then the prosecution should disclose the information.

A prosecutor who believes that admissibility of the evidence is a precondition to disclosure has a valid discretionary basis to withhold evidence that might be highly relevant to the defense. In Problem 7, the defense might be able to use the hearsay evidence to discredit the complainant. The defense, however, cannot properly suggest that the prosecutor is acting in violation of *Brady* in making a discretionary judgment based on evidentiary admissibility. A

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39. See FED. R. EVID. 803(6) (providing business records are not excluded by the rule against hearsay).

40. Cf. *Wood v. Bartholomew*, 516 U.S. 1, 5–6 (1995) (suggesting that admissibility is precondition for *Brady* disclosure); *Brady v. Maryland*, 373 U.S. 83, 87–90 (1963) (finding co-defendant's undisclosed confession could not have affected verdict because it was inadmissible).

41. See *Madsen v. Dormire*, 137 F.3d 602, 604–05 (8th Cir. 1998); *United States v. Derr*, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993).

42. See *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 465–66 (6th Cir. 2015) (finding inadmissible hearsay would have led to admissible evidence); *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5–6 (1st Cir. 2003) (finding hearsay statement by victim may have led to discovery of witnesses to corroborate information contained in statement).

43. See *Barton*, 786 F.3d at 465–66; *Ellsworth*, 333 F.3d at 5–6.

44. See *Jones v. Jago*, 575 F.2d 1164, 1169 (6th Cir. 1978).

prosecutor may, after analyzing the evidence and the rules of admissibility, reasonably conclude that the evidence is legally inadmissible. In many jurisdictions, the prosecutor's reasonable conclusion that the evidence is inadmissible places the evidence within her discretion not to disclose.

The determination that the prosecution may conceal the note because of evidentiary rules may seem troubling. The prosecutor's discretionary decision not to disclose the director's note, however well-based legally, does raise ethical concerns. A prosecutor should be committed to serving justice and to ensuring that defendants have a fair opportunity to challenge the prosecution's case. Indeed, the policy underlying *Brady* suggests that even if the evidence may be inadmissible, the evidence may still provide a promising lead to exculpatory evidence. If inadmissible evidence could lead to exculpatory evidence, then the prosecution has no reasonable basis to withhold the otherwise inadmissible evidence. The note does not indicate what Billy may have told persons at his previous facility, or exactly how the director learned of Billy's accusations. The note indicates, however, that persons at Billy's previous facility believed Billy made complaints that he was sexually molested and that Billy's complaints were untrue. The note further indicated that the director of Billy's new facility believed that the new facility would need to take special precautions to protect itself against further false complaints by Billy.

The prosecutor should reasonably know that if the defense knew about the note's contents, the defense would surely undertake an aggressive investigation of the circumstances surrounding Billy's stay at the first facility. With the information from the note, the defense would try to learn whether Billy's complaints at the first facility were false. The defense would be in a position to interview persons at the first facility, as well as the director of Billy's present facility. An interview with the director who interviewed Billy and his parents before accepting Billy's placement and made the note would likely prove significant for the defense. Depending on the results of that investigation, the defense might be armed with relevant and credible evidence to attack Billy's credibility. On balance, the prosecutor's decision not to disclose the intake note on the basis of its inadmissibility is arguably an unreasonable exercise of *Brady* discretion.

*Problem 8: Is the Evidence Relevant?*

Problem 8 involves the nondisclosure of information from an eyewitness who identifies a killer who is neither of the two persons

charged with the murder. A prosecutor making a good-faith determination whether to disclose the witness evidence would likely have serious doubts about the witness's reliability. The prosecutor would likely conclude that the witness made a mistake, that her identification is unreliable, and that disclosure would enable the defense to introduce untrustworthy evidence. Further, the prosecutor could reasonably conclude that disclosure of the witness might confuse the jury and diminish the strength of the prosecutor's case. Does a prosecutor have discretion under *Brady* not to disclose the information from the eyewitness?

The additional eyewitness evidence could not affect Ed, who admitted his participation in the murder and testified for the prosecution. The eyewitness evidence does appear to be favorable to Drago, however, because the witness evidence suggests that someone who looks like Drago was the shooter. Although the police and prosecutor have discounted the evidence as unreliable, the evidence would provide the defense with a basis to exculpate Drago. A prosecutor seeking to enforce her *Brady* duty responsibly must try to anticipate how the defense might use evidence in preparing or presenting its case. For example, if Drago argued that Ed was the shooter and Drago waited in the car, the conclusion would logically follow that the witness's identification of a perpetrator other than Drago and Ed was clearly a mistake. If, however, Drago claimed an alibi, then the identification of Martin might appear less of a mistake and support Drago's alibi.

In Problem 8, however, the prosecutor has solid proof linking Drago to the killing. Ed admits to being an accomplice and claims that Drago was the actual killer. The facts do not suggest that Ed has a motive to make up a story to falsely identify Drago as a participant. Sally, who appears to have no motive to lie, has testified that Drago told her he shot the clerk. Finally, the police discovered the gun used in the killing near the residence where Drago lived with Sally.

Problem 8 may be an instance in which a prosecutor could properly consider the relevance of the evidence as bearing on whether to disclose. The relevance of the evidence is dependent on the defense's theory of the case. Consider, for example, that Drago claims Ed was the shooter. If Drago claims that Ed was the shooter, the evidence would be of no value. The eyewitness evidence suggesting a different shooter altogether would not be of value because the jury would have to determine whether Drago or Ed was the actual shooter. The jury would have to decide whether the shooter was Drago or Ed, however, and would likely not con-

sider a third person. Even if Drago claims an alibi, the jury would still have to discount the testimony of Ed and Sally, as well as the discovery of the gun. Ed and Sally's testimony and the gun all link Drago to the murder. The eyewitness's contradictory identification of Martin, instead of Drago, would have to overcome the strong evidentiary value that the testimony and gun provide. The jury would have to assume that Martin, who appears to be a stranger to the case and does not know Drago or Ed, was somehow involved in the killing. A jury would be unlikely to accept the witness's identification of Martin. Without any more basis in the evidence that Martin was somehow involved, the jury would likely not know how to fit the witness's identification of Martin into the case. A prosecutor exercising *Brady* discretion responsibly would logically ask whether Wendi's identification of Martin would have any significance in causing a rational jury to acquit Drago.

The defense certainly has a basis to argue that the prosecutor, in the proper exercise of *Brady* discretion, should disclose the evidence about Martin. If the jurisdiction had an open file policy, the prosecution would likely disclose the eyewitness identification of Martin. In a non-open file jurisdiction, however, a prosecutor has a significant amount of discretion to decide what evidence to disclose. Problem 8 presents a tricky disclosure question. The prosecutor could opt for disclosure and then easily rebut the proof. Alternatively, the prosecutor could conceal the evidence in the good-faith belief that it is irrelevant and its use would only confuse and distract the jury.

#### CONCLUDING THOUGHTS

Each of the problems presents a challenging decision for a prosecutor seeking to comply with *Brady*. Each problem requires the prosecutor to fairly and responsibly decide whether *Brady* requires the disclosure of evidence. Each problem is a relatively close call, both legally and factually. Whether a court would find that the prosecutor violated her *Brady* duty in any of the problems would depend on how the court views the scope of the prosecutor's *Brady* discretion. The reviewing court would also consider the basis for the prosecutor's decision not to disclose the evidence. As the discussion of the problems suggests, a prosecutor who possesses evidence that may be of some value to a defendant is not necessarily required to disclose that evidence. Prosecutors have room to exercise some discretion over whether to disclose the evidence.

The discussions of the problems illustrate many of the pertinent factors that a prosecutor would likely consider when seeking

to enforce her *Brady* obligation fairly and responsibly. A prosecutor should understand that significant doubts about whether the evidence ought to be disclosed should be resolved in favor of disclosure. Thus, Problem 4, which involved unrelated evidence from a defense witness that the defense may not have known about; Problem 6, which involved inconclusive scientific tests on several items of clothing that the defendant wore; and Problem 7, which involved arguably inadmissible evidence that could have led to admissible evidence, each require the prosecutor to disclose the evidence. The prosecutor should disclose the evidence in question because the prosecutor would have no significant doubt that the evidence would assist the defense. Further, the prosecutor should disclose the evidence because the defense does not face any substantial legal impediments to effectively using the evidence.

By contrast, a prosecutor cannot always anticipate how the defense might use the evidence in either preparing or presenting its case. A prosecutor, however, can be skeptical about whether the defense could use the evidence effectively. So, in Problem 1, which involved information that a key defense witness may be under investigation, and in Problem 8, which involved an apparent misidentification of a perpetrator by a witness, a prosecutor could properly conclude that the evidence would be of minimal or no value in assisting the defense. If the evidence in question would be of minimal or no value to the defense, the prosecution may decide not to disclose. In Problem 2, which involved seemingly exculpatory blood tests by an incompetent chemist, the prosecutor could make a similar determination: that the evidence is unreliable and could not assist the defense. In Problem 2, however, the prosecutor should not preempt the defense's determination about whether to use the evidence at issue. Therefore, in Problem 2, the prosecution should arguably disclose the chemist's findings and the evidence undermining the accuracy of those findings and should allow the defense to decide how to use the evidence.

Moreover, a prosecutor likely understands that *Brady* was not intended to displace the adversary system. The defense has responsibility to demonstrate not only that the evidence in the hands of the prosecutor would have made a difference to its case, but also that the defense did not have access to that evidence. To qualify as *Brady* material, access to the evidence must be held solely by the prosecutor. As Problem 4 shows, however, the belief that the defense could obtain the evidence through a reasonably diligent investigation might inform the prosecutor's decision whether to disclose. If the defense could obtain the evidence through a reasonably dili-

gent investigation, the prosecutor might conclude that the responsibility to uncover the evidence lies with the defendant. If the defense can reasonably uncover the evidence with diligent investigation, the prosecutor is not under obligation to disclose the evidence. The prosecutor who fails to disclose evidence under the theory that the defense should be able to uncover it with reasonable investigation, however, may exercise discretion inconsistent with the spirit of *Brady*. A prosecutor who decides to conceal evidence in the belief that the defendant could find the evidence may be exercising prosecutorial discretion too narrowly.

Similar to the prosecution's failure to disclose on the basis that the defense could uncover evidence through reasonable investigation, a prosecutor arguably misuses discretion when she fails to disclose based on the conclusion that the evidence would not be admissible. Some prosecutors conclude that if evidence would be inadmissible, then the prosecution does not have a requirement to disclose the evidence. However, Problem 7, which involves the youth treatment intake note, illustrates that a discretionary determination based on evidentiary admissibility is arguably much too narrow. Even if the evidence in question is not itself admissible, a prosecutor should ask whether, through further investigation, the inadmissible evidence could lead to admissible evidence. As Problem 5 illustrates, a prosecutor should also know that the absence of an explicit promise to a cooperating witness does not preclude *Brady* obligations. The witness might reasonably believe that he would receive favorable treatment for his cooperation based on the prosecutor's statements. If the witness could have a reasonable basis to believe he will receive a benefit, a reviewing court may infer from all of the facts that the prosecution had made a tacit sentencing promise to the witness. When a reviewing court finds that a tacit sentencing promise existed, the court would likely find the promise to be covered by *Brady*. If the prosecutor made a tacit sentencing promise, then the prosecutor must not allow the witness to testify otherwise.

Finally, as Problem 3, which was the work product example, suggests, a prosecutor need not disclose opinions that he or his staff have formed about the case or the credibility of witnesses. Nevertheless, a prosecutor cognizant of her *Brady* duty should be sensitive to the concerns that *Brady* meant to address. The conscientious prosecutor should seek to ascertain if any factual basis exists for her colleagues' adverse conclusions and opinions. If a factual basis does exist for the adverse opinion, a prosecutor seeking to enforce *Brady* responsibly should disclose the opinion and

the basis for the opinion. The prosecutor should acknowledge that while work product privilege can protect opinions from disclosure, in some instances, a prosecutor's commitment to the fair and responsible enforcement of *Brady* should override the privilege.