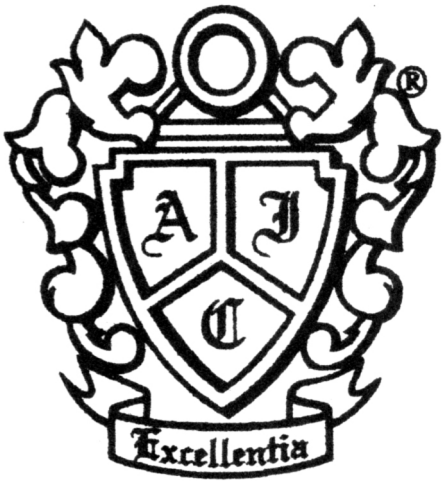


HERE'S THE STORY, OF A MAN NAMED BRADY: A ROUNDTABLE DISCUSSION OF EVIDENCE FAVORABLE TO THE ACCUSED

GEORGE MASON AMERICAN INN OF COURT PRESENTATION FOR OCTOBER 17, 2012

I. What is Brady?

A. Constitutional Obligation

a. *Brady v. Maryland*, 373 U.S. 83 (1963)
   i. In *Brady*, Defendant and his companion were sentenced to death after separate trials in which the defendant was tried first. During his trial, the prosecution withheld testimonial evidence from defendant's companion admitting responsibility for the murder
   ii. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

b. Brady Rule
   i. Brady violation occurs when
      1. favorable evidence is
      2. suppressed by government
      3. resulting in prejudice
         a. 3 part test reiterated in *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

c. Scope of Disclosure
   i. Must disclose all "favorable evidence"
   ii. Favorable evidence includes
      1. Material evidence
         a. Court has defined material evidence as any evidence for which there is a **"reasonable probability that disclosure . . . would have changed the outcome of the proceeding"**
            i. SCOTUS has defined **"reasonable probability" as a probability sufficient to undermine confidence in the outcome**
               1. Thus a defendant does not have to show a by a preponderance of the evidence that disclosure of the evidence would have resulted in acquittal
               2. Late disclosure of *Brady* material does not of itself constitute a per se violation of *Brady*
            ii. Must take into account the **cumulative effect of suppressed evidence in light of other evidence**

(not merely the probative value of the suppressed evidence standing alone)

b. Subsequent SCOTUS opinions have held that "outcome of the proceeding" is changed when the evidence is determinative of guilt or innocence

2. Impeachment evidence
    a. Information that tends to negatively impact the credibility or reliability of a Government witness
    b. Similar to material evidence, impeachment information falls under Brady: "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [Brady]." *Giglio v. United States*, 405 U.S. 150, 154 (1972).
        i. Includes bias evidence
            1. e.g., an agreement with a government witness for testimony in exchange for monetary compensation or favorable treatment in the criminal justice system

d. Scope of Duty
    i. Duty to Learn and disclose
        1. a prosecutor has a non-delegable duty "to learn of any favorable evidence known to the others acting on the government's behalf in a case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)
        2. Extends to information that has not been memorialized
        3. May extend to documents that are otherwise privileged or protected from disclosure by statute or court rules
            a. *Tuma v. Commonwealth*, 726 S.E.2d 365 (Va. App. 2012).

    ii. "Others acting on the government's behalf in a case"
        1. What constitutes "others acting on the government's behalf in a case" under Virginia Law?

            a. In *Commonwealth v. Williams*, a recent case out of Fairfax, Judge Thacher found the Department of Family Services, as a state agency, was an extension of the Commonwealth and subject to disclosure of properly requested Brady material relevant for the purposes of mitigating the defendant's punishment for burglary

e. When Must the Prosecution Disclose?
    i. Under Virginia law, disclosure must be made in "sufficient time to investigate and evaluate the evidence in preparation for trial." *Bramblett v. Commonwealth*, 513 S.E.2d 400, 409 (Va. 1999).

    ii. Government does have a continuing obligation to disclose Brady violations that had already occurred. *See generally, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

    iii. In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct 2308 (2009), the Supreme Court indicated that the government does not have a continuing Brady obligation to seek and develop exculpatory evidence after a defendant's conviction has been affirmed on appeal and the conviction is final

f. Brady Violations
    i. Must result in prejudice
        1. Commonwealth's failure to disclose police officer's preliminary hearing testimony did not constitute Brady violation that prejudiced defendant when defendant was present during preliminary hearing and heard testimony, and therefore, had same access to transcript of hearing as Commonwealth, and he had opportunity to explore inconsistency in officer's testimony on cross-examination. *Coley v. Commonwealth*, 55 Va. App. 624, 635-36 688 S.E.2d 288 (Va. App. 2010)

B. <u>Ethical Obligations</u>

a. Rule of Professional Conduct 3.8
    i. Section d
        1. A lawyer engaged in a prosecutorial function shall: (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court

b. Generally considered broader than Constitutional protection
    i. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (noting that the constitutional rule "requires less of the prosecution" than Rule 3.8)

ii. According to the Legal Ethics Opinion 1862 there are two major differences between the ethical and legal obligations
    1. The ethical rule is not limited to "material" evidence but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence
    2. The Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature while Brady imputes knowledge of other state actors
iii. Another relevant difference is the inclusion of word "timely"
    1. Indicates that a prosecutor has a duty not to intentionally delay making the disclosure without lawful justification or good cause
    2. *Read v. Virginia State Bar* – found that a prosecutor did not violate an ethical rule that mirrored Brady when the prosecutor did not disclose the fact that two former prosecution witnesses decided that they misidentified the defendant but the witnesses later, on their own accord, contacted the defense counsel midway through the trial and managed to testify for the defense
    3. Following this decision, the Bar rewrote the relevant rule, replacing the Brady standard with the standard now found in Rule 3.8(d)
    4. The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of the information that would otherwise have to be turned over to the defendant
    5. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks

LEGAL ETHICS OPINION 1862

"TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the "timely disclosure" of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes "timely disclosure" for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 3.8(d)[1], Rule 3.3(a)(1)[2], Rule 4.1[3], and Rule 8.4(c)[4].

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty.[5]

Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure. The standard established by the Rule is also significantly different from the *Brady* standard in at least two ways: first, the Rule is not limited to "material" evidence, but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence; second, the Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature[6], while *Brady* imputes knowledge of other state actors, such as the police, to the prosecutor. These differences from the *Brady* standard raise the further question of whether Rule 3.8(d) requires earlier disclosure than the

Brady standard, which requires only that the evidence be disclosed in time for the defendant to make effective use of it. Thus, the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial so long as the defendant has an opportunity to put on the relevant evidence.[7]

Although the Committee has never definitively addressed the question, it opines today that the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

At the time of the conduct at issue, Beverly Read was a Commonwealth's Attorney. Read was conducting the prosecution of an arson case. During the investigation, the Commonwealth discovered two witnesses, Sils and Dunbar, who both identified the defendant at the scene of the crime. Sils had second thoughts after he identified the defendant in a line-up and later became convinced that the defendant was not the person Sils had observed at the scene of the crime. Sils disclosed to Read that the defendant was definitely not the man observed at the scene of the crime. Read told Sils that he would not be called as a witness and that his presence was no longer necessary. Read concluded his case and rested without disclosing that the two witnesses had changed their statements. When Sils went home and had further discussions with the other witness, Dunbar, both became convinced that the defendant was not the man they saw. They returned to the courthouse during the trial the following day and agreed to testify for the defense. Read then attempted to pass a message to defense counsel that would have disclosed the exculpatory information but defense counsel refused to accept the writing. Unsuccessful in passing this information to defense counsel, Read then read into the record that the two witnesses had recanted and would testify that the defendant was not the man they saw at the scene of the crime. After this exchange, defense counsel moved to dismiss for prosecutorial misconduct. The motion to dismiss was denied. A complaint against Read was made with the Virginia State Bar and a disciplinary proceeding ensued.

Read's counsel argued that his client had complied with *Brady* because the information was available to use during trial, and therefore had disclosed "all information required by law." In spite of the Board's finding that Read had willfully intended to see the defendant tried without the disclosure that the two witnesses had recanted, the Supreme Court of Virginia agreed that Read had complied with the disciplinary rule, reversed the Disciplinary Board's decision, and entered final judgment that Read had not engaged in any misconduct. Following this decision, the Bar rewrote the relevant rule, replacing the *Brady* standard with the standard now found in Rule 3.8(d), clarifying that the prosecutor's ethical duty under that rule is not coextensive with the prosecutor's legal duty under *Brady*.

In light of the conclusion that Rule 3.8(d) requires earlier disclosure than the *Brady*

standard, the Committee next turns to the meaning of "timely disclosure." In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without lawful justification or good cause.

The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of information that would otherwise have to be turned over to the defendant. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks. As specified by the Rule, however, disclosure must be "precluded or modified *by order of a court*" (emphasis added) in order for the prosecutor to be excused from disclosure.

Because this is not a bright-line rule, the Committee cannot give a definitive answer to the question of whether the prosecutor must immediately turn over the exculpatory evidence at issue in the hypothetical; however, the prosecutor may not withhold the evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.

As to the second question, assuming that the witness's unavailability does not come within the scope of Rule 3.8(d), other rules might obligate the prosecutor to disclose this information during plea negotiations or when the plea bargain is being presented to the court.

Specifically, Rules 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Both of these provisions would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer. Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d), either to the opposing lawyer during negotiations or to the court when the plea is entered.[8]

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion
July 23, 2012

[1] Rule 3.8 Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:
***

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

[2] Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

[3] Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

[4] Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
***
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

[5] *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."), *citing* Rule 3.8(d); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (noting that *Brady* "requires less of the prosecution than" Rule 3.8(d)).

[6] As Comment [4] to Rule 3.8 explains, "[p]aragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence…"

[7] *See e.g.*, *Read v. Virginia State Bar,* 233 Va. 560, 357 S.E.2d 544 (1987).

[8] See also Rule 3.8(a), which bars a prosecutor from filing or maintaining a charge that the prosecutor knows is not supported by probable cause.

Litigation Series

DEFENDING FEDERAL CRIMINAL CASES: Attacking the Government's Proof

Diana D. Parker
Member of the New York Bar

2012
(Date originally published 2006)

Law Journal Press
120 Broadway
New York, New York 10271
www.lawcatalog.com

#00683
(Rel. 11)

Defending Federal Criminal Cases: Attacking the Government's Proof

Chapter 5: Disclosure Pursuant to Brady v. Maryland

§ 5.01 Introduction

This chapter addresses the government's constitutional obligation to disclose evidence pursuant to the seminal case of *Brady v. Maryland*,[1] the consequences of the government's failure to abide by its disclosure obligations, and arguments defense counsel may make to obtain both disclosure of information and meaningful relief in the event of improper nondisclosure.

A federal prosecutor's obligation to produce favorable evidence to the defense arises principally from the Fifth Amendment's Due Process Clause,[2] although it also derives from the Sixth Amendment's right to a fair trial.[3] *Brady* requires the government to produce evidence in its possession that is favorable to the accused, either with respect to guilt or to punishment.[4] *Brady* arose from a petition for *habeas corpus* challenging a state prosecutor's failure to disclose a confession by a codefendant, and was thus reviewed under the Fourteenth Amendment's due process clause.

Cases decided since *Brady* have explored its boundaries, but none has significantly changed its scope.[5] Due process requires a fair trial,[6] and *Brady*'s purpose is to ensure that a miscarriage of justice does not occur. Thus, a defense attorney's duty is to demonstrate both to a trial court and to an appellate court that a defendant may have been deprived of a fair trial by the failure to disclose *Brady* material and that the deprivation of a fair trial is a miscarriage of justice.

The three elements of a *Brady* claim are: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.[7]

Given the disparity between the investigatory capabilities of the government and most defendants, including most significantly the government's power to compel potential witnesses to testify in the grand jury, *Brady* material may be the single most important source of information in preparation of the defense case.

As described below, however, the operation of *Brady* is hampered by several factors. *First*, there are few clear, firm guidelines for prosecutors to follow, and prosecutors may not recognize exculpatory information when they see it—either because they do not know the defense theory of the case or because they do not appreciate how an impartial finder of fact might fit together all of the pieces of evidence. *Second*, especially in cases that are the result of large investigations, prosecutors may not know all of the materials that are in their investigators' files. *Third*, many *Brady* errors may never be discovered because, following a conviction, plea, or appeal, there may not be an occasion for anyone to comb the prosecutor's files to determine what, if anything, should have been produced. *Fourth*, because *Brady* errors are difficult to assess on appeal, the relative infrequency of convictions overturned for *Brady* errors means that there is little deterrence for failure to disclose *Brady* material.

---

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 101 L.Ed.2d 215 (1963).

[2] United States v. Ruiz, 536 U.S. 622, 628, 122 S.Ct. 2450, 152 L.Ed.2d 586 (2002).

[3] *Id*; but see, Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion rejecting claim that Confrontation Clause provides right to pretrial discovery and expressly not addressing whether right to *Brady* material may arise from the Sixth Amendment Compulsory Process Clause).

[4] *Brady v. Maryland*, N. 1 *supra*, 373 U.S. at 87.

[5] See, e.g.: Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d

490 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[6] *Supreme Court:* United States v. Bagley, 473 U.S. 667, 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).
Sixth Circuit: Mays v. City of Dayton, 134 F.3d 809, 815 (6th Cir.), *cert. denied* 524 U.S. 942 (1998).

[7] Strickler v. Greene, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

§ 5.02 Requesting *Brady* Material

The government's obligations under *Brady* are automatic. Nevertheless, defense counsel are well advised to make a written request, specifically listing the categories of *Brady* material recognized by courts and discussed in this chapter, and adding additional categories, if applicable, depending on the case.[1] Defense counsel may also urge courts to apply new standards to *Brady* violations to further *Brady's* goals of ensuring a fair trial for all defendants.

[1]—By Letter

Defense counsel should request disclosure of *Brady* material in a letter to the government shortly after the filing of an indictment. Although *Brady* and its progeny do not require the defense even to make a request, it is better practice to list the categories of information courts have recognized as *Brady* material, such as inculpatory statements by co-defendants and favorable laboratory analyses, as well as particular information especially relevant to the facts of the case. The government generally responds by letter, stating that it understands its *Brady* obligations and will produce all *Brady* material, without stating whether any such information in fact exists.

As the defense investigation and preparation for trial progresses, defense counsel should not hesitate to continue to send letters requesting specific *Brady* material that the defense believes may exist. These letters may later be the basis for a showing of prejudice if the government withholds evidence.

[2]—By Motion

Defense counsel ordinarily includes a request that the court order the production of *Brady* material in an omnibus motion concerning discovery, unless the government has agreed, for example, to make all files available to the defense pursuant to an open-file policy. Such a motion should impress upon the court the importance of early disclosure.

Defense counsel should also bring to the attention of the court any failure of the government to respond to later letters requesting *Brady* material.

---

[1] Indeed, the more specific the request, the more likely the failure to disclose will result in reversal. See, e.g., United States v. Sipe, 388 F.3d 471, 490 (5th Cir. 2004).

§ 5.03 The Elements of a *Brady* Violation: Evidence Favorable to the Accused

Evidence may be "favorable to the accused" in a number of ways. For example:

- The evidence may be exculpatory because it tends to show directly that the defendant did not commit the charged criminal acts, such as when someone else has admitted committing the crime,[1] or because it may assist the defendant in establishing an affirmative defense.[2]
- The evidence may impeach a government witness. Almost any prior statement by a witness may fall within this category if it differs slightly from the witness's trial testimony, giving defense counsel the opportunity to undermine the witness's credibility through cross-examination.[3]

- The "evidence" may in fact be an *absence* of evidence. For example, in a case in which a key government witness testified that the defendant had driven his car to a certain parking lot before stealing another car and killing the car's owner, the police had prepared a list of all of the license plates of cars in the parking lot following the theft and murder, and defendant's car was not on the list.[4] The list, which was not turned over to the defendant, was favorable to the accused because it impeached the testifying witness.[5] Similarly, uncertain forensic tests may benefit the defense's case by suggesting directly or indirectly that another person committed the crime.[6]

Whether evidence is favorable to the accused will, of course, depend on the particular facts of the case.[7] Where the information in question relates to a potential defense, counsel should articulate how the information may impact the defense strategy and how it could be favorable in light of various potential defenses. General requests for a file are insufficient. Moreover, attempts to use *Brady* as a discovery device are regularly rejected.[8] At the same time, a defense may not be raised that would have been raised had the information been disclosed.

[1]—Exculpatory Evidence

Brady itself is an example of classic exculpatory information: another man admitted to the killing of which Brady was convicted. Brady and his confederate were charged with the murder committed during the course of a robbery and tried separately. Brady's counsel had asked the prosecutor to allow him to review the statements made by the other man. The prosecution provided Brady's counsel with some statements, but withheld the one statement in which the confederate admitted that he was the one who actually committed the homicide. Brady was convicted after trial and sentenced to death. Although the other man's statement that he had done the killing would not have reduced Brady's conviction from first degree murder, it was highly relevant to Brady's sentence.

Exculpatory information does not have to be as stark as another person's confession to the crime.[9] The Tenth Circuit found a *Brady* violation where the prosecution had failed to disclose that another person had been arrested for the same crime and there was physical evidence pointing to that other person.[10] The Eleventh Circuit found a *Brady* violation where the prosecution failed to disclose the results of a psychiatric evaluation of a defendant that might have had a significant impact on the defendant's trial strategy.[11] The Second Circuit has explicitly stated that evidence tending to have both an inculpatory and exculpatory effect is *Brady* material.[12]

A defendant's own prior statements may also qualify as exculpatory information,[13] as may statements made to the police by the defense's own witnesses.[14]

[2]—Impeachment Evidence

No distinction exists between exculpatory and impeachment evidence for the purposes of determining whether the evidence is favorable to the accused.[15] Either can be favorable to the accused, even if it is not directly exculpatory.[16] Indeed, *Brady* may require disclosure of impeachment evidence that on its face is inculpatory.[17] Put simply, if information would have a substantial impact on the defense's ability to impeach a witness, it should be disclosed.[18] For example, the government must produce the criminal history of its witnesses.[19]

Impeachment evidence is especially important where the witness will provide the only testimony on a particular point at trial,[20] or where the evidence furnishes the only potential impeachment of a government witness.[21] When impeachment evidence sought would "seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration," it is likely that production will be required.[22]

If impeachment is based on the witness's drug use before trial, evidence that the witness continued to use drugs during the trial is highly probative.[23] Not surprisingly, impeaching a witness on the basis that he may be under the influence of drugs at the time of his testimony is qualitatively different than impeaching him on past drug use.[24]

[a]—Benefits Provided to Government Witnesses

Information about benefits provided to a witness by the prosecution is material because a jury may conclude that such benefits provided the witness with a motive to testify falsely.[25] It is "beyond genuine debate" that a prosecution witness's status as a paid informant "qualifies as evidence advantageous" to a defendant,[26] but any benefit—a reduction in charges or sentence, or extra prison privileges, for example—is potential impeachment material.[27]

Cooperation agreements with government witnesses may therefore constitute *Brady* material,[28] especially where the witness has changed his story when testifying against the defendant.[29] Even otherwise minor benefits, such as allowing cooperators to travel, work, make phone calls, or visit with family members can constitute *Brady* material.[30]

Whether a promise to a government witness is *Brady* material may turn on when the promise is made. As the Second Circuit has stated, "[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony. . . . [T]he fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony."[31] The First Circuit has held that only a failure to disclose a *written* promise can constitute a *Brady* violation.[32]

These cases may be criticized for making it too easy for the government to offer a witness a benefit by "a wink and a nod." Even when both the prosecutor and a witness understand that testimony that aids the government's case will result in significant benefits to the witness, the absence of a pre-existing, written agreement may allow for deniability.

[b]—Prior Statements and Interviews

The government is required to produce prior statements of testifying witnesses pursuant to the Jencks Act, 18 U.S.C. § 3500, regardless of whether they are *Brady* material.[33] In some circumstances, such as when a witness has prior ties to law enforcement, the government may be required to produce prior statements and interviews of non-testifying witnesses.[34] The prosecution may not be required, however, to provide the original notes of pretrial interviews as long as the notes were taken for the purpose of creating a finished report, they were destroyed in good faith, and the defense is provided with a final report.[35]

[3]—Information Related to the Defense Theory of the Case

There is no general obligation on the prosecution to investigate potentially exculpatory leads,[36] and there is no constitutional right to a better police investigation.[37] However, *Brady* compels the disclosure of information that supports the defense theory of the case when the prosecutor discovers it.[38]

In one case, for example, the defendant, arrested on drug trafficking charges, had provided the government with the name of the source of the drugs she was carrying and offered to affect a controlled delivery to their intended recipient. The defense at trial was that the source of the drugs had coerced the defendant and threatened her children. The prosecutor repeatedly mocked the defendant's coercion claims, and indeed mocked the idea that the source existed, even though the government had for years been investigating a man who appeared to be that source. Despite the "overwhelming" evidence that the defendant had transported drugs and the "substantial" evidence that she knew the items she had transported were illegal, the First Circuit remanded for a new trial because the withheld information concerning the identity of the source would have "dramatically corroborated" the defendant's story.[39]

[4]—Evidence the Prosecution Does Not Intend to Use at Trial

Evidence gathered during the course of the investigation that the prosecution does not intend to use at trial may be *Brady* material.[40] In fact, even "[in]tangible" information that the government learns during its investigation but does not record may be *Brady* material.[41] If the defendant has access to the information, however, the prosecution may not be under an obligation to disclose it.[42] If the evidence does

come out at trial, that may be sufficient to satisfy any disclosure obligation the prosecution might have had.[43]

[5]—Inadmissible Evidence

The Supreme Court has held that the results of a polygraph test, which were exculpatory, were not material within the meaning of *Brady* since they were not "'evidence' at all."[44] Because the results would not have been admissible, they could not have had a direct effect on the outcome of the trial. The Supreme Court rejected the lower court's conclusion that knowledge of the results of an undisclosed polygraph exam might have altered trial counsel's trial strategy as too speculative to render the results material. Given the strength of the case against the defendant, it takes "more than supposition on the weak premises offered by respondent to undermine a court's confidence in the outcome."[45]

In that case, the results of the polygraph test merely reinforced the defense's position at trial (i.e., the defendant maintained his innocence, and the failed polygraph test supported him). However, where inadmissible evidence actually would change the defendant's strategy, it is not clear that this result should govern.[46] Defense attorneys should distinguish their facts from this case and argue that undisclosed evidence, even if itself inadmissible, would lead to the discovery of admissible evidence.[47] *Brady* does not require the disclosure of government "opinion work product," or material encompassing a prosecutor's "mental impressions or legal theories."[48] To the extent a prosecutor's recorded opinions also contain underlying exculpatory facts, such material may be discoverable.[49]

---

[1] See, e.g.:

Sixth Circuit: Sawyer v. Hofbauer, 299 F.3d 605, 612 (6th Cir. 2002) (negative semen test withheld from defendant was exculpatory); Jamison v. Collins, 291 F.3d 380, 385 (6th Cir. 2002) (undisclosed witness identifications of possible suspects in murder investigation were exculpatory).

Tenth Circuit: Gonzales v. McKune, 247 F.3d 1066, 1077 (10th Cir. 2001) (fact that semen sample lacked any amount of sperm exculpatory), *rev'd on other grounds* 279 F.3d 922 (10th Cir. 2002), *cert. denied* 537 U.S. 838 (2002); United States v. Robinson, 39 F.3d 1115, 1117-19 (10th Cir. 1994) (undisclosed evidence tending to identify prosecution witness, rather than defendant, as drug courier exculpatory).

State Courts:

California: In re Miranda, 43 Cal.4th 541, 545, 576 (2008) (undisclosed letter written by jail inmate recounting government witness's confession to committing murder for which defendant was convicted was exculpatory; at trial, witness had testified that defendant committed the murder while witness tried to stop the killing).

Iowa: Harrington v. State, 659 N.W.2d 509, 523 (Iowa 2003) (undisclosed police reports indicating that an individual with a shotgun was caught trying to break into a vehicle at car dealership several nights before murder of car dealership night watchman exculpatory).

[2] See, e.g.:

First Circuit: Ellsworth v. Warden, 333 F.3d 1, 8 (1st. Cir. 2003) (note demonstrating victim had history of lying about sexual abuse considered exculpatory as it raised doubt as to victim's testimony regarding lack of consent).

Ninth Circuit: United States v. Jernigan, 492 F.3d 1050, 1054-57 (9th Cir. 2007) (undisclosed evidence demonstrating additional bank robberies committed in a similar manner by similar looking suspect exculpatory); Bailey v. Rae, 339 F.3d 1107, 1114-15 (9th Cir. 2003) (reports from therapist discussing victim's ability to consent to sexual advances exculpatory).

Tenth Circuit: Trammel v. McKune, 485 F.3d 546, 551-52 (10th Cir. 2007) (undisclosed credit card receipts linking other individual to crime exculpatory).

[3] See, e.g.:

Supreme Court: Giglio v. United States, 405 U.S. 150, 150-151, 154-155, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (defendant's conviction reversed where government failed to disclose deal in which defendant's co-conspirator was promised immunity in trial in which government case "depended almost entirely" on that witness's testimony).

Fourth Circuit: Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 555-556 (4th Cir. 1999) (prior inconsistent statement about whether a witness was an eyewitness was "evidence favorable to [the] accused").

Ninth Circuit: Benn v. Lambert, 283 F.3d 1040, 1054-1060 (9th Cir.) (due process violated by government's failure to disclose that prosecution witness lied to police and was not prosecuted for drug violations), *cert. denied* 537 U.S. 942 (2002).

Eleventh Circuit: Jacobs v. Singletary, 952 F.2d 1282, 1287-1289 (11th Cir. 1992) (due process violated by government's failure to disclose witness's prior statements professing doubt as to the defendant's involvement in the shooting).

[4] See Kyles v. Whitley, 514 U.S. 419, 450-451, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[5] *Id*., 514 U.S. at 450-451.

[6] See, e.g.:

Second Circuit: DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006) (confession to crime by non-defendant where not a single witness actually saw defendant stab the victim was "unmistakably exculpatory" evidence).

Sixth Circuit: Sawyer v. Hofbauer, 299 F.3d 605, 611-612 (6th Cir. 2002) (non-disclosure by government of forensic test demonstrating that semen stain found on victim's clothing had been tested against defendant's blood type and resulted in a negative result was violation of *Brady*).

Ninth Circuit: Pham v. Terhune, 400 F.3d 740, 743 (9th Cir. 2005) (ordering that government disclose "inconclusive" forensic evidence, including laboratory notes of gunshot residue test, as evidence "essential" to *Brady* claim where notes potentially could provide evidence as to identity of the shooter).

[7] Allen v. Secretary, Florida Department of Corrections, 611 F.3d 740, 746-747 (11th Cir. 2010), *cert. denied sub nom.* Allen v. Buss, 131 S.Ct. 2898, 179 L.Ed.2d 1192 (2011) (undisclosed fingerprint evidence showing defendant was in car not *Brady* material where defendant's presence in car was undisputed).

[8] *Supreme Court:* Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

Third Circuit: U.S. v. Moyer, 726 F. Supp. 2d 498, 513 (M.D. Pa. 2010) (denying motion to release *Brady* materials because it was no more than a general request).

Fourth Circuit: United States v. Caro, 597 F.3d 608, 619 (4th Cir. 2010) (mere speculation insufficient to establish that withheld evidence would be "favorable to the accused" for *Brady* purposes).

Sixth Circuit: United States v. Faulkenberry, 614 F.3d 573, 589 (6th Cir. 2010) (defendant must allege specific withheld items to make a valid *Brady* claim).

Seventh Circuit: United States v. Jumah, 599 F.3d 799, 807-811 (7th Cir. 2010) (no *Brady* claim where defendant failed to specify *Brady* material and failed to request *in camera* review).

[9] *First Circuit:* United States v. Aviles-Colon, 536 F.3d 1 (1st Cir.), *cert. denied* 129 S.Ct. 615 (2008) (*Brady* violation where government suppressed exculpatory information that defendant was a member of a rival gang, making it unlikely that he conspired with other defendants).

Sixth Circuit: Jells v. Mitchell, 538 F.3d 478 (6th Cir. 2008) (*Brady* violation where government suppressed exculpatory statements made by victim's friend, sister and boyfriend).

[10] Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995).

[11] United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992).

[12] DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006).

[13] *Eleventh Circuit:* United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986) (defendant's recorded statements were exculpatory on the question of intent and defendant did not know that his statements had been recorded).

But see:

First Circuit: United States v. Lau, 828 F.2d 871 (1st Cir. 1987) (prosecution's failure to turn over taped conversation between defendant and government agents did not violate *Brady*), *cert. denied* 486 U.S. 1005 (1988).

[14] Boss v. Pierce, 263 F.3d 734, 740-744 (7th Cir. 2001), *cert. denied* 535 U.S. 1078 (2002).

[15] *Supreme Court:* Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Ninth Circuit: United States v. Antonakeas, 255 F.3d 714 (9th Cir. 2001).

[16] *Supreme Court:* United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); see also, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (evidence related to witness credibility can be material).

Second Circuit: United States v. Jackson, 345 F.3d 59 (2d Cir. 2003), *cert. denied* 541 U.S. 956 (2004).

[17] Strickler v. Greene, 527 U.S. 263, 282 n.21, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

[18] See United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996). See also, Friedman v. Rehal, 618 F.3d 142, 153-154 (2d Cir. 2010) (stating in dicta that the use of hypnosis to trigger a witness' memory would constitute impeachment evidence).

[19] *Third Circuit:* Breakiron v. Horn, 642 F.3d 126, 132-133 (3d Cir. 2011) (*Brady* violation where government suppressed evidence that witness (1) had sought a deal from prosecutors in exchange for his testimony; (2) was a suspect in another criminal investigation pending at that time; and (3) had been convicted of a assault with intent to rob.); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991).

See also:

Ninth Circuit: United States v. Kohring, 637 F.3d 895, 913 (9th Cir. 2011) (failure to disclose criminal investigation of key witness was *Brady* violation); United States v. Kott, 423 Fed. Appx. 736, 2011 U.S. App. LEXIS 6058, *1 (9th Cir. March 24, 2011) (same); United States v. Price, 566 F.3d 900, 910-911 (9th Cir. 2009) (prosecutor's failure in his "duty to learn" witness' criminal history constitutes suppression of evidence under *Brady*).

[20] *Second Circuit:* United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996).

See also:

Third Circuit: Lambert v. Beard, 633 F.3d 126, 134 n.3 (3d Cir. 2011).

Sixth Circuit: Robinson v. Mills, 592 F.3d 730, 737-738 (6th Cir. 2010) (government's failure to disclose key witness' status as confidential informant violated *Brady*).

Tenth Circuit: Douglas v. Workman, 560 F.3d 1156, 1174-1175 (10th Cir. 2009) (prosecution's failure to disclose that key witness who was "the lynchpin to a conviction" received a benefit to testify constitutes suppression of material impeachment evidence).

Eleventh Circuit: Arnold v. Secretary, Florida Department of Corrections, 622 F. Supp.2d 1294 (M.D. Fla. 2009)*aff'd per curium,* 595 F.3d 1324 (11th Cir. 2010) (*Brady* violation where prosecution failed to disclose criminal activities of key witness).

[21] See United States v. Avellino, 136 F.3d 249, 257 (2d Cir. 1998).

[22] See:

Fifth Circuit: United States v. Weintraub, 871 F.2d 1257, 1262 (5th Cir. 1989).

See also:

Third Circuit: Wilson v. Beard, 589 F.3d 651, 665-666 (3d Cir. 2009) (*Brady* violation where government suppressed witness' prior arrest for impersonating a police officer as well as presentence report describing witness's distorted perception of reality and desire to involve and align himself with police activities, and also suppressed second witness' mental illness and treatment with psychotropic drugs).

State Courts:

New York: People v. Hunter, 11 N.Y.3d 1, 862 N.Y.S.2d 301, 892 N.E.2d 365 (N.Y. 2008) (evidence that victim in rape trial had made a prior rape accusation in a factually similar circumstance constitutes *Brady* material despite guilty plea in other case).

[23] See, e.g.:

Tenth Circuit: United States v. Robinson, 583 F.3d 1265, 1271-1272 (10th Cir. 2009) (*Brady* violation where witness's testimony was "central—indeed essential—to the government's case" and government failed to disclose witness's extensive illegal drug use both at time of trial and possibly at time of crime); Browning v. Workman, 07-CV-16-TCK-PJC, 2011 U.S. Dist. LEXIS 71081 (N.D. Okla. June 30, 2011) (*Brady* violation where defense was not provided records which "outlined the informant's extensive illegal drug use, mental health condition, and use of prescription drugs at the time of trial").

District of Columbia Circuit: United States v. Cuffie, 80 F.3d 514, 517-518 (D.C. Cir. 1996) (information regarding witness's prior perjury was material even though witness already had been impeached with drug use and cooperation agreement).

But see:

First Circuit: United States v. Rodriguez, 162 F.3d 135 (1st Cir. 1998) (information regarding witness's continuing prostitution and pending charges not material where prior prostitution and drug use already revealed and witness's story was corroborated by others), *cert. denied*526 U.S. 1152 (1999); United States v. Perkins, 926 F.2d 1271 (1st Cir. 1991) (information regarding witness's prior drug use was not material where witness was impeached with other, more powerful, impeachment information).

[24] See United States v. Boyd, 55 F.3d 239 (7th Cir. 1995).

[25] See, e.g.:

Sixth Circuit: Robinson v. Mills, 592 F.3d 730, 738 (6th Cir. 2010) (*Brady* violation where government failed to disclose that its key witness was a paid informant and had worked on multiple matters for state and local law enforcement).

Ninth Circuit: Singh v. Prunty, 142 F.3d 1157 (9th Cir.), *cert. denied* 525 U.S. 956 (1998).

But see:

Fifth Circuit: United States v. Valencia, 600 F.3d 389, 418-419 (5th Cir. 2010) (although government should have disclosed fee agreement in advance of trial, existence of agreement deemed immaterial and harmless because jury learned about fee earned by witness during trial, and witness was not testifying as a "hired gun" or as an accomplice and would receive no bonus for guilty verdict).

[26] Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (witness testified that he had not taken any money from police officers and despite its promise of open discovery, the prosecution did not reveal witness had been paid $200 for information regarding the defendant and for setting him up so the police could arrest him).

[27] See, e.g.:

Supreme Court: Giglio v. United States, 405 U.S. 150, 152-155, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (prosecutor gave witness certain benefits to secure testimony consistent with proffer).

Third Circuit: Wilson v. Beard, 589 F.3d 651, 666-667 (3d Cir. 2009) (*Brady* violation where government failed to disclose that witness received interest-free loans from law enforcement officer to whom he reported defendant's alleged crime).

District of Columbia Circuit: United States v. Smith, 77 F.3d 511 (D.C. Cir. 1996).

[28] Goff v. Bagley, 601 F.3d 445, 476 (6th Cir. 2010), *cert. denied* 131 S.Ct. 1045 (2011) (state prosecutors did not violate *Brady* by failing to learn about and disclose that witness had plea agreement with federal prosecutors; prosecutor not obligated to learn information possessed by other government agencies not involved in investigation).

[29] See:

District of Columbia Circuit: In re Sealed Case No. 99-3096, 185 F.3d 887 (D.C. Cir. 1999).

But see:

Third Circuit: United States v. Coletta, 59 Fed. Appx. 492 (3d Cir.), *cert. denied* 540 U.S. 852 (2003).

Ninth Circuit: United States v. Blanco, 392 F.3d 382 (9th Cir. 2004).

[30] *Fifth Circuit:* United States v. Sipe, 388 F.3d 471, 488-490 (5th Cir. 2004).

Seventh Circuit: United States v. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996); United States v. Boyd, 55 F.3d 239, 243-245 (7th Cir. 1995).

Cf.:

Eleventh Circuit: United States v. Scheer, 168 F.3d 445 (11th Cir. 1999) (prosecutor's threatening remarks to a government witness also may be material for *Brady* purposes).

[31] *Second Circuit:* Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003).

Fifth Circuit: United States v. Davis, 609 F.3d 663 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1676 (2011) (no *Brady* violation where government failed to disclose that it had discussed possible plea agreement with testifying witness but that no actual agreement was in place).

See also:

Sixth Circuit: Akrawi v. Booker, 572 F.3d 252, 263-264 (6th Cir. 2009) (*Brady* violation where there existed an "informal agreement" between prosecution and witness to reduce the charges against witness in return for his testimony,. "the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*") (Emphasis in original); Bell v. Bell, 512 F.3d 223 (6th Cir.) (no *Brady* violation where there was no evidence of pre-trial explicit or implicit agreement between prosecution and witness), *cert. denied* 129 S.Ct. 114 (2008); Matthews, v. Ishee, 486 F.3d 883, 895-896 (6th Cir.) *cert. denied* 552 U.S. 1023 (2007) (no *Brady* violation where circumstantial evidence tended to show government cooperation agreement with eyewitness, if it existed at all, was reached post-trial). United States v. Thompson, No. 07-35-GFVT, 2011 U.S. Dist. LEXIS 9672 (E.D.Ky. April 4, 2011) (no *Brady* violation where prosecutor failed to disclose existence of informal immunity agreement, but such agreement was disclosed in grand jury transcripts provided prior to trial).

[32] United States v. Soto-Beniquez, 356 F.3d 1 (1st Cir.), *cert. denied* 541 U.S. 1074 (2004).

[33] The government's disclosure obligations pursuant to the Jencks Act are the subject of Chapter 4 *supra.*

[34] Banks v. Dretke, 540 U.S. 668, 697-698, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

[35] *Supreme Court:* Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961).

See also:

Tenth Circuit: United States v. Nichols, 242 F.3d 391 (10th Cir. 2000) (even where information from preliminary notes is not disclosed, the information is not material where there is no reasonable probability that the information would have led to a different result at trial), *cert. denied* 532 U.S. 985 (2001).

[36] See generally, Fisher, "'Just the Facts, Ma'am': Lying and the Omission of Exculpatory Evidence in Police Reports," 28 New Eng. L. Rev. 1 (1993).

[37] See: Note, "Toward a Constitutional Right to an Adequate Police Investigation," 53 N.Y.U. L. Rev. 835 (1978); Fahringer, "Has Anyone Here Seen Brady? Discovery in Criminal Cases," 9 Crim. L. Bull. 325 (1973).

[38] *First Circuit:* United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993).

Fifth Circuit: Mahler v. Kaylo, 537 F.3d 494 (5th Cir. 2008) (*Brady* violation where suppressed statements suggested shooting was an accident or an act of self-defense).

Seventh Circuit: Toliver v. McCaughtry, 539 F.3d 766 (7th Cir. 2008) (*Brady* violation where suppressed statement created doubt as to whether defendant aided and abetted murder or attempted to prevent it).

Ninth Circuit: Valdovinos v. McGrath, 598 F.3d 568, 577-578 (9th Cir. 2010) (*Brady* violation where government failed to disclose photo of another person at crime scene wearing cowboy hat, even though government argued that cowboy hat was distinguishing feature of defendant's attire).

[39] United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993).

[40] See United States v. White, 492 F.3d 380, 411-414 (6th Cir. 2007) (abuse of discretion where district court failed to conduct an evidentiary hearing to explore the materiality of documents produced by potential government witness that allegedly worked on defendants' case but was not introduced as a witness at trial).

[41] See United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007) (information provided to prosecutors but not recorded in their notes could be *Brady* material; "[t]he obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form").

[42] See:

Fifth Circuit: United States v. Stephens, 964 F.2d 424 (5th Cir. 1992).

Eighth Circuit: United States v. Bond, 552 F.3d 1092, 1095-1097 (9th Cir. 2009) (no "suppression" of evidence where prosecution failed to call key witness where prosecution provided defendant with summaries from interviews of witness and alerted defendant to transcript of the witness's testimony from related trial).

But see:

Fourth Circuit: Walker v. Kelly, 195 Fed. Appx. 169, 175 (4th Cir. 2006) (the availability of material to the defense, for example, through a Freedom of Information request, does not absolve the prosecutor of his duty to disclose that material if it falls within the confines of *Brady*).

[43] United States v. Woodlee, 136 F.3d 1399 (10th Cir.), *cert. denied* 525 U.S. 842 (1998).

[44] Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

[45] *Id.*, 516 U.S. at 8.

[46] See Conley v. United States, 332 F. Supp. 2d 302 (D. Mass. 2004) (in perjury trial, notation in police report requesting permission to give witness, who expressed doubt about his recollections, a polygraph test deemed material), *aff'd* 415 F.3d 183 (1st Cir. 2005).

[47] See:

Second Circuit: United States v. Rodriguez, 496 F.3d 221, 226 n.4 (2d Cir. 2007) (material that is favorable to the accused may be *Brady* material even if it is not admissible).

Ninth Circuit: United States v. Kohring, 637 F.3d 895, 907 (9th Cir. 2011) (materials that "lead to information that will be admissible" can be *Brady* material); United States v. Price, 566 F.3d 900, 912 (9th Cir. 2009) ("Regardless of whether inadmissible evidence is material under *Brady* if its disclosure could have led the defendant to discover favorable admissible evidence, under Ninth Circuit law evidence is material if it might have been used to impeach a government witness.") (internal quotation marks and citation omitted).

Cf., United States Attorneys" Manual § 9-5.001, "Policy Regarding Disclosure of Exculpatory and Impeachment Information" (Oct. 19, 2006) ("While ordinarily, evidence that would not be admissible at trial need not be disclosed, [DOJ] policy encourages prosecutors to err on the side of disclosure if admissibility, is a close question.").

[48] *Ninth Circuit:* Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006) *cert. denied* 549 U.S. 1125 (2007) (disallowing production of statement of the prosecutor's opinion about whether prosecution witness testified truthfully enough to receive benefit of plea bargain).

Eleventh Circuit: Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000) *cert. denied* 534 U.S. 903 (2001).

[49] See:

Ninth Circuit: Paradis v. Arove, 240 F.3d 1169, 1173 (9th Cir. 2001) (prosecutor's notes which recorded the opinion of expert witness were *Brady* material).

District of Columbia Circuit: United States v. Andrews, 532 F.3d 900, 906 (D.C. Cir. 2008) (agent's notes from witness interviews could be *Brady* material).

§ 5.04 Elements of a *Brady* Violation: Evidence That Was Undisclosed

The defendant need not make a request for *Brady* material because the government is under an affirmative obligation to provide it.[1] The good faith of the prosecutor is also irrelevant as to whether there was a *Brady* error—inadvertent errors are treated the same as willful ones.[2] Indeed, there can be a *Brady* error if the undisclosed information was in the possession, custody or control of the law enforcement authorities, regardless of whether the prosecutor himself (or anyone in his office) was even aware of the information.[3]

The prosecutor is charged with knowledge of all *Brady* material in her files as well as any *Brady* material obtained by her office during its investigation, even if the prosecutor on the case lacks direct knowledge of the existence of the information.[4] She is also presumed to recognize the potential exculpatory value of information in those files,[5] and has an affirmative "duty to learn of any favorable evidence known to the others acting on the government's behalf."[6] Even where the investigating agency has withheld *Brady* information from the prosecutor, the prosecutor still is responsible for failing to turn over this information.[7]

However, the prosecutor is not necessarily charged with knowledge of information held by government actors in another office not working with the prosecutor.[8] This distinction may be crucial in white collar cases in which the U.S. Attorney and the SEC have investigated the defendant. The defendant will have a better chance of obtaining material held by the SEC if he can show that the two offices were working together (e.g., the SEC was present at proffer sessions held during the U.S. Attorney's investigation).[9] Indeed, in a Ninth Circuit case, the government was charged with knowledge of information uncovered in a parallel SEC investigation.[10] In that case, executives at a communications company were prosecuted for securities fraud, falsifying corporate books and records and violating related statutes and regulations for backdating stock options. The CEO's defense was that he relied in good faith on the Finance Department's handling of the documentation. A government witness from the Finance Department testified that she and others did not know about the backdating. Based on this testimony, the government argued in summation that the Finance Department did not know about the backdating. However, other higher-ups in the Finance Department had given statements to the FBI to the contrary; moreover, SEC complaints were filed against some of the Finance Department employees who had allegedly known about the backdating. In vacating Reyes' conviction and remanding for a new trial, the Ninth Circuit found that the government had made an argument that it "knew [was] false, or at the very least had strong reason to doubt."[11]

The prosecution's charged knowledge extends to the criminal history of government witnesses, even if the prosecutor has failed to run a criminal history check.[12] It may not extend, however, to the medical history of government witnesses. The First Circuit has found it "questionable" whether the prison medical records of a state inmate are within the control and custody of the federal government.[13]

Though undisclosed, no *Brady* violation occurs if the relevant evidence is "readily available" to the defense from another source,[14] nor can there be a *Brady* violation if the defendant was *actually* aware of the evidence,[15] for the government may not be obliged to produce information that is already known to the defendant.[16] Arguments that the defendant *should have been aware* of the material fare less well for the government.[17] The Supreme Court has held that when the government failed to disclose that one of its witnesses was in fact a paid informant, the defendant's failure to make sufficient inquiries did not relieve the government of its obligation to turn the information over to the defense:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed, in *Strickler [v. Greene]*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."[18]

Courts have held that when the government follows an "open file" policy, permitting the defense access to all information it has gathered, there can be no *Brady* violation.[19] At least one court, however,

has suggested the possibility that the government may violate its *Brady* obligations even if it follows an open-file policy.[20] Especially in white collar cases, the discovery materials may be so voluminous that it would be incumbent on the government either to provide an index of the documents, or to flag documents of particular exculpatory value.[21]

---

[1] See United States v. Agurs, 427 U.S. 97, 107-111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (the prosecution's duty under *Brady* to disclose material, favorable evidence to the defense is not limited only to situations in which there has been a specific request made by the defense); see also, Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[2] *Supreme Court:* Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

See also:

Ninth Circuit: United States v. Blanco, 392 F.3d 382 (9th Cir. 2004).

[3] See, e.g.:

Supreme Court: Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ("'[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'") (quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Ninth Circuit: United States v. Price, 566 F.3d 900, 903, 908 (9th Cir. 2009) (*Brady* compels the disclosure not only of information the prosecutor has personal knowledge of, but also any information "known to the *others* acting on the government's behalf in the case, including the police") (emphasis in original) (internal quotation marks and citation omitted).

District of Columbia Circuit: United States v. Brooks, 966 F.2d 1500, 1502-05 (D.C. Cir. 1992) (*Brady* violation where prosecutor failed to search police files for information addressing the credibility of a deceased police officer as there was a "non-trivial prospect" that such a search would produce exculpatory information).

[4] See, e.g., Kyles v. Whitley, 514 U.S. 419, 420, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (prosecutor remains responsible for turning over *Brady* material "regardless of any failure by the police to bring favorable [to the accused] evidence to the prosecutor's attention").

[5] See United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

[6] See:

Supreme Court: Kyles v. Whitely, N. 4 *supra*, 514 U.S. at 437.

District of Columbia Circuit: United States v. Andrews, 532 F.3d 900, 906 (D.C. Cir. 2008) (Inspector General Special Agents' notes of witness interviews, "never reviewed by the prosecutor," could be *Brady* material).

Cf.:

Fifth Circuit: Avila v. Quarterman, 560 F.3d 299, 308-309 (5th Cir.) *cert. denied* 130 S.Ct. 536 (2009) (the question of whether the prosecutor's expert witness is part of the prosecution team such that his opinion is imputed to the prosecution must be determined on a case-by-case basis).

Sixth Circuit: United States v. Graham, 484 F.3d 413, 417-418 (6th Cir. 2007) *cert. denied* 552 U.S. 1280 (2008) (undisclosed evidence in possession of unindicted cooperating witness acting pursuant to plea agreement was not under the "effective control" of the government and could not be the basis for a violation of *Brady*).

[7] United States v. Blanco, 392 F.3d 382 (9th Cir. 2004) (*Brady* "imposes[s] obligations not only on the prosecutor, but on the government as a whole. . . . The DEA cannot undermine *Brady* by keeping exculpatory evidence out of the prosecutor's hands until the DEA decides the prosecutor ought to have it.") (internal quotation marks omitted).

[8] *Second Circuit:* United States v. Avellino, 136 F.3d 249, 255-256 (2d Cir. 1998).

See also:

First Circuit: United States v. Rivera-Rodriguez, 617 F.3d 581 (1st Cir. 2010), *cert. denied* 131 S. Ct. 968 (2011) (prosecutors have no duty to turn over material in possession of probation officers); United States v. Casas, 356 F.3d 104, 116 (1st Cir.), *cert. denied* 541 U.S. 1069 (2004).

Third Circuit: United States v. Pelullo, 399 F.3d 197, 217-218 (3d Cir. 2005)*cert. denied* 546 U.S. 1137 (2006).

Sixth Circuit: Goff v. Bagley, 601 F.3d 445, 476 (6th Cir. 2010)*cert. denied* 131 S.Ct. 1045 (2011).

Eleventh Circuit: Moon v. Head, 285 F.3d 1301, 1310 (11th Cir. 2002)*cert. denied* 537 U.S. 1124 (2003).

[9] See United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (holding that the government must search files of other branches of government if they are "closely aligned with the prosecution" or have a "close working relationship").

[10] United States v. Reyes, 577 F.3d 1069, 1078 (9th Cir. 2009).

[11] *Id*., 577 F.3d at 1078.

But see:

Second Circuit: United States v. Rigas, 583 F.3d 108, 126 (2d Cir. 2009) (government not "in possession" of SEC interview notes and therefore had no obligation to disclose what it did not possess).

[12] *Fifth Circuit:* United States v. Auten, 632 F.2d 478, 481-482 (5th Cir. 1980).

See also:

Third Circuit: United States v. Perdomo, 929 F.2d 967, 970-971 (3d Cir. 1991).

[13] United States v. Bender, 304 F.3d 161, 163-164 (1st Cir. 2002) (prosecution's failure earlier to turn over witness's mental health history did not violate *Brady* where witness had told defendant of his time in a mental hospital), *cert. denied* 537 U.S. 1167 (2003).

[14] See:

First Circuit: United States v. Celestin, 612 F.3d 14, 22 (1st Cir. 2010) (no *Brady* violation when prosecution did not obtain and turn over defendant's bank records until mid-trial because defendant "could have subpoenaed them himself").

Sixth Circuit: Matthews v. Ishee, 486 F.3d 883, 890-891 (6th Cir.)*cert. denied* 552 U.S. 1023 (2007) (no *Brady* violation where jailhouse informant's withdrawal of original guilty plea, plea to reduced charges, and terms of re-sentencing were all "public information.").

Ninth Circuit: Rhoades v. Henry, 638 F.3d 1027, 1039 (9th Cir. 2010) (no *Brady* violation where prosecution disclosed tape but failed to point out exculpatory portion).

[15] See, e.g.:

Third Circuit: United States v. Hill, 976 F.2d 132, 139 (3d Cir. 1992) (no *Brady* violation in failure to produce government agent's grand jury testimony where testimony was summarized in reports previously given to defendant).

Fourth Circuit: Hoke v. Netherland, 92 F.3d 1350, 1355-1356 (4th Cir.), *cert. denied* 519 U.S. 1048 (1996).

[16] Rector v. Johnson, 120 F.3d 551, 558-559 (5th Cir.), *cert. denied* 522 U.S. 1120 (1998).

[17] See:

Seventh Circuit: Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001) (police report of interview of defendant's own witness was *Brady* material), *cert. denied* 535 U.S. 1078 (2002).

But see:

Fifth Circuit: Moore v. Quarterman, 534 F.3d 454, 462 (5th Cir. 2008) (exculpatory witness statement not *Brady* material because witness "only gave the police information that, if true, [defendant] should have already known or should have obtained by his own reasonable investigation").

State Court:

Indiana: Stephenson v. State, 864 N.E.2d 1022, 1057 (Ind. 2007) *cert. denied* 552 U.S. 1314 (2008) (convenience store surveillance tape available to defense "in the exercise of reasonable diligence;" evidence was not "suppressed by government").

[18] Banks v. Dretke, 540 U.S. 668, 695-696, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

[19] See, e.g.:

Tenth Circuit: United States v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999) *cert. denied* 529 U.S. 1077 (2000).

Eleventh Circuit: Haliburton v. Secretary for Department of Corrections, 342 F.3d 1233, 1239 (11th Cir. 2003) *cert. denied* 541 U.S. 1087 (2004).

[20] See: *Second Circuit:* United States v. Stein, 2005 WL 3058644 at *2 (S.D.N.Y. Nov. 15, 2005).

Cf:

Fifth Circuit: United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009), *rev'd on other grounds* 130 S. Ct. 2896 (2010) ("We do not hold that the use of a voluminous open file can never violate *Brady*. For instance, evidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it.").

Sixth Circuit: United States v. Warshak, 631 F.3d 266, 297 (relying on analysis in United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *rev'd on other grounds* 130 S. Ct. 2896 (2010)).

[21] *Fifth Circuit:* United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009), *rev'd on other grounds* 130 S. Ct. 2896 (2010) ("In the present case, the government did much more than drop several hundred million pages on Skilling's doorstep. The open file was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to Skilling's defense. The government created

indices to these and other documents. The government also provided Skilling with access to various databases concerning prior Enron litigation. Skilling contends that the government should have scoured the open file in search of exculpatory information to provide to him. Yet the government was in no better position to locate any potentially exculpatory evidence than was Skilling.").

But see:

Sixth Circuit: United States v. Warshak, 631 F.3d 266, 297-298 (6th Cir. 2010) ("While access to the documents may have been somewhat hampered due to the format in which they were transferred, the district court noted that the defendants' motion practice 'demonstrate[d] they [were] capably navigating the discovery, which primarily all came from [the] [d]efendants in the first place.'" (Alterations in original.)).

§ 5.05 Elements of a *Brady* Violation: Materiality

The most difficult questions concern the third requirement, prejudice to the defendant from the absence of the information. The determination of prejudice turns on whether the information is "material."[1] Favorable evidence is material, and constitutional error results from its non-disclosure by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[2] There are "[f]our aspects of materiality":[3]

[1]—The Elements of Materiality

First, to be material, evidence does not have to be so strong that one considering it would likely vote for the defendant's acquittal; materiality requires only a "'reasonable probability' of a different result—and the adjective is important."[4]

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.[5] A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."[6]

Second, and related, the materiality test is *not* a sufficiency of the evidence test.[7] It is no answer that, even after taking into account the wrongfully undisclosed evidence, the government's case would still have been sufficient.[8] For example, if evidence had been disclosed to defense counsel that impeached the credibility of a government witness, the jury might have rejected the previous testimony and acquitted the defendant, in spite of the sufficiency of other evidence. At the same time, the strength of other evidence pointing to the defendant's guilt is relevant to whether the undisclosed evidence is material.[9]

The lesson for the defense attorney is that the materiality of evidence cannot be evaluated in a vacuum. It "depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."[10] The more cumulative the undisclosed information—whether with respect to the facts of the case or the impeachment of a witness—the less likely that it falls within *Brady*'s materiality requirement.[11] "The critical question, however, is whether the defendant received a trial resulting in a verdict worthy of confidence."[12]

Third, once a court has determined that the undisclosed evidence is material, there is no further harmless error inquiry.[13] The court has, by definition, determined that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[14] Such evidence "must have had [a] 'substantial and injurious effect or influence in determining the jury's verdict.'"[15]

Fourth, materiality is to be determined collectively, not item-by-item.[16] Thus, where several pieces of potentially exculpatory evidence are withheld, their materiality must be measured cumulatively.[17]

[2]—Materiality Not Found

[a]—Exculpatory Information

While a defendant's own statements may be favorable to his defense, a defendant's mere protestations of innocence are unlikely to be considered material.[18] For the same reason, even the most

blatantly exculpatory information is unlikely to be found to be material when the information itself is incredible.[19]

[b]—Cumulative Evidence

An additional version of already disclosed evidence may not be considered material.[20] Impeachment evidence has also been held not to be material for *Brady* purposes when it "merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."[21] For example, if the defense impeaches a government witness with his record of five prior convictions, courts are likely to view evidence of an earlier, sixth conviction for the same offense as merely cumulative. However, a sixth conviction might be the final piece of evidence that leads a juror to reject a witness's testimony; if the conviction is of a different nature than those convictions about which the jury already has knowledge, or if it is of a *crimin falsi*, the argument may be strengthened.

However, information that may seem cumulative at the outset of a trial may become material as the trial progresses. For example, when the prosecution withheld impeachment information related to a witness who testified in both the guilt and penalty phases of a trial, but the defense was able to impeach this witness with two witnesses of its own, additional impeachment evidence of the government's witness no longer was cumulative and became material after the prosecution impeached the two defense impeachment witnesses.[22]

Similarly, even when prior statements of a government witness do not satisfy *Brady*'s materiality standard prior to the trial, where the witness denies giving any pretrial statements to the government, these pretrial statements become material.[23]

While arguments that a defendant could have done a better job impeaching witnesses or refuting the prosecution's story had he possessed additional information have been held insufficient to satisfy the materiality standard,[24] counsel should consider that, depending on the particular circumstances of the case, it may be almost impossible for a court to know which piece of evidence would have an effect on a jury.

---

[1] *Supreme Court:* Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A defendant seeking discovery of information pursuant to *Brady* must make a *prima facie* showing of materiality.

Ninth Circuit: United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) ("Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense.").

[2] United States v. Bagley, 473 U.S. 667, 668, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

[3] See Kyles v. Whitley, 514 US. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[4] *Id*., 514 U.S. at 434.

[5] Trammell v. McKune, 485 F.3d 546, 552 (10th Cir. 2007) (reversing district court denial of habeas petition; "[w]e are not certain that timely disclosure of the Amoco receipts would have resulted in a different result. But that is not the standard.").

See also:

Seventh Circuit: Goudy v. Basinger, 604 F.3d 394, 400 (7th Cir. 2010) ("reasonable probability" standard does not require defendant to prove suppressed evidence would have established innocence).

[6] *Kyles v. Whitley*, N. 3 *supra* (quoting *United States v. Bagley*, N. 2 *supra*, 473 U.S. at 678).

[7] *Id*., 514 U.S. at 435.

[8] See *id*.

[9] *Second Circuit:* United States v. Orena, 145 F.3d 551, 559 (2d Cir. 1998), *cert. denied* 525 U.S. 1072 (1999).

See also:

Fifth Circuit: Powell v. Quarterman, 536 F.3d 325, 340-341 (5th Cir. 2008) *cert. denied* 129 S.Ct. 1617 (2009) (suppressed statements suggesting defendant's friend's involvement in crime immaterial given weight of additional evidence concerning defendant's involvement).

Sixth Circuit: In re Siggers, 615 F.3d 477, 481 (6th Cir. 2010) (suppressed testimony suggesting another person committed crime immaterial given two eyewitness identifications of defendant as shooter).

Eight Circuit: Christenson v. Ault, 598 F.3d 990, 996 (8th Cir. 2010) (although *habeas* claim was procedurally defaulted, court also concluded that undisclosed photographs taken from different angles than disclosed photographs would be immaterial given overwhelming evidence of defendant's guilt).

[10] Smith v. Black, 904 F.2d 950, 967 (5th Cir. 1990), *rev'd on other grounds* 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609 (1992). See also:

Rhoades v. Henry, 638 F.3d 1027, 1038-1039 (9th Cir. 2010) (no *Brady* violation for failure to turn over third police report when third report added no new information to that contained in first two reports).

[11] Allen v. Woodford, 395 F.3d 979, 997 (9th Cir. 2005) *cert. denied* 546 U.S. 858 (2005).

[12] *Eighth Circuit:* United States v. Almendares, 397 F.3d 653, 663 (8th Cir. 2005).

See also:

Seventh Circuit: United States v. Elem, 269 F.3d 877 (7th Cir. 2001), *cert. denied* 535 U.S. 945 (2002).

District of Columbia Circuit: United States v. Johnson, 592 F.3d 164, 171-172 (D.C. Cir. 2010) (government's failure to disclose evidence that heroin found in defendant's bedroom belonged to defendant's cousin—as set forth in FBI wiretap application dated six months after defendant's arrest and one year before his trial—undermined confidence in defendant's conviction).

[13] Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[14] *Id*. (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

[15] Kyles v. Whitley, 514 U.S. 419, 435-436 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[16] *Id*., 514 U.S. at 436-437.

See also:

Rhoades v. Henry, 638 F.3d 1027, 1038-1039 (9th Cir. 2010) (no *Brady* violation for failure to turn over third police report when third report added no new information to that contained in first two reports).

[17] *Supreme Court:* Kyles v. Whitley, 514 U.S. 419, 435-436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Seventh Circuit: Goudy v. Basinger, 604 F.3d 394, 400-401 (7th Cir. 2010).

Eleventh Circuit: Smith v. Sec., Dep't of Corrections, 572 F.3d 1327, 1346-47 (11th Cir. 2009) ("*Brady* materiality is a totality-of-the-evidence macro consideration, not an item-by-item micro one. The most common error courts make in conducting the *Brady* materiality analysis is to stop half way through the process—they consider the force and effect of the undisclosed evidence one item at a time but do not consider it cumulatively. . . . Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part.").

[18] See United States v. Danielson, 325 F.3d 1054 (9th Cir. 2003).

[19] United States v. Bryser, 10 F. Supp. 2d 392 (S.D.N.Y. 1998).

[20] See, e.g.:

Fourth Circuit: United States v. Curtis, 931 F.2d 1011 (4th Cir.), *cert. denied* 502 U.S. 881 (1991).

[21] *Second Circuit:* United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996) (internal citations omitted).

See also:

Second Circuit: U.S. v. Paul Nosworthy, 707 F. Supp. 2d 415, 419 (E.D.N.Y. 2010) (*Brady* not violated where prosecution failed to produce officers' prior testimony, court deemed testimony "irrelevant," and defense was nonetheless able to conduct "withering" and "thorough" cross examinations of officers).

Sixth Circuit: Johnson v. Bell, 525 F.3d 466 (6th Cir. 2008) *cert. denied* 129 S.Ct. 1668 (2009).

Eighth Circuit: United States v. Whitehead, 176 F.3d 1030 (8th Cir. 1999).

Ninth Circuit: Morris v. Ylst, 447 F.3d 735, 741 (9th Cir. 2006) *cert. denied* 549 U.S. 1125 (2007).

Eleventh Circuit: United States v. Jones, 601 F.3d 1247, 1266 (11th Cir. 2010) (no *Brady* violation for failing to disclose letter that could have been used to question witness' motivations for testifying when jury was aware of witness' plea agreement with government).

District of Columbia Circuit: United States v. Hemphill, 514 F.3d 1350, 1360-1361 (D.C. Cir.) cert. denied 129 S.Ct. 590 (2008).

[22] Banks v. Dretke, 540 U.S. 668, 680, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

[23] *Id*., 540 U.S. at 677-678, 680. Perjury by government witnesses is the subject of Chapter 8 *infra*.

[24] United States v. Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994), *cert. denied* 514 U.S. 1008 (1995).

§ 5.06 Materiality From Other Perspectives

[1]—Materiality as Reviewed on Appeal

Appellate courts reviewing allegations of *Brady* violations apply a *de novo* standard of review to the district court's findings on materiality.[1] Determining whether disclosure would have created a "reasonable

probability" of a hung jury or an acquittal, however, is understandably difficult for a court to determine. Similarly, whether a verdict is "worthy of confidence" is almost entirely a subjective matter. As hard as the decision would be for a district court—which has observed the entire case and been able to assess for itself the demeanors of the witnesses and the jury—it is especially difficult for an appellate court.[2]

It is not surprising, then, that appellate courts come to different conclusions about materiality even when faced by the same, or similar, facts. In one case, the circuit court held that the witness's status as an informant was not material,[3] while the Supreme Court later held that the witness's status as an informant must be disclosed, even holding that the status of a *non-testifying* informant must be disclosed if that witness could have amplified or contradicted witnesses who did testify for the government.[4] A year after that decision by the Supreme Court, the Second Circuit found it immaterial that the government did not disclose a co-defendant's status as an informant—without even mentioning the Supreme Court's apparently contrary holding.[5]

In a wide variety of cases that seem contrary to *Brady*, appellate courts have found withheld evidence not material:

- a police report that contradicted the testimony of a confidential informant;[6]
- the prior statement of a witness contradicting her trial testimony on the grounds that the defendant was able to prove that she lied about another statement and the defendant was able to use the tardily disclosed testimony to cross-examine another witness;[7]
- various FBI reports containing witnesses' statements about the defendant's intoxication—his defense to intent—and witness accounts of the shooting and of flight and demeanor that contradicted trial testimony;[8] and
- impeachment material disclosed only after the jury reached a verdict.[9]
- a face sheet from the polygraph unit stating that an individual other than the defendant was "the prime suspect" and that the same individual had burned down the building next to the location of the crime.[10]

In each of these cases, the courts necessarily found no reasonable probability of a different result had the information been disclosed.

As Justice Scalia has commented in a similar context, "ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decision making. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not fact finding, but closer to divination."[11]

The case law demonstrates that materiality is difficult at best as a standard for appellate courts to apply. Not only are appellate courts required to apply "ineffable gradations of probability" to determine the effect on a jury had the government disclosed information that it instead withheld, but also appellate courts are required to determine whether and how defense counsel would have used that information had it been disclosed. Requiring the "hypothesizing of events that never in fact occurred" leaves much to be desired as an appellate standard.

[2]—Problems with the Materiality Standard

The current materiality standard places too much responsibility in the hands of the government in deciding what and what is not *Brady* material. Prosecutors alone are put in the important position of deciding what is "material," with no significant judicial oversight and extremely deferential appellate review. There is an emerging conflictover whether there can even be a true *Brady* violation before trial, when "materiality" may be impossible to assess.

[a]—Materiality as an Unworkable Standard for the Government

The "reasonable probability" standard is a difficult guide to the prosecutor, who must determine *before* the trial the likelihood that a piece of evidence will lead to an acquittal. Moreover, in determining materiality, the evidence must be "considered collectively, not item-by-item."[12] A prosecutor trying to decide whether a particular piece of evidence is *Brady* material must:

1. assume that he does not turn over the piece of evidence,

2. imagine all of the *other* evidence that he expects will be introduced during the trial, including the testimony of witnesses and their demeanor,
3. further assume that there would be a conviction based upon this other evidence,
4. then reverse step (1) and assume that the piece of evidence in question was turned over, and
5. determine whether that piece of evidence would have led to an acquittal or a hung jury, rather than a conviction.

The prosecutor must perform this mental calculation without knowing what defenses will, in fact, be raised. Difficult enough to perform once, it may have to be performed several times for several pieces of evidence that the prosecutor believes may be favorable to the defendant. Each calculation is more difficult than the one before it, because the materiality of the evidence may depend upon the totality of the other evidence at trial, which may depend upon the prosecutor's prior calculations.

The mental gymnastics are entrusted to the person perhaps least able to perform them. Because the prosecutor is not privy to the defense strategy, she cannot be certain—and in many cases will have no idea—what evidence fits into that strategy and is thus "favorable" to the defense. The difficulty in deciding *ex ante* what material is both material and exculpatory has led some courts to refuse to undertake pretrial any *Brady* analysis at all.[13]

The Supreme Court, aware of the difficulty facing the prosecutor has speculated that the difficulty would actually work to the benefit of defendants:

> While the definition of . . . materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden.
>
> * * *
>
> [T]he Government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.
>
> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be . . . . The prudence of the careful prosecutor should not therefore be discouraged.[14]

This reasoning is hardly persuasive. It is akin to saying that vague traffic rules ("don't go too fast") are better than specific ones ("65 miles per hour is the speed limit") because the former will make careful drivers take extra precautions. That proposition is doubtful in itself, and it hardly encourages thoughtful compliance by prosecutors who are *not* scrupulous about their *Brady* duties—not necessarily because they are venal, or even careless, but because they are so convinced (perhaps rightly) of the guilt of the defendant that they discredit evidence that might appear exculpatory to a jury.[15] Moreover, the reasoning seems less persuasive so long as the burden of proving materiality rests with the defendant.

To its credit, the Department of Justice, in an attempt to "promote regularity in disclosure practices," made it official Department "policy" that "prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence."[16] Indeed, Department policy also requires the disclosure of information that (i) "is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense" or (ii) "either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence."[17] These additional disclosures "must" be made "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime."[18]

While helpful, it is unclear how much of a deterrent this policy is. If the deterrent for *Brady* violations were in reality significant, the vagueness of the standard might be less important because prosecutors, concerned about the consequences of violating what a court might determine was a *Brady* obligation, would construe *Brady* especially broadly. But evidence that is not disclosed is seldom found to be

material and most *Brady* violations are never discovered, largely because most cases never come to trial and defendants are never aware of them. It is often only through happenstance that an alleged *Brady* violation comes to the defendant's attention so that he can raise the issue in post-trial proceedings. Usually the evidence in a prosecutor's files—including arguably exculpatory evidence—never comes to light.[19]

[b]—Materiality in the Pretrial Context

The analytical framework that is applied by courts when deciding what is "material" evidence under *Brady* has developed almost entirely in the post-conviction appellate context.[20] This "post-hoc" posture has led some courts to suggest that there can be no *Brady* analysis until after the trial.[21] This logic runs contrary to at least one Court of Appeals decision that has found a *Brady* violation *mid*trial.[22] Moreover, a handful of courts have interpreted *Brady* in the *pre*trial context as requiring prosecutors to produce "all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case."[23] In crafting this standard, these courts have explicitly found that favorable material must be produced regardless of whether the prosecutor believes that it is "material."

In justifying the removal of the question of materiality from the *Brady* equation in a pretrial setting, courts have focused on two factors. First, while acknowledging that *Brady* requires the disclosure of only evidence that is "material," these courts have concluded that the traditional "post-hoc" materiality analysis is "extremely difficult if not impossible" to apply in the pretrial setting.[24] Because the traditional analysis measures "materiality" by looking at the "cumulative" evidence presented, these courts conclude that the question of whether a piece of undisclosed evidence would have influenced the outcome of a trial can be answered only *after* a trial is completed,[25] when it can be addressed by both the prosecutor and the court.[26]

Instead of merely ending the analysis at that point, however, these courts take an important next step and reason that the prosecutor must make pretrial disclosure of favorable evidence, even if it is not "material." As stated by one court, "[s]imply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."[27] Therefore, prosecutors will not be let "off the hook" simply because "materiality" cannot be assessed in a pretrial setting by traditional *Brady* standards. To hold otherwise would be to permit conduct unbecoming by prosecutors that runs contrary to principles of justice:

> [T]he government urges *Brady*'s materiality standard is the limit of the duty to disclose. This court cannot agree.
>
> * * *
>
> *Brady*'s concern whether a constitutional violation occurred after trial is a different question than whether *Brady* is the full extent of the prosecutor's duty to disclose pretrial. *Brady*'s materiality standard for due process violations in a post-trial context should not be used to sanction any and all conduct that does not rise to a constitutional violation of defendant's due process rights because the United States Attorney is held to a higher standard.[28]

Through this and similar reasoning, some district courts have crafted a pretrial *Brady* standard that simply asks if the "evidence" in question is reasonably considered "favorable" to the defense, without regard to whether it is "material."[29] Defense practitioners will want to note the arguments raised in these cases but should be aware that no court of appeals has endorsed this pretrial *Brady* standard.[30] Moreover, the pretrial standard is subject to criticism that in rejecting the question of "materiality," the standard strays too far from *Brady* itself.[31]

[3]—Materiality in Other Contexts

When an act is defined by a legislature "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," that statute violates the Due Process Clause.[32] "Materiality" as used to determine *Brady* violations certainly fits that description, to the detriment of defendants, prosecutors, the courts and the justice system.

The first step in re-evaluating the definition of materiality in the context of *Brady* is an examination of materiality in other contexts. The legal landscape is dotted with requirements rooted in materiality. Defense attorneys can use analogies to these other definitions of materiality to help the court see that information sought by the defense is indeed material.

[a]—Materiality in the Securities Laws

Materiality under the securities laws can be an especially useful analogy. Violations of both civil and criminal securities laws can be founded on "material" misstatements. A statement or omission is material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" at the time the investor was making an investment decision.[33] "[M]ateriality is a determination of whether the market would have cared about a particular statement so that the market price of the stock . . . would then have changed."[34]

This definition of materiality is not unlike the determination regarding a defendant's use of information withheld. Instead of viewing materiality in the context of all of the information later introduced at trial, courts should view the materiality of *Brady* information from the perspective of defense counsel's investigation and preparation for trial. From that perspective, it is possible to see how the information might have led defense counsel to pursue other avenues.

In addition, cumulative information is often not considered material for *Brady* purposes. The opposite may be true in the securities context, because a single additional piece of information may significantly alter the "total mix" of information made available. Using such an analogy, defense counsel could argue that if the non-disclosure of a previous conviction, for example, would be material under the securities laws, it should be material under *Brady*, even when the defense was able to cross-examine a witness about other previous convictions.

[b]—Materiality Under Other Laws

Materiality is also an element of a false statements case. In that context, a statement is material to some decision when it has a "natural tendency to influence" that decision.[35] Although courts are in disagreement as to even what that standard means,[36] it is a standard more readily understood than the *Brady* standard, which requires speculation as to the "probable" effect of the outcome of a criminal trial had something taken place that did not, in fact, take place. Applying this standard, courts would look to whether the information would have had a tendency to influence a defense decision or strategy.

Contract law is also replete with determinations of materiality. For example, a court may find a contract void for unconscionability where the nondrafting party is unaware of a material fact.[37] In assessing unconscionability, courts ask whether the drafting party—usually the party with superior information and bargaining power—took unfair advantage of the weaker, nondrafting party.[38]

In the course of a criminal investigation, the prosecution undoubtedly is the party with superior information. Consider how different the *Brady* inquiry would look if courts considered whether, by withholding the evidence in question, the prosecution affected defense strategy in the case.

In the context of business negotiations, a duty to disclose material information "may arise from the need to complete or clarify one party's partial or ambiguous statement."[39] The duty to disclose in this context arises where one party has knowledge of facts that are not available to the other party and knows that the other party is relying on a mistaken understanding of the facts.[40] This analogy may be particularly useful.

For example, in one case, the First Circuit found a *Brady* violation, not simply because the prosecution withheld the information, but because the prosecution affirmatively, and repeatedly, commented on the incredibility of the defendant's assertions. In the absence of disclosure, these comments led the jury to believe that the government had information to support its contention that the defendant had made up her story, when it in fact possessed just the opposite information.[41] As in

business negotiations, the government's duty to disclose arose in this case from its attempt to mislead. The government misled the jury, the court and the defense.

When defense counsel believes that the government has information that it has failed to disclose, these analogies may be useful in persuading courts to order disclosure of specific information. On appeal, defense counsel should argue for a standard of materiality that can better be applied both by the government and by the courts.

[4]—Proposed New Materiality Inquiry

Classic exculpatory evidence, such as another person's confession to the crime, falls within even the narrowest definition of materiality. Absent a shift to a mandatory open-files policy (a shift that is unlikely ever to come about),[42] courts are left to craft a materiality standard that captures all exculpatory evidence.

The current materiality test is problematic for two reasons. It forces the prosecutor to answer, *ex ante*, a question that can only be answered post-trial, and it allows the prosecutor, who believes the defendant to be guilty, to decide whether the information in question would undermine confidence in an eventual guilty verdict that she already has confidence is correct.[43]

A better inquiry would focus on defense trial strategy—rather than the prosecutor's opinion of a jury's potential reaction to the information in question—and would involve the court in the inquiry. Where the prosecution possesses exculpatory information, it should be required to make its existence known to the defense. Whether the information is cumulative should always be irrelevant. If the defense can provide the court with a reasonable explanation as to how the information in question could alter defense strategy, the information should be considered material.[44]

However, even this standard requires that the prosecutor first determine that information is "exculpatory." Requiring a prosecutor to continue to make that determination fails to solve the problem. It may be that shifting the burden of proof to the government to demonstrate that the defendant received a fair trial when the defense makes a *Brady* claim would be more effective in avoiding *Brady* violations than a new approach to materiality.[45]

In addition, when the trial court finds that the government withheld *Brady* materials in bad faith, there should be an automatic reversal requiring a new trial. It should be presumed that a prosecutor would not willfully withhold information in violation of the Constitution unless that information were material to the defense. Such a rule would operate as a deterrent—currently lacking—to *Brady* violations. Defense requests for *Brady* material would be especially important if there were such a rule, because it would be more likely that a court would find bad faith in the government's failure to provide *Brady* material where there is a specific request for such material than in the absence of such a request.

---

[1] See, e.g.:

Sixth Circuit: United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991), *cert. denied* 504 U.S. 930 (1992).

Ninth Circuit: United States v. Lehman, 792 F.2d 899, 901 (9th Cir.), *cert. denied* 479 U.S. 868 (1986).

Tenth Circuit: United States v. Rogers, 960 F.2d 1501, 1510 (10th Cir.), *cert. denied* 506 U.S. 1035 (1992).

[2] See Teitelbaum, Sutton-Barbere & Johnson, "Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?," 1983 Wisc. L. Rev. 1147 (1983) (concluding, based upon empirical studies, that appellate judges often cannot accurately assess the prejudicial effect of evidence on juries).

[3] Banks v. Cockrell, 48 Fed. Appx. 104 (5th Cir. 2002), *rev'd sub nom.* 540 U.S. 668 (2004).

[4] Banks v. Dretke, 540 U.S. 668, 697-98, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

[5] United States v. Madori, 419 F.3d 159, 169-170 (2d Cir. 2005) cert. denied 546 U.S. 1115 (2006).

[6] United States v. Owens, 96 Fed. Appx. 199 (5th Cir. 2004).

[7] United States v. Stamper, 91 Fed. Appx. 445 (6th Cir. 2004).

[8] Morrow v. Dretke, 367 F.3d 309 (5th Cir.), *cert. denied* 543 U.S. 960 (2004).

[9] United States v. Mitchell, 365 F.3d 215, 257 (3d Cir.), *cert. denied* 543 U.S. 974 (2004).

[10] Ward v. Hall, 592 F.3d 1144, 1186-1187 (11th Cir. 2010), *cert. denied* 131 S.Ct. 647 (2010).

[11] United States v. Dominguez Benitez, 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (Scalia, J., concurring).

[12] Kyles v. Whitley, 514 US. 419, 436-37, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[13] See, e.g.:

Second Circuit: United States v. Stein, 473 F. Supp.2d 597, 600 (S.D.N.Y. 2007) ("[T]here can be no violation of the government's *Brady* obligation unless the defendant has been prejudiced by the government's failure to disclose. Claims under *Brady* therefore may be assessed only after a conviction.").

Fifth Circuit: United States v. Causey, 356 F. Supp.2d 681, 696 (S.D. Tex. 2005) ("[E]ven assuming that the government were withholding evidence favorable to the defense, without the benefit of a trial record the court is unable to determine whether the defendants' right to due process has been, would, or even could be violated.").

Tenth Circuit: United States v. McVeigh, 954 F. Supp. 1441, 1450 (D. Col. 1997) ("[I]t is not possible to apply the materiality standard in *Kyles* before the outcome of a trial is known.").

District of Columbia Circuit: United States v. Hsia, 24 F. Supp.2d 14, 30 (D.D.C. 1998) ("it is not the court's role to referee . . . disagreements about materiality and supervise the exchange of information") (internal quotations omitted).

[14] See *Kyles v. Whitley*, N. 11, *supra* 514 U.S. at 437, 439-40 (citations omitted).

[15] See, e.g., United States v. Rivas, 377 F.3d 195 (2d Cir. 2004) (government committed *Brady* violation requiring reversal where it failed to disclose that testifying witness in narcotics conspiracy and importation case had, in fact, brought the narcotics in question onto the ship; the government believed that the evidence was not exculpatory of defendant because testifying witness "denied knowing what the package contained" and claimed that package belonged to defendant).

[16] United States Attorneys' Manual § 9-5.001, "Policy Regarding Disclosure of Exculpatory and Impeachment Information" (Oct. 19, 2006). For further discussion of the Ogden memo, see § 5.08 *infra*.

[17] *Id.*

[18] *Id.*

[19] See Stacy & Dayton, "Rethinking Harmless Constitutional Error," 88 Colum. L. Rev. 79, 106 (1988) ("Because the facts establishing a *Brady* violation are exclusively within a prosecutor's possession, they are easily concealed from the defense. It is therefore likely that a significant share of constitutional errors involving the *Brady* right, whether intentional or negligent, are never uncovered.").

[20] See § 5.06[1] *supra*.

[21] See, e.g.:

Second Circuit: United States v. Stein, 473 F. Supp.2d 597, 600 (S.D.N.Y. 2007).

Fifth Circuit: United States v. Causey, 356 F. Supp.2d, 681, 696 (S.D. Tex. 2005).

[22] See United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008).

[23] *Ninth Circuit:* United States v. Sudikoff, 36 F. Supp.2d 1196, 1199 (C.D. Cal. 1999).

See also:

Seventh Circuit: United States v. Carter, 313 F. Supp. 2d 921, 924-925 (E.D. Wis. 2004).

District of Columbia Circuit: United States v. Safavian, 233 F.R.D. 12, 16-17 (D.D.C. 2005).

[24] United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005).

[25] See:

Seventh Circuit: United States v. Carter, 313 F. Supp. 2d 921, 924 (E.D. Wis. 2004).

Ninth Circuit: United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198-1199 (C.D. Cal. 1999).

[26] See United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial.").

[27] *United States v. Acosta*, N. 24 *supra*, 357 F. Supp. 2d at 1233. See also, United States v. Sudikoff, 36 F. Supp.2d 1196, 1199 (C.D. Cal. 1999) ("[T]hat the suppression may not have been sufficient to violate due process does not mean that it was proper.").

[28] *United States v. Acosta*, N. 24, *supra*, 357 F. Supp.2d at 1232.

[29] See:

Seventh Circuit: United States v. Carter, 313 F. Supp.2d 921, 924-925 (E.D. Wis. 2004).

Ninth Circuit: United States v. Acosta, N. 24, *supra*, 357 F. Supp.2d at 1233-1234; United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198-1200 (C.D. Cal. 1999).

District of Columbia Circuit: United States v. Safavian, 233 F.R.D. 12, 16-17 (D.D.C. 2005).

[30] *Cf.*, United States v. Price, 566 F.3d 900, 913 n.14 (9th Cir. 2009) (citing *Acosta* and *Sudicoff* favorably).

[31] See:

Second Circuit: United States v. Stein, 424 F. Supp. 2d 720, 726 (S.D.N.Y. 2006) (stating that an analysis that would require the disclosure of favorable evidence pursuant to *Brady* prior to trial "appears" to have been "rejected" in the Second Circuit).

Fifth Circuit: United States v. Causey, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005) (rejecting pretrial disclosure; "the *Brady* standard applied in *Sudikoff* conflicts with the *Brady* standard applied in this circuit").

[32] Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

[33] *Supreme Court:* Basic v. Levinson, 485 U.S. 224, 231-232, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (quoting TSC Industries Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)).

Second Circuit: In re Global Crossing, Ltd. Securities Litigation, 322 F.Supp.2d 319, 328 (S.D.N.Y 2004).

[34] In re Worldcom, Inc. Securities Litigation, 2005 WL 408137 at *4 (S.D.N.Y. Feb. 22, 2005).

[35] Kungys v. United States, 485 U.S. 759, 772, 108 S.Ct. 1537, 99 L.Ed. 839 (1988).

[36] See, e.g., United States v. Wu, 419 F.3d 142, 148-150 (2d Cir. 2005) (Pooler, J., dissenting).

[37] In re Currency Conversion Fee Antitrust Litigation, 361 F. Supp. 2d 237, 251 (S.D.N.Y. 2005).

[38] See, e.g.: Graham v. State Farm Mutual Auto Insurance Co., 565 A.2d 908, 912 (Del. 1989); J.A. Jones Construction Co. v. City of Dover, 372 A.2d 540, 552 (Del. Sup. 1977).

[39] Banque Arabe et Internationale d'Investissement v. Maryland National Bank, 57 F.3d 146, 155 (2d Cir. 1995).

[40] *Id.*, 57 F.3d at 153.

[41] United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993).

[42] Open-files policies have their own problems. It is often difficult for a single defendant to sift through the thousands or millions of documents made available in white-collar cases, and dividing the work with co-defendants requires relying on other counsel to discover evidence that may be helpful to someone with a different strategy than her own.

[43] See United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

[44] *Cf.*, DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006) ("[I]f there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel—and not of the prosecution—to exercise judgment in determining whether the defendant should make use of it. . . . To allow otherwise would be to appoint the fox as henhouse guard.").

[45] See § 5.09 *infra.*

§ 5.07 When Information Must Be Disclosed

To devise and effectuate the best possible strategy, defense counsel must pursue every available avenue to obtain as much disclosure as possible from the government before trial. While the government has significantly more resources than virtually any defendant, a defense investigation may at least reveal sufficient information about the case generally, or a particular witness, for defense counsel to convince the court that the government may be withholding information. Such defense arguments should be as specific and fact-based as possible. The point is not that the government may be acting in bad faith, but that the government and the defense may not see eye-to-eye concerning what information would be helpful to the defense.[1]

In general, information must be disclosed at a point when it can be of some use to the defendant.[2] Ideally, the government would turn over all *Brady* information to the defense prior to trial, allowing defense counsel time to use the material to investigate and integrate it into the defendant's trial strategy. Unfortunately, neither the government nor trial courts are bound by any hard and fast rule concerning when disclosure should occur.[3] Instead, the government must turn over information only in sufficient time for the defendant to make use of it.[4]

Defense arguments should emphasize that the timing of disclosure is within the discretion of the trial court, and that an appellate court is unlikely to reverse a district court order requiring production sufficiently in advance of trial to make the information useful to the defense. At a minimum, such defense arguments force the government to articulate its countervailing interests in late disclosure.

[1]—Prior to Testimony or Cross-Examination

It is not an abuse of discretion for the district court to order production of *Brady* impeachment material prior to the opening of the trial, and defense counsel should seek such an order.[5] Disclosure on the day the witness testifies can be timely.[6] Moreover, evidence concerning any deal a witness may have made with the prosecution need not be turned over until the witness testifies,[7] unless the court orders otherwise.[8]

When information is not turned over until after the trial begins, or after the witness has begun testifying, the defendant must be given an opportunity to use the information.[9] This right generally includes the right to recall a witness, if necessary or, where additional investigation is required, an adjournment.

When information is disclosed during trial but too late for the defense to make use of it, a mistrial may be ordered. If the delayed disclosure was the result of flagrant or willful conduct, a trial court has discretion to dismiss the indictment.[10]

Defense attorneys should argue that the interests of judicial economy and consideration for the jury support early disclosure of the government's evidence.

[2]—Prior to Sentencing

Brady applies to sentencing, and both the materiality and timing standards are the same as they are for trial disclosures. A defendant's own statements that do not qualify as material before the trial may be material at sentencing. For example, while a defendant's inculpatory pre-arrest statements are not *Brady* material in the context of trial, his early acceptance of responsibility may decrease his sentence, making those statements *Brady* material for sentencing.[11]

[3]—Prior to a Plea

Brady's interest in a fair trial is difficult to apply in the context of plea negotiations.[12] The materiality inquiry in the plea context focuses on whether the defendant would have refused to plead had the information at issue been revealed to him.[13] The Supreme Court has rejected the argument that a defendant is entitled to potential impeachment material prior to a guilty plea because "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary."[14] The Supreme Court has not yet ruled, however, on whether a defendant is entitled to exculpatory information prior to a guilty plea.[15]

However, no one benefits when people plead guilty to crimes they did not commit, and full disclosure in the context of plea negotiations would help reduce such pleas. At a minimum, disclosure should be required if the evidence in question goes to the defendant's innocence, rather than to the credibility of a witness.

[4]—*Ex Parte* Disclosure Proceedings

The defense may come to believe that certain information contains *Brady* material, and the government may resist disclosing the material on the grounds that disclosure would sacrifice a governmental interest in, e.g., keeping secret the identity of a confidential informant or the terms of his relationship with the government,[16] or maintaining the confidentiality of presentence reports.[17] In such circumstances, courts have agreed to review materials *in camera* and *ex parte* to determine whether the materials contain *Brady* information, and, if so, whether the materials can be disclosed to the defense without compromising the government's interests in maintaining confidentiality.[18]

In camera and *ex parte* proceedings in criminal trials must be the rare exception, not the norm, or else both the court's appearance of impartiality and the Sixth Amendment's guarantee of a public trial will be undermined.[19] Thus, the government must make a compelling showing of the need for secrecy before the courts undertake such proceedings.[20] The Second Circuit found such a compelling showing was made where the government submitted evidence to the trial court concerning a witness's cooperation with the government in an unrelated matter, arguing that the evidence lacked impeachment value and that its disclosure would endanger the life of the witness.[21] The district court sealed the information and declined

to order its disclosure to the defense, and the circuit found no error, on the ground that the impeachment evidence was not material and in light of a concern for the safety of the witness.[22]

[5]—Delayed Disclosure

Delayed disclosure violates *Brady* if the delay prejudiced the defendant by preventing him from using the material effectively in preparing and presenting his case. The courts disagree about the theoretical basis for this "prejudice" standard for delayed disclosure, if not about its application. Some courts take the view that delaying disclosure to the point where a defendant cannot use the information amounts to suppression of *Brady* material.[23] For these courts, the standard for reversal in delayed disclosure cases is the same as in cases of complete nondisclosure, that is, reversal is appropriate only "where there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different."[24] These courts are unlikely to reverse for violation of *Brady* in cases where disclosure was merely delayed.[25]

Other courts distinguish the usability standard of delayed disclosure from the more demanding "reasonable probability of a different result" standard of nondisclosure.[26] The standard for timeliness of disclosure is the constitutional right to a fair trial. Delay in disclosure warrants reversal only when the timing of disclosure so interfered with defendant's preparation or presentation of his defense that he was denied his constitutional right to a fair trial.[27]

Because it asks whether defendant had an opportunity to use the late disclosed material, the standard requires defense counsel to persuade the court that delayed disclosure amounted to a failure to disclose. Delayed disclosure can adversely effect the use of information in a number of ways, including preventing its use in choosing a defense strategy.

Because the standard is context specific, there are no bright line rules about when disclosure is ineffective. The type of information and the use to which it may be put are as important to the analysis as the timing of disclosure.[28] Courts have upheld convictions when *Brady* material was disclosed during trial, on the ground that defendant had sufficient opportunity to use the information.[29] By the same token, even pretrial disclosures have been held to violate *Brady* on the ground that the disclosure was too late to be used effectively by the defendant.[30]

There is some disagreement among the Courts of Appeal about whether to consider the reasons for late disclosure when deciding whether *Brady* is violated. The First and Second Circuits discount the reasons for delay,[31] while the Eighth and Ninth Circuits consider the reasons for delay as important to the inquiry as defendant's ability to use the information.[32]

---

[1] *Cf.*:

Third Circuit: United States v. Mitchell, 365 F.3d 215, 255 (3d Cir.) (where bad faith on the part of the government *can* be demonstrated, a court should weigh such evidence in the overall materiality analysis, because it is "doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial"), *cert. denied* 543 U.S. 974 (2004).

Seventh Circuit: United States v. Jackson, 780 F.2d 1305, 133 n.4 (7th Cir. 1986) (non-*Brady* materiality context; "[it is] doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial").

[2] United States v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), *cert. denied* 532 U.S. 1078 (1998).

[3] *Cf.*, United States Attorneys' Manual § 9-5.001, "Policy Regarding Disclosure of Exculpatory and Impeachment Information" (Oct. 19, 2006) (stating Department of Justice policy that the disclosure of material, exculpatory evidence must be "made in sufficient time to permit the defendant to make effective use of that information" and in "most cases . . . will be made in advance of trial"). There is a split in authority as to whether there can even be a *Brady* violation pretrial. See generally, § 5.06[2] *supra.*

[4] See:

Second Circuit: Leka v. Portuondo, 257 F.3d 89, 103 (2d Cir. 2001) ("The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.").

Fourth Circuit: United States v. Garcia, 271 Fed. Appx. 347, 352 (4th Cir. 2008) (providing evidence to defense one day before relevant witness testified does not constitute a *Brady* violation where evidence is "neither protracted nor complicated").

Sixth Circuit: United States v. Garner, 507 F.3d 399, 406-407 (6th Cir. 2008) (*Brady* violation where prosecution did not produce to defense evidence acquired close to beginning of trial that required additional investigation; "[a]lthough the prosecution may not have received the phone records until shortly before the start of trial. . . . The government used those five days to check the phone numbers. . . . The defense should have been afforded at least the same amount of time to conduct its own investigation. . . .").

District of Columbia Circuit: United States v. Andrews, 532 F.3d 900, 907 (D.C. Cir. 2008) (no *Brady* violation where witness notes were produced on fourth day of trial, immediately prior to beginning of defense case).

See also, § 5.08 *infra*, concerning Local Rules governing the timing of disclosure.

[5] See:

Third Circuit: United States v. Starusko, 729 F.2d 256 (3d Cir. 1984).

But see:

Second Circuit: United States v. Gil, 297 F.3d 93, 105-107 (2d Cir. 2002) (*Brady* violation when less than one business day before start of trial, the government delivered to the defense 2,700 pages of documents which included over 600 exhibits).

[6] United States v. Bissell, 954 F. Supp. 841 (D.N.J. 1996).

See also:

United States v. Celis, 608 F.3d 818, 834-837 (D.C. Cir. 2010) (*per curium*), *cert. denied,* 131 S.Ct. 620 (2010) (no *Brady* violation where, pursuant to protective order, prosecution did not name witnesses until two days before testimony where evidence against defendant, including video and wiretap evidence, was overwhelming).

[7] United States v. Rinn, 586 F.2d 113 (9th Cir. 1978), *cert. denied* 441 U.S. 931 (1979).

[8] *Cf*., 18 U.S.C. § 3500 (the Jencks Act) (providing that prior statements of a witness shall not be turned over until after the witness testifies; in fact, in most cases, the court orders 3500 material to be turned over in advance of trial, certainly in advance of the witness's testimony, in order to avoid delay). Note, however, that the disclosure requirements of *Brady* "always trump[]" the disclosure requirements of both the Jencks Act and Rule 16, F.R.Crim.P. See United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005). The Jencks Act and Rule 16, F.R. Crim. P., are discussed in greater detail in Chapter 4 *supra.*

[9] The defendant can waive a potential *Brady* claim by failing to accept the court's offer of extra time to make use of tardily disclosed information. See United States v. Williams, 132 F.3d 1055 (5th Cir. 1998).

[10] See United States v. Chapman, 524 F.3d 1073, 1084, 1088 (9th Cir. 2008) (affirming dismissal of action mid-trial based on prosecution's admission that it failed to disclose *Brady* material and the prosecution's "flagrant" misconduct in, among other things, failing to keep a discovery log).

[11] See United States v. Severson, 3 F.3d 1005 (7th Cir. 1993).

[12] In addition, many plea agreements include waivers of *Brady* rights, and courts have upheld such waivers. See, e.g.:

Supreme Court: United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 152 L.Ed.2d 586 (2002).

Ninth Circuit: United States v. Mortensen, 63 Fed. Appx. 348, 349 (9th Cir. 2003).

[13] *Ninth Circuit:* Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995).

See:

Second Circuit: United States v. Avellino, 136 F.3d 249 (2d Cir. 1998).

Cf.:

Tenth Circuit: United States v. Walters, 269 F.3d 1207, 1214-1215 (10th Cir. 2001) (failure to disclose impeachment evidence prior to guilty plea did not violate *Brady* where defendant did not demonstrate that he would have insisted on a trial had the government turned it over).

[14] *Supreme Court:* United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 152 L.Ed.2d 586 (2002).

Sixth Circuit: United States v. Cottage, 307 F.3d 494 (6th Cir. 2002).

[15] United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) (noting lack of Supreme Court authority on accused's right to exculpatory evidence prior to plea and noting differing circuit court treatment of issue).

[16] See, e.g.:

Second Circuit: United States v. Madori, 419 F.3d 159 (2d Cir. 2005).

Ninth Circuit: United States v. Blanco, 392 F.3d 382, 392-395 (9th Cir. 2004).

[17] See, e.g.:

Fifth Circuit: United States v. Scroggins, 379 F.3d 233, 263-264, 269 (5th Cir. 2004), *rev'd on other grounds* 543 U.S. 1112 (2005).

Seventh Circuit: United States v. McGee, 408 F.3d 966, 974 (7th Cir. 2005).

[18] See e.g.:

First Circuit: United States v. De La Paz-Rentas, 613 F.3d 18, 27 (1st Cir. 2010)

Second Circuit: United States v. Madori, 419 F.3d 159 (2d Cir. 2005).

Seventh Circuit: United States v. McGee, 408 F.3d 966, 974 (7th Cir. 2005).

See also:

Fifth Circuit: United States v. Scroggins, 379 F.3d 233, 263-264, 269 (5th Cir. 2004), *rev'd on other grounds* 543 U.S. 1112 (2005).

Ninth Circuit: United States v. Blanco, 392 F.3d 382, 392-395 (9th Cir. 2004).

[19] United States v. Madori, 419 F.3d 159, 171 (2d Cir. 2005).

See also:

United States v. Jewell, 614 F.3d 911 (8th Cir. 2010), *cert. denied* 131 S. Ct. 1677 (2011) (speculation that a file contains *Brady* materials is insufficient to compel remand for *in camera* review).

[20] *Id*.; United States v. Molina, 356 F.3d 269, 274-275 (2d Cir. 2004) (*ex parte* review of co-defendants' PSRs permitted only if defendant makes threshold showing of good faith belief that PSRs contain exculpatory evidence not available elsewhere).

[21] *United States v. Madori*, N. 19 *supra*, 419 F.3d at 164, 171.

[22] *Id.*, 419 F.3d at 171.

[23] See:

Seventh Circuit: United States v. O'Hara, 301 F.3d 563, 569 (7th Cir.), *cert. denied* 537 U.S. 1049 (2002).

Eleventh Circuit: United States v. Beale, 921 F.2d 1412, 1426 (11th Cir.), *cert. denied* 502 U.S. 829 (1991).

[24] United States v. Davis, 306 F.3d 398, 420-421 (6th Cir. 2002) (internal quotations omitted), *cert. denied* 537 U.S. 1208 (2003).

[25] *Id.*, 306 F.3d. at 421 ("Thus, *Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose.") (internal quotations omitted).

[26] United States v. Ingraldi, 793 F.2d 408, 411-412 (1st Cir. 1986). But see, United States v. Perez-Ruiz, 353 F.3d 1, 8-9 (1st Cir. 2003), *cert. denied* 541 U.S. 1005 (2004) (stating that "delayed disclosure only leads to the upsetting of a verdict when there is a reasonable probability that, had the evidence been disclosed to the defense in a timeous [*sic*] manner or had the trial court given the defense more time to digest it, the result of the proceeding would have been different").

[27] United States v. Shelton, 588 F.2d 1242, 1247 (9th Cir. 1978), *cert. denied* 442 U.S. 909 (1979).

[28] See DiSimone v. Phillips, 461 F.3d 181, 197 (2d Cir. 2006) ("The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use.'").

[29] See, e.g.:

First Circuit: United States v. Perez-Ruiz, 353 F.3d 1 (1st Cir. 2003), *cert. denied* 541 U.S. 1005 (2004).

Sixth Circuit: United States v. Bencs, 28 F.3d 555 (6th Cir. 1994), *cert. denied* 513 U.S. 117 (1995).

Eighth Circuit: United States v. Gonzales, 90 F.3d 1363 (8th Cir. 1996).

District of Columbia Circuit: United States v. Bailey, 622 F.3d 1, 8 (D.C. Cir. 2010) (no *Brady* violation where the inability to locate a traffic ticket was disclosed at trial "in sufficient time for appellant to make effective use of the ticket's absence"); United States v. Andrews, 532 F.3d 900 (D.C. Cir. 2008).

[30] See: Leka v. Portuondo, 257 F.3d 89, 100-103 (2d Cir. 2001) (disclosure of identity of key witness on "eve of trial" violated *Brady* because defense did not have opportunity to use information effectively); St. Germain v. United States, 2004 WL 1171403, at *10-*18 (S.D.N.Y. May 11, 2004) (granting new trial where disclosure made immediately prior to trial).

[31] *First Circuit:* United States v. Perez-Ruiz, 353 F.3d 1, 8 (1st Cir. 2003) ("When *Brady* or *Giglio* material surfaces belatedly, the critical inquiry is not why disclosure was delayed but whether the tardiness prevented defense counsel from employing the material to good effect.") (Internal quotations omitted.), *cert. denied* 541 U.S. 1005 (2004).

Second Circuit: United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995) ("Where the government's suppression of evidence amounts to a denial of due process, the prosecutor's good faith or lack of bad faith is irrelevant."), *cert. denied* 516 U.S. 115 (1996).

[32] Ashker v. Class, 152 F.3d 863, 867 (8th Cir. 1998) ("'In determining whether disclosure was timely enough to satisfy due process, we consider the prosecution's reasons for late disclosure, . . . and [what opportunity] . . . the defendant had . . . to make use of the disclosed material.'") (quoting LaMere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987)).

§ 5.08 Local Rules and Department of Justice Policy

A number of federal district courts have local standing rules that delineate a prosecutor's discovery obligations by outlining what types of material must be turned over by the government and when it must do so.[1] Such rules are not "constitutionally compelled" and are instead based on a court's "inherent power to manage its docket and provide for the orderly and timely disposition of cases."[2]

The local rules vary widely from state-to-state, but the rules issued by the District of Massachusetts are notable, having been described by the American College of Trial Lawyers as "the most extensive local criminal discovery rules in the nation."[3] In 1998, Massachusetts amended its local rules, partially in response[4] to a case in which the prosecutors were taken to task for continuing "a pattern of sustained and obdurate indifference to, and un-policed subdelegation of, disclosure responsibilities by the United States Attorneys Office" in Boston.[5] The rules provide for "[a]utomatic" discovery and requires that the government produce, within twenty-eight days of a defendant's arraignment, an array of discovery, including Rule 16 material, the identification of un-indicted co-conspirators, and certain impeachment evidence.[6] Even prior to the 1998 amendments, the Massachusetts Local Rules gave teeth to the local federal prosecutor's *Brady* obligations.[7]

The effect of the local rules may be examined by consideration of a *habeas* petition following a guilty plea by a capo of the Patriarca Family of La Cosa Nostra. The plea involved the petitioner ordering his co-defendant to murder a third person. Well after the plea, the court learned that the Assistant United States Attorney (AUSA) prosecuting the case had been in possession of information from a witness that the co-defendant had admitted killing the third person *without* the petitioner's permission. The court granted the *habeas* petition,[8] and its holding was affirmed.[9]

The district court also referred the matter for investigation to the Department of Justice. The Department of Justice's Office of Professional Responsibility (OPR) found that the AUSA responsible had "engaged in professional misconduct and exercised poor judgment."[10] It further found that the witness's information was "exculpatory and impeaching."[11] Even after that finding, however, the United States Attorney for the District of Massachusetts still argued in the appellate court (in its unsuccessful appeal of Ferrara's *habeas* petition) that the information was *not Brady* material.[12]

The district court—incensed by both the United States Attorney's argument before the First Circuit Court of Appeals (which the district court found was entirely inconsistent with the finding of OPR), and by what the district court found was too light a punishment of the AUSA (private letter of reprimand)—referred the matter to the local bar association, requesting the initiation of formal disciplinary proceedings against the AUSA.[13] The Massachusetts Bar has "accepted the appointment to prosecute" the disciplinary proceedings against the violating attorney.[14]

Chief District Judge Wolf has been at the forefront of another high- profile case involving *Brady* violations at the United States Attorneys' Office for the District of Massachusetts.[15] Indeed, Judge Wolf took the opportunity in this case to strongly criticize federal prosecutors in Massachusetts and the Department of Justice for their failures to adhere to the requirements of *Brady*.[16] As a result, Judge Wolf took the perhaps unprecedented step of "arranging to have a program presented on discovery in criminal cases involving judges, defense lawyers, and prosecutors" which Massachusetts federal prosecutors "will be at least invited, and perhaps ordered, to attend."[17] Ultimately, sanctions were not imposed, but only after a showing that sufficient remedial measures had been taken by the AUSA, including participation in such training programs.[18]

To the extent that the local rules of any court impose obligations on the prosecutor that exceed the requirements of *Brady*, violations of such locally imposed obligations will not constitute constitutional error.[19] Practitioners should make sure to check within their jurisdictions to determine whether local rules exist that address the government's discovery obligations and the extent of those obligations.

In addition to local rules, Department of Justice policies address federal prosecutors' *Brady* obligations. In January 2010, stung by the embarrassment of the case of *United States v. Stevens,*[20] in which the conviction of former United States Senator Ted Stevens was vacated because of the government's failure to produce *Brady* material, the Department of Justice issued three memoranda regarding discovery policies. These memoranda do not have the force of law, but they may at least lead to some standardization of the discovery practices in the various United States Attorneys' offices.

The memoranda require each office to "develop a discovery policy that reflects circuit and district court precedent and local rules and practices," and it provides that individual prosecutors are required to "obtain supervisory approval to depart from the" prescribed practices.[21] The memoranda also set forth discovery guidance for prosecutors intended "to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case."[22]

The guidance includes an injunction that the prosecutor must search the files of "all members of the prosecution team" for discovery materials, including "federal, state and local law enforcement officers and other government officials participating in the investigation and prosecution."[23] It also instructs prosecutors to "err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes."[24] The memoranda also instruct the prosecutors to search all investigative agency files, all evidence gathered during the investigation, all "substantive communications" among members of the prosecution team about the case, and also communications "between victim-witness coordinators and witnesses and/or victims."[25] They also urge prosecutors to have "candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues."[26] They advise that although, generally speaking, witness interviews are not required by law to be memorialized, such interviews "should be memorialized by the agent," and the prosecutor should review the interview memoranda for discoverable information; it notes that "material variances" in a witness's statements "should be provided to the defense as *Giglio* information. The memoranda expressly state that "[t]rial preparation meetings with witnesses generally need not be memorialized."[27]

The memoranda states that "[p]rosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations" of Federal Rules of Criminal Procedure 16, and 26.2, 18 U.S.C. § 3500, *Brady* and *Giglio*.[28] It also states that prosecutors are encouraged to make disclosure early—unless countervailing factors counsel against early disclosure.[29] It also states that exculpatory information must be disclosed "reasonably promptly after discovery," but provides no further guidance on what that means.[30]

The January 2010 discovery memoranda were greeted with much excitement. It remains to be seen, however, what if any effect they will have on practice by federal prosecutors.

---

[1] See, e.g.:
Alabama: S.D. Ala. L.R. 16.13.
Florida: S.D Fla. Gen. R. 88.10.
Massachusetts: D. Mass. R. 116.1-.2.

[2] United States v. Perez, 222 F. Supp. 2d 164, 171 (D. Conn. 2002).

[3] See American College of Trial Lawyers, "Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16," 41 Am. Crim. L. Rev. 93, 105 (2004).

[4] See *id*.

[5] United States v. Mannarino, 850 F.Supp. 57, 59 (D. Mass. 1994).

[6] See D. Mass. R. 116.1-.2.

[7] See: United States v. Snell, 899 F. Supp. 17, 19, 21 n.9 (D. Mass. 1995) (relying in part on language of Local Rule 116.1 in forcing government to turn over *Brady* material immediately; distinguishes other cases "because none deals with a local rule on *Brady* as explicit as that of this district"); United States v. Guzman, 160 F.R.D. 6, 7 (D. Mass. 1995) (same).

[8] Ferrara v. United States, 384 F. Supp.2d 384 (D. Mass. 2005).

[9] Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006).

[10] Letter from Chief District Judge Mark L. Wolf to the Honorable Alberto R. Gonzales, Attorney General of the United States (June 29, 2007) (quoting Dep't of Justice Office of Professional Responsibility Report, dated January 10, 2005).

[11] *Id.* (quoting Dep't of Justice Office of Professional Responsibility Report, dated January 10, 2005).

[12] Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006), Opening Brief for the United States at 82-83.

[13] Letter from Chief District Judge Mark L. Wolf to Constance Vecchione, Massachusetts Board of Bar Overseers (June 29, 2007).

[14] In re Auerhahn, No. 09-10206 (D. Mass. filed July 28, 2009).

[15] See United States v. Jones, 620 F. Supp.2d 163, 164-167 (D. Mass. 2009) (summarizing *Brady* violation and considering sanctions against AUSA).

[16] *Id.*, 620 F. Supp.2d at 167 ("The persistent recurrence of inadvertent violations of defendants' constitutional right to discovery in the District of Massachusetts persuades this court that it is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government's obligation to produce certain information to defendants is understood and properly discharged.").

[17] *Id.*

[18] See United States v. Jones, 686 F.Supp.2d 147, 152-153 (D. Mass. 2010).

[19] See United States v. Simms, 385 F.3d 1347, 1357 (11th Cir. 2004) (local rule providing for disclosure by the government, at the defendant's arraignment, of all *Brady* material, "without regard to materiality;" despite violation of rule, no constitutional error because defendant could not demonstrate a "reasonable probability of a different result" had the information been disclosed earlier than when it was) (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

[20] United States v. Stevens, No. 1:08-cr-00231 (April 4, 2009).

[21] Department of Justice Memorandum, "Requirement for Office Discovery Policies in Criminal Matters" (David W. Ogden, Jan. 4, 2010). Note that along with the Ogden memo, the Department of Justice created the new position of National Coordinator of Criminal Discovery Initiatives in an attempt to provide prosecutors with the training and resources they need to meet discovery obligations in criminal cases.

[22] Department of Justice Memorandum, "Guidance for Prosecutors Regarding Criminal Discovery" (David W. Ogden, Jan. 4, 2010).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Department of Justice Memorandum, "Guidance for Prosecutors Regarding Criminal Discovery" (David W. Ogden, Jan. 4, 2010).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Department of Justice Memorandum, "Guidance for Prosecutors Regarding Criminal Discovery" (David W. Ogden, Jan. 4, 2010).

§ 5.09 The Government's Duty to Preserve Potential *Brady* Material

The Constitution provides criminal defendants with a "constitutionally guaranteed access to evidence"[1] which demands that the government preserve not all, but only *certain* categories of evidence. Any government destruction of evidence will not violate the Due Process Clause unless the evidence: (1) "possess[es] an exculpatory value that was apparent before the evidence was destroyed" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[2] Where evidence has been destroyed and these factors are met, determining a remedy is particularly difficult. In nondisclosure cases, the court may grant the defendant a new trial at which the previously suppressed evidence can be introduced. That remedy is, however, unavailable when the government has destroyed the evidence.

While the government's good or bad faith in failing to disclose *Brady* material is irrelevant, the government's good or bad faith is relevant in assessing the government's failure to preserve evidence. Thus, in addition to looking to the two factors mentioned above—the evidence's exculpatory value and its uniqueness—the good or bad faith of the government in destroying the evidence is a third, and oftentimes critical, factor in a court's decision whether or not to require a remedy. The analysis employed by courts in reaching a decision on remedies in destroyed evidence cases has been described as "a case-by-case assessment of the government's culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the government's untainted proof."[3] Although this description appears to equate the good or bad faith of the government with other considerations, more often than not, as demonstrated below, the government's good or bad faith is the critical factor in the analysis: Unless a defendant can clearly demonstrate bad

intent on the part of the government, remedies, such as dismissal of the indictment or suppression of government evidence, will be rare.[4]

[1]—Exculpatory Value

The inquiry into whether destroyed evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed" is similar to the materiality inquiry discussed *supra*: courts ask if the destroyed evidence would have made a substantial difference in the overall outcome of the case.[5] This proof is often difficult to establish—the defendant has the burden of proof and *cannot* rely on "speculation" in attempting to demonstrate the exculpatory nature of any destroyed evidence,[6] while the prosecutor (and the deciding judge) inherently *must* rely on "speculation" in arguing (or ruling) that the destroyed evidence was *non*-exculpatory.[7]

[2]—Comparable Evidence

A criminal defendant will also have the burden of demonstrating that the destroyed evidence was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[8] Courts have applied this language quite broadly. Thus, where defendants' "breath samples" were destroyed by the government, leading to defendants' inability to use such data in challenging their incriminating "Intoxilyzer" test results in drunk driving prosecutions, the Supreme Court suggested a myriad of other means to challenge the results, including examining the "Intoxilyzer" machine for defects and cross-examining the machine operator.[9] Following this reasoning, if a court believes that an objectively "reasonable" evidentiary alternative exists from which a defendant can establish his legal arguments, the defendant will not prevail in a due process challenge. This seems logical, but only to a point—that the cross-examination of a government employee could serve as "comparable evidence" to the tangible items themselves seems to be an especially questionable proposition, but has, at least in part, satisfied this factor several times.[10]

Instances in which defendants were able to show that it would be impossible "to obtain comparable evidence by other reasonably available means" are few and far between, typically involving unique evidence that is beyond the scope of the "everyday" criminal investigation. Examples include the destruction by the government of sophisticated laboratory equipment suspected of being used to manufacture methamphetamine[11] or of the steel "legs" of radio transmission towers fraudulently constructed by defendants while under contract with the government.[12]

[3]—Bad Faith

Most defendants making destroyed evidence arguments will also have to demonstrate bad faith in order to establish a due process violation. The Supreme Court made this clear in the case of *Arizona v. Youngblood*, which established a crucial distinction between the treatment of destroyed "*material* exculpatory" evidence and the treatment of destroyed evidence that is merely "*potentially* useful."[13] The good or bad faith of the government in the destruction of "material exculpatory" evidence, the Court stated, is irrelevant. However, with evidence that is only "potentially useful," the type "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," the Due Process Clause will not be violated without a showing of bad faith on the part of the government.[14] The Court justified such a huge distinction in a few sentences, citing concerns over the task courts must face in "divining" the value of non-existent evidence and fears over placing unreasonable burdens on police officers.[15] But, the Court was comfortable in adding the bad faith requirement where the evidence was only "potentially useful," as such a showing, in the eyes of the Court, would somehow also help shed light on the innocence of the defendant. As the Court explained, where bad faith could be shown, "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."[16]

When forced to choose, courts dealing with these issues rarely have the facts at their disposal confidently to rule that destroyed evidence would have been *conclusively* "material[ly] exculpatory," thus avoiding *Youngblood*'s bad faith requirement.[17] Most destroyed evidence situations involve inconclusive evidence that a court will safely be able to deem only "potentially" useful. In *Youngblood*, for example, the

government failed to preserve semen samples from the scene of a rape. The defendant, arguing mistaken identity, claimed that the semen samples would have exonerated him. As in the vast majority of criminal cases, the semen in *Youngblood* could not be classified as "material[ly] exculpatory," but in the words of the Court, most certainly would have been "subject to further tests" in order to determine its worthiness. The *Youngblood* bad-faith requirement for "potentially exculpatory" evidence has been reaffirmed by the Supreme Court, but the case's reasoning has also been rejected by several states.[18]

A defendant attempting to demonstrate "bad faith" must show much more than negligence, but it is impossible to define exactly what else a defendant must show.[19] Some post-*Youngblood* courts of appeals decisions have suggested that a defendant need not prove an "official animus" or a "conscious effort to suppress exculpatory evidence" on the part of the government.[20] Courts that have made findings of bad faith in destroyed evidence cases have done so when the following factors were present: (1) the government was placed on explicit notice by the defendant of the potentially exculpatory nature of the evidence; (2) the assertion that the evidence was exculpatory was supported by independent and objective sources; (3) the government still had control of the evidence at the time it was put on notice; (4) the destroyed evidence was central to the government's case; and (5) the government could offer no "innocent explanation" whatsoever for the evidence's disappearance or destruction.[21]

Finally, the presence or absence of bad faith will also turn on *when* the government apparently gained knowledge of the value of the destroyed evidence. As the above factors suggest, only when the government has knowledge of a piece of evidence's exculpatory nature *at the time of the destruction* will a finding of bad faith be warranted.[22] At least one court has found that this is so even where evidence, believed to be destroyed, was "recovered" post-trial and found to have exculpatory value.[23] One implication is that after-the-fact "cover-ups" by the government of merely "negligent" destruction will not be evidence of "bad faith."

[4]—Remedies

If a defendant contesting his conviction on appeal is able to satisfy the aforementioned factors, a court may be forced to choose between dismissing the indictment or suppressing the government's most probative evidence relating to the destroyed materials while ordering a new trial.[24] One court has suggested that this decision will "turn[] on the prejudice that resulted to the defendant at trial," and that courts making this determination should analyze the "centrality" and "reliability" of the secondary evidence presented by the government along with the effect the destruction of the primary evidence had on the defendant's ability to present his case.[25]

Courts have also found due process violations resulting from government destruction of evidence in pretrial situations and have dismissed indictments when the aforementioned factors were satisfied.[26]

---

[1] United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982).

[2] California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

[3] United States v. Grammatikos, 633 F.2d 1013, 1019-1020 (2d Cir. 1980).

[4] See Arizona v. Youngblood, 488 U.S. 51, 56-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

[5] See *California v. Trombetta*, N. 2 *supra* 467 U.S. at 488-489.

[6] *Third Circuit:* United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (no due process violation where defendants offered "nothing beyond speculation" to support argument that destroyed government agent's interview notes contained exculpatory material).

Sixth Circuit: United States v. Jobson, 102 F.3d 214, 219 (6th Cir. 1996) (even if government's destruction of dispatch tape of defendant's arrest was performed in bad faith, no due process violation where defendant offered no more than "mere speculation" as to the tape's exculpatory nature).

See also:

Ninth Circuit: United States v. Griffin, 659 F.2d 932, 939 (9th Cir. 1981), *cert. denied* 456 U.S. 949 (1982).

[7] *Cf.*, United States v. Ramos, 27 F.3d 65, 70-71 (3d Cir. 1994) (acknowledging that "[i]t is difficult to imagine, for example, how a court could determine whether the exculpatory nature of an agent's notes would have been apparent to the agent before destruction without first reviewing the notes" while relying, *inter alia*, on government proffer as to the absence of exculpatory evidence in destroyed materials).

[8] See *California v. Trombetta*, N. 2 *supra,* 467 U.S. at 489.

[9] See *California v. Trombetta*, N. 2 *supra,* 467 U.S. at 490.

[10] See, e.g.:

Fifth Circuit: United States v. Sherrod, 964 F.2d 1501, 1507-1508 n.18 (5th Cir.) (no due process violation from destruction of methamphetamine by officers; "[c]ounsel for all defendants were present at both hearings and were given an opportunity to question the witnesses. That the district court obviously found the Government's evidence more credible does not prove a due process violation."), *cert. denied* 506 U.S. 1041 (1992).

Eighth Circuit: United States v. Boswell, 270 F.3d 1200, 1207 (8th Cir. 2001) (no due process violation from failure to preserve blood and serum samples; defendant "had the opportunity to raise the issue of the evaporated serum at trial and to impeach the reliability of the test results"), *cert. denied* 535 U.S. 990 (2002).

[11] United States v. Cooper, 983 F.2d 928, 931-932 (9th Cir 1993).

[12] United States v. Bohl, 25 F.3d 904, 910-911 (10th Cir. 1994).

[13] Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

[14] *Id.,* 488 U.S. at 57-58.

[15] *Id*., 488 U.S. at 57-58.

[16] *Id.*, 488 U.S. at 58.

[17] See, e.g., United States v. Laurent, 607 F.3d 895, 900 (1st Cir. 2010), *cert. denied* 131 S. Ct. 998 (2011) (videotape was only potentially useful, so prosecution's failure to preserve and disclose it did not violate *Brady*).

[18] See, e.g.:

Supreme Court: Illinois v Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

State Courts:

Connecticut: State v. Morales, 657 A.2d 585, 593 (Conn. 1995) ("Fairness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant has received due process of law.").

Delaware: Lolly v. State, 611 A.2d 956, 960 (Del. 1992) ("Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith.").

Tennessee: State v. Ferguson, 2 S.W.3d 912, 916-917 (Tenn. 1999) (the *Youngblood* analysis "substantially increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial").

Vermont: State v. Delisle, 648 A.2d 632, 643 (Vt. 1994) (rejecting *Youngblood* for limiting due process violations to only those cases in which a defendant can demonstrate bad faith, even though the negligent loss of evidence may critically prejudice a defendant).

West Virginia: State v. Osakalumi, 461 S.E.2d 504, 512-513 (W. Va. 1995).

But see:

Pennsylvania: Commonwealth of Pennsylvania v. Snyder, 963 A.2d 396, 405-406 (Pa. 2009) (destroyed soil samples that had been tested by the government were only "potentially useful," rather than "materially exculpatory").

[19] See, e.g.:

Supreme Court: California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

First Circuit: United States v. Femia, 9 F.3d 990, 995 (1st Cir. 1993) (no due process violation where evidence "destroyed due to the government's gross negligence, not bad faith").

Third Circuit: United States v. Christian, 302 Fed. Appx. 85, 87 (3d Cir. 2008) (no due process violation when police negligently lost fingerprint evidence; bad faith cannot be inferred from police failure to follow procedure).

Fourth Circuit: United States v. Sanders, 954 F.2d 227, 231 (4th Cir. 1992) (no due process violation from accidental erasure of video evidence).

Fifth Circuit: United States v. Moore, 452 F.3d 382, 388-389 (5th Cir.) *cert. denied* 549 U.S. 969 (2006) (no due process violation from destruction of tape recordings between defendant and drug supplier pursuant to "standard" Bureau of Prisons policy).

Seventh Circuit: Montgomery v. Greer, 956 F.2d 677, 680-681 (7th Cir.) (no due process violation when police negligently lost photographs used to identify the defendant), *cert. denied* 506 U.S. 972 (1992).

[20] See:

Ninth Circuit: United States v. Cooper, 983 F.2d 928 (9th Cir 1993).

Tenth Circuit: United States v. Bohl, 25 F.3d 904 (10th Cir. 1994).

[21] *Ninth Circuit:* United States v. Cooper, 983 F.2d 928, 928 (9th Cir. 1993).

Tenth Circuit: United States v. Bohl, 25 F.3d 904, 904 (10th Cir. 1994).

[22] Arizona v. Youngblood, 488 U.S. 51, 56-57 n. *, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

[23] Richter v. Hickman, 521 F.3d 1222, 1235-1236 (9th Cir. 2008) *rev'd and remanded sub nom.* Harrington v. Richter, 131 S. Ct. 770 (2011), *affirmed on remand sub nom.* Richter v. Harrington, 643 F.3d 1238 (9th Cir. 2011) ("[In *Youngblood*] [t]he Supreme Court did not approve a constitutional standard where acceptable management of evidence by law enforcement could retroactively be found unconstitutional if, after trial and conviction, a defendant shows that the evidence would have been exculpatory.").

[24] *Supreme Court:* California v. Trombetta, 467 U.S. 479, 487, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

Tenth Circuit: United States v. Bohl, 25 F.3d 904, 914 (10th Cir. 1994).

[25] United States v. Bohl, 25 F.3d 904, 904 (10th Cir. 1994).

[26] *Ninth Circuit:* United States v. Cooper, 983 F.2d 928, 933 (9th Cir. 1993).

State Courts:

Georgia: State v. Blackwell, 537 S.E.2d 457 (Ga. 2000).

§ 5.10 The Burden of Proof

The defendant has the burden of proving that there is a reasonable probability that his conviction or sentence would have been different absent the improper withholding of evidence. Regardless of whether withholding evidence was willful or inadvertent, the question is whether, in the absence of the evidence, the defendant received a fair trial.[1] A defendant must demonstrate "the probable outcome of a hypothetical trial where hypothetical witnesses are called,"[2] or where the cross-examination of witnesses that were called would have occurred differently.

For the same reason that this standard is difficult for appellate courts and prosecutors to apply,[3] it is an extremely difficult standard for the defendant to satisfy. Moreover, since the government caused the error, it is unfair to require the defendant to prove what would have happened had the government not erred.

That the defendant bears the burden of demonstrating the existence of a *Brady* error is at odds with the well-established general rule that "[t]he burden of proving [an] error's harmlessness falls 'to someone other than the person prejudiced by it.'"[4] When the government has erred by not disclosing potential *Brady* material, the government should bear the burden of demonstrating the defendant was not prejudiced, instead of the other way round. Shifting the burden to the government to prove that its error did not deprive the defendant of a fair trial would encourage more fulsome *Brady* compliance.

By way of further analogy, the Second Circuit's "modified plain-error rule" provides that when "'the source of plain error is a supervening decision,' the government, not the defendant, bears the burden to demonstrate that the error did not affect substantial rights."[5]

The government bears that burden in similar contexts. When the government has investigatory responsibilities, it has the burden to prove that it complied with those responsibilities.[6] The government bears the burden to prove that *Miranda* rights were waived;[7] that the defendant consented to a search;[8] that evidence seized without a warrant would have been inevitably discovered;[9] and that a confession was voluntary.[10] Similarly, because the government has the burden to provide *Brady* evidence to the defense, when it does not do so, the government should have the burden of proving that the defendant nevertheless had a fair trial.

---

[1] See, e.g., Strickler v. Greene, 527 U.S. 263, 288, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

[2] United States v. Mitchell, 365 F.3d 215, 253 (3d Cir.), *cert denied* 545 U.S. 974 (2004).

[3] See §§ 5.04-5.05 *supra*.

[4] Guitierrez v. McGinnis, 389 F.3d 300, 303 (2d Cir. 2004), quoting Schneble v. Florida, 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972).

[5] See, e.g., United States v. Outen, 286 F.3d 622, 639 (2d Cir. 2002) (citation omitted).

[6] Medina v. California, 505 U.S. 437, 456, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (O'Connor, J., concurring).

[7] Colorado v. Connelly, 479 U.S. 157, 168-69, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

[8] United States v. Matlock, 415 U.S. 164, 177-78 n.14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

[9] Nix v. Williams, 467 U.S. 431, 444-45 n.5, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

[10] Lego v. Twomey, 404 U.S. 477, 489, 925 S.Ct. 619, 30 L.Ed.2d 618 (1972).

§ 5.11 *Brady* and Rule 33

Too often, *Brady* material is disclosed only after a conviction. When helpful evidence is discovered post-trial, the defendant may file a motion for a new trial under Federal Rule of Criminal Procedure 33. Such a motion is filed in the same court that tried the case.

[1]—Timing

Rule 33(b)(1) states:

Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.[1]

This three-year time limitation is jurisdictional.[2] There is neither a "diligence extension" nor a possibility of equitable tolling, regardless of the consequences.[3] The three-year rule is not delayed by the assertion of a collateral attack pursuant to 28 U.S.C. § 2255.[4]

[2]—Standards

To succeed on a Rule 33 motion, defendants must show: (i) that the proffered evidence was "newly discovered," (ii) that the failure to discover the evidence earlier was not a result of the defendant's lack of diligence,[5] and (iii) that the evidence would have been "likely" to produce an acquittal.[6] However, claims raised under Rule 33 motions that the government violated its *Brady* obligations are assessed by some courts under the traditional, and more lenient, *Brady* "reasonable probability" standard.[7]

The standard of review on appeal may also be more favorable to the defendant if the Rule 33 motion presents a *Brady* claim.[8] Appellate courts typically adopt the "abuse of discretion" standard for Rule 33 rulings,[9] because trial courts are in a better position than appellate courts to weigh whether newly presented evidence would have changed a trial's outcome. This logic, however, does not always carry over when there are allegations of *Brady* violations, and thus appellate courts may conduct *de novo* reviews over lower courts' *Brady* determinations.[10]

---

[1] Fed. R. Crim. P. 33(b)(1).

[2] *Fifth Circuit:* United States v. Erwin, 277 F.3d 727, 732 (5th Cir. 2001) *cert. denied* 537 U.S. 989 (2002).

Tenth Circuit: United States v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999), *cert. denied* 529 U.S. 1029 (2000).

[3] See United States v. Smith, 331 U.S. 469, 475-76, 67 S.Ct. 1330, 1334-1335, 91 L.Ed. 1610 (1947).

[4] See Mankarious v. United States, 282 F.3d 940, 945 (7th Cir.), *cert. denied* 537 U.S. 823 (2002).

[5] See, e.g.:

Seventh Circuit: United States v. Theododopolos, 48 F.3d 1438, 1449 (7th Cir.), *cert. denied* 516 U.S. 871 (1995).

Eighth Circuit: United States v. Oberhauser, 284 F.3d 827, 833 (8th Cir.), *cert. denied* 537 U.S. 1071 (2002).

[6] See, e.g.:

Sixth Circuit: United States v. Jones, 399 F.3d 640, 648 (6th Cir.) *cert. denied* 546 U.S. 863 (2005).

Eleventh Circuit: United States v. Pope, 132 F.3d 684, 687 (11th Cir. 1998).

[7] See, e.g.:

First Circuit: United States v. Conley, 249 F.3d 38, 45 (1st Cir. 2001).

Fifth Circuit: United States v. Runyan, 290 F.3d 223, 246-247 (5th Cir.), *cert. denied* 537 U.S. 888 (2002).

Tenth Circuit: United States v. Quintanilla, 193 F.3d 1139, 1149 n.10 (10th Cir. 1999), *cert. denied* 529 U.S. 1029 (2000).

But see:

Fifth Circuit: United States v. Nix, 84 Fed. Appx. 415, 416-417 (5th Cir. 2003), *cert. denied* 542 U.S. 913 (2004).

Eighth Circuit: United States v. Knight, 230 F.3d 1086, 1088 (8th Cir. 2000).

[8] See, e.g.:

First Circuit: United States v. Conley, 249 F.3d 38, 44 (1st Cir. 2001).

Fifth Circuit: United States v. Runyan, 290 F.3d 223, 246 (5th Cir.), *cert. denied* 537 U.S. 888 (2002); United States v. Gonzales, 121 F.3d 928, 946 (5th Cir. 1997), *cert. denied* 522 U.S. 1131 (1998).

[9] See e.g.:

Seventh Circuit: United States v. Childs, 447 F.3d 541, 544 (7th Cir. 2006).

Tenth Circuit: United States v. Brown, 595 F.3d 498 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 903 (2011).

[10] See e.g.:

First Circuit: United States v. Conley, 249 F.3d 38, 44-45 (1st Cir. 2001).

Fifth Circuit: United States v. Runyan, 290 F.3d 223, 246 (5th Cir.) (internal citation omitted) ("This court reviews a district court's denial of a motion for new trial for abuse of discretion . . . [h]owever, when the newly-discovered evidence is alleged to be exculpatory evidence that the Government withheld in violation of *Brady*, we review any *Brady* determinations *de novo*."), *cert. denied* 537 U.S. 888 (2002); United States v. Gonzales, 121 F.3d 928, 956 (5th Cir. 1997).

§ 5.12 *Brady* on Collateral Review

Defendants may assert errors arising from *Brady* violations on collateral review by filing a petition for *habeas corpus* pursuant to 28 U.S.C. § 2254 (if the conviction was in a state court) or Section 2255 (if the conviction was in a federal court). *Habeas* petitions must be filed in the federal district court that has personal jurisdiction over the warden of the prison where the petitioner is being held.[1] This section addresses some special considerations for asserting *Brady* claims in collateral proceedings.

[1]—The § 2254 Heightened Standard for Collateral Review

A petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 has long been the principal vehicle for defendants in state court cases to obtain federal review of their convictions. With the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[2] in 1996, Congress made writs for *habeas corpus* pursuant to Section 2254 more difficult to obtain than they had been previously. This section focuses on certain changes wrought by the AEDPA on § 2254 that are of particular importance to petitioners raising *Brady* claims arising from state court convictions.[3]

Section 2254(d) sets a high standard for granting a writ of *habeas corpus* to a state prisoner whose claim was adjudicated on the merits in a state court proceeding:[4]

(d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[a]—Section 2254(d)(1)

"The threshold question under AEDPA [is] whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."[5] Although some cases since *Brady* have expanded on the rights enunciated in that case, none has significantly changed the law. A defendant's *Brady* rights are thus clearly established federal law for purposes of § 2254(d)(1).[6]

The next question—whether the state court's decision is "contrary to" that law—is more difficult. According to the Second Circuit:

"A decision is 'contrary to' clearly established federal law as determined by the Supreme Court "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or

if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts."[7]

This standard requires federal courts to show deference to a state court's legal conclusions, although "'if the state court employed the wrong legal standard in deciding the merits of the federal issue,'" a federal court will review the state court's legal conclusions and resolutions of mixed questions of law and fact *de novo*.[8]

The fact-specific nature of a *Brady* materiality inquiry makes it extremely difficult to conclude that the facts of any case are "materially indistinguishable" from those of a previous Supreme Court case. Almost every case is different. Thus, *habeas* petitions are routinely denied on the ground that their facts are different from previous cases.[9]

Even if the decision of a state court on a *Brady* claim is not "contrary to" clearly established law, it might still be the grounds for the issuance of a writ of *habeas corpus* if it involved an "unreasonable application of" that law to the facts of the case.[10] However, in practice, this standard is extremely deferential to state court decisions.[11] As the Supreme Court has stated:

The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. . . . . The state court's application of clearly established law must be objectively unreasonable.[12]

An "unreasonable application" of law by the state court means something more than even "clear error" by that court: "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."[13] Once again, because the *Brady* standard is so highly fact-specific, the § 2254(d)(1) standard of "unreasonable application" will be extremely difficult to meet. [14] Nevertheless some courts have found the standard satisfied.[15]

[b]—Section 2254(d)(2)

Section 2254(d)(2) applies if a petitioner argues that the state court's *Brady* decision was based on "an unreasonable determination of the facts in light of the evidence presented." The standard of review in federal court is quite deferential: § 2254(e)(1) provides that: "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[16]

The high standard of proof has made § 2254(d)(2) a generally difficult route for litigants contending that state court *Brady* errors entitle them to issuance of the writ of habeas corpus.[17] Indeed, the Fifth Circuit has held that because *Brady* claims involve mixed questions of law and fact and § 2254(d)(2) appears to apply to purely factual claims, § 2254(d)(2) has no relevance to any *Brady* claim on *habeas corpus* review.[18]

[2]—The § 2255 Limitations Period

Until 1996, a prisoner could have filed a motion under § 2255 at any time following conviction.[19] With the passage of the AEDPA, however, Congress enacted a one-year filing deadline within which such motions must be filed. The AEDPA provides that the one-year period runs from the latest of:

1. The date on which the judgment of conviction becomes final;
2. The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
3. The date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
4. The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.[20]

The fourth provision is of particular importance for the assertion of *Brady* claims. The one-year period may be counted from the date litigants obtain access to favorable, material evidence previously withheld by the prosecution.[21] The second provision may also prove valuable for the assertion of *Brady* claims made in the AEDPA context, with the one-year period running from the date the "impediment . . . created by governmental action . . . is removed [i.e., the date a *Brady* violation is revealed.]"[22]

Courts have also ruled that the limitations period may be equitably tolled in some instances,[23] though most courts that have addressed the situation have limited equitable tolling to only the most extraordinary situations.[24] A timely filed petition pursuant to § 2255 may be amended to include a *Brady* claim pursuant to Federal Rule of Civil Procedure 15(c), under appropriate circumstances.[25] Rule 15(c) allows the post-limitations period amendment of *timely* filed motions. Courts have recognized that timely filed 2255 motions may be amended pursuant to 15(c) where the amendment "relates back" to the original motion (i.e., where the claims in the original motion and the amendment arose out of the same facts).[26] The information presented in the amendment must only "clarif[y] or amplif[y]" a claim in the original motion, and cannot add a new claim or theory to the litigation.[27] Thus, in at least one case, a court has allowed a defendant to proffer additional support to a *Brady* claim through a 15(c)-amendment to timely-filed 2255 petition.[28] The 15(c) mechanism will likely not prove useful to defendants who failed to raise a *Brady* argument in an originally, timely-filed 2255 motion.

---

[1] See Rumsfeld v. Padilla, 542 U.S. 426, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004).

[2] 28 U.S.C.A. § 2255, as amended by Act of April 24, 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220.

[3] This section is not a complete review of the AEDPA or § 2254, but focuses on one aspect of the AEDPA that particularly affects *Brady* claims.

[4] See Harrington v. Richter, 131 S.Ct. 770, 784-785 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

[5] Williams v. Taylor, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

[6] Crawford v. Head, 311 F.3d 1288, 1324-26 (11th Cir. 2002) (referring to *Brady* and its progeny as "clearly established federal law"), *cert. denied* 540 U.S. 956 (2003).

[7] Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir.) (quoting Williams v. Taylor, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)), *cert. denied* 537 U.S. 909 (2002).

[8] Trammell v. McKune, 485 F.3d 546, 550 (10th Cir. 2007) (quoting Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003)) (federal court reviewed *Brady* claim *de novo* and vacated conviction where state court applied *Brady* standard "inconsistent" with Supreme Court precedent). *Cf.* Arnold v. McNeil, 622 F. Supp. 2d 1294 (M.D. Fla. 2009) *aff'd per curiam* by Arnold v. Secretary, Department of Corrections, 595 F.3d 1324 (11th Cir. 2010) (refusing to apply AEDPA's deferential standard, reviewing *de novo*, and granting habeas petition where state court failed to address the *Brady* claim even though it had been properly raised) (Citing cases.).

[9] See, e.g., Ventura v. Attorney General, 419 F.3d 1269 (11th Cir. 2005) ("Whether a *Giglio* violation is material is a highly fact-dependent inquiry, and we can find no Supreme Court case whose facts may fairly be characterized as 'materially indistinguishable' from those of [Petitioner's] case.").

[10] See 28 U.S.C. § 2254(d)(1).

[11] See, e.g.:

Sixth Circuit: Harris v. Stoval, 212 F.3d 940, 943 (6th Cir.), *cert. denied* 532 U.S. 947 (2001).

Seventh Circuit: Harris v. Cotton, 365 F.3d 552, 555 (7th Cir. 2004).

[12] Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166, 1174, 155 L.Ed.2d 144 (2003) (citations omitted).

[13] *Id.* (citations omitted).

[14] Junta v. Thompson, 615 F.3d 67, 74 (1st Cir. 2010); Teti v. Bender, 507 F.3d 50, 57 (1st Cir. 2007) ("A decision can still be reasonable even if the reviewing court thinks it is wrong; 'unreasonable' here means something more than incorrect or erroneous.").

[15] See, e.g.:

First Circuit: Norton v. Spencer, 351 F.3d 1, 8–9 (1st Cir. 2003) (finding state court decision "arbitrary and devoid of reason" where prosecutor withheld crucial impeachment evidence), *cert. denied* 542 U.S. 933 (2004).

Seventh Circuit: Boss v. Pierce, 263 F.3d 734, 741 (7th Cir. 2001) (state court's holding that "reasonable diligence requires defense counsel to ask witnesses about matters of which counsel could not have reasonably expected to have knowledge" was "unreasonable application" of *Brady)*, *cert. denied* 535 U.S. 1078 (2002).

[16] See 28 U.S.C. § 2254(e)(1); see also Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our *habeas* jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).").

[17] See, e.g.:

Fifth Circuit: Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir.), *cert. denied* 527 U.S. 1056 (1999).

Eleventh Circuit: Haliburton v. Secretary for Department of Corrections, 342 F.3d 1233, 1239 (11th Cir. 2003), *cert. denied* 541 U.S. 1087 (2004).

[18] DiLosa v. Cain, 279 F.3d 259, 262 (5th Cir. 2002).

In contrast, other courts have applied a § 2254(d)(2) analysis to *Brady* claims. See, e.g.:

Second Circuit: Kennaugh v. Miller, 289 F.3d 36, 48-49 (2d Cir.), *cert. denied* 537 U.S. 909 (2002).

Eleventh Circuit: Haliburton v. Secretary for Department of Corrections, 342 F.3d 1233, 1238-39 (11th Cir. 2003), *cert. denied* 541 U.S. 1087 (2004).

[19] See:

Supreme Court: Hill v. United States, 368 U.S. 424, 426-427, 825 S.Ct. 468, 7 L.Ed.2d 417 (1962) (interpreting § 2255 as providing for four situations in which collateral relief may be obtained: when "the sentence was imposed in violation of the Constitution or laws of the United States," if "the court was without jurisdiction to impose such sentence," if "the sentence was in excess of the maximum authorized by law," and when a sentence "is otherwise subject to collateral attack").

See also:

District of Columbia Circuit: McKinney v. United States, 208 F.2d 844, 847 (D.C. Cir. 1953) ("tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined").

[20] 28 U.S.C. § 2255 (1996).

[21] See, e.g.:

Fourth Circuit: United States v. Anderson, 238 F.3d 415 (4th Cir. 2000) (Table) (*per curiam*).

Ninth Circuit: Quezada v. Scribner, 611 F.3d 1165, 1167-1168 (9th Cir. 2010) (one-year period began to run when defendant first discovered the compensation agreement between the government and the prosecution witness).

But see:

Third Circuit: United States v. Chew, 284 F.3d 468 (3d Cir. 2002) (*per curiam*) (*Brady* claim time-barred).

[22] *Cf.*, United States v. Cottage, 307 F.3d 494, 497, 499-500 (6th Cir. 2002) (holding that no government-created impediment prevented defendant from bringing a § 2255 motion where defendant revealed that he was aware of the information allegedly withheld under *Brady*).

[23] See, e.g.:

Second Circuit: Friedman v. Rehal, 618 F.3d 142, 152 (2d Cir. 2010).

Sixth Circuit: Dunlap v. United States, 250 F.3d 1001, 1008-1009 (6th Cir.) *cert. denied* 534 U.S. 1057 (2001).

Seventh Circuit: Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001).

[24] See, e.g., United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002) (petitioner tricked by attorney into believing § 2255 motion was filed could present a "rare and extraordinary circumstance" in which limitations period would be equitably tolled).

[25] Mandacina v. United States, 328 F.3d 995 (8th Cir.), *cert. denied* 540 U.S. 1018 (2003).

[26] See United States v. Espinoza-Saenz, 235 F.3d 501, 503-505 (10th Cir. 2000) (collecting cases).

[27] *Id.*

[28] *Mandacina v. United States*, N. 25 *supra*, 328 F.3d at 999-1001.

§ 5.13 Civil Litigation Insights into *Brady* Rights

The victim of a *Brady* violation may file a civil suit for damages based on Title 42 U.S.C. § 1983 (Section 1983), although winning such suits is difficult. Section 1983 provides that every person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. As discussed below, a plaintiff can use Section 1983 to pursue cases against law

enforcement officers[1] and prosecuting government entities,[2] but rarely against individual prosecutors themselves.[3]

The U.S. Supreme Court has addressed the showing of "deliberate indifference" necessary for civil liability to attach in the *Brady* context.[4] The Court ruled that the New Orleans District Attorney's office was not deliberately indifferent to the *Brady* rights of criminal defendants despite a complete failure to train its prosecutors on *Brady*. The plaintiff in the case, John Thompson, had spent eighteen years in prison, including fourteen on death row, after being falsely convicted and sentenced to death on murder charges. Prosecutors had failed to turn over significant *Brady* material. For example, it was undisputed that one prosecutor had intentionally suppressed exculpatory blood evidence and a crime lab report that conclusively established Thompson's innocence. A detective discovered the exculpatory lab report a few days before Thompson's scheduled execution. After being acquitted, Thompson filed a Section 1983 claim against the District Attorney's office alleging a failure to train its employees on *Brady*. Thompson won the suit and a jury awarded him $14 million in damages.

On appeal, the District Attorney's office challenged whether Thompson had proved a pattern of violations that is typically required to meet the requisite showing of "deliberate indifference." The U.S. Supreme Court majority and dissenting opinions characterized the record below differently, but it appears that: i) the New Orleans District Attorney's office did not train its prosecutors on *Brady* at all; ii) the New Orleans District Attorney himself did not understand Brady obligations and had been indicted for suppressing evidence as a prosecutor; and iii) Louisiana courts had overturned four convictions in the preceding ten years because of *Brady* violations by prosecutors in the New Orleans District Attorney's office. Nevertheless, the Supreme Court reversed the Fifth Circuit and concluded that Thompson had not proved "reckless indifference" and the District Attorney's office had not been on notice of its obligation to train prosecutors on *Brady*. Justice Ginsburg, who authored the dissent, warned that because of the majority's decision, "[t]he prosecutorial concealment Thompson encountered . . . is bound to be repeated."[5]

[1]—Absolute Immunity

Various doctrines of immunity can thwart Section 1983 claims. Prosecutors enjoy absolute immunity from suit for personal damages under Section 1983 for all activities falling within the ambit of their "prosecutorial function."[6] The activities that fall within the "prosecutorial function" are vast, including not just prosecuting itself but also preparing to initiate a judicial proceeding,[7] and appearing in court to present evidence to obtain a search warrant.[8] It is thus practically impossible to obtain damages from a prosecutor who violated *Brady* while preparing for or during trial, even in cases of bad-faith and despite the fact that absolute immunity can "leave the genuinely wronged defendant without civil redress."[9]

[2]—Qualified Immunity

Prosecutors do not enjoy absolute immunity for "investigative" activities normally performed by detectives or police officers, such as searching for corroborative evidence or planning a raid.[10] Rather, they enjoy qualified immunity for such activities—the same type of immunity that benefits law enforcement officers themselves. Qualified immunity is an affirmative defense that can be defeated if an official: i) knew or reasonably should have known that his official actions would violate the plaintiff's constitutional rights; or ii) took action with the malicious intention to deprive the plaintiff of his constitutional rights.[11]

It is well established that a plaintiff who can show bad faith will be able to proceed in the face of a qualified immunity defense regardless of the jurisdiction. The federal circuits differ, however, on whether a lesser showing also suffices to defeat the qualified immunity defense.[12] Unfortunately the same findings of bad faith that allow a plaintiff to proceed with a Section 1983 claim can also present problems at the collection stage. Findings of bad faith may trigger statutory exceptions to a state or local office's duty to indemnify its employees and can also give insurance companies grounds to deny coverage. Some plaintiffs who succeed in proving an official's bad faith ultimately face the prospect of collecting against bankrupt defendants.

[3]—Municipal Liability

Municipalities do not enjoy qualified immunity and can be liable for *Brady* violations under certain circumstances. Municipal liability may not be predicated on *respondeat superior*[13] but may be imposed "when execution of a government's policy or custom, whether made by its lawmakers or by those [who] represent official policy, inflicts the injury."[14] A city's failure to train its prosecutors on their Brady obligations, for example, can form the basis for Section 1983 liability.[15] Such "failure to train" liability only attaches when the failure amounts to a "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."[16] Proving "failure to train" and "deliberate indifference" arising out of *Brady* violations will prove a daunting task, even in egregious cases.[17]

See, e.g.:

Fifth Circuit: Brown v. Miller, 519 F.3d 231, 238 (5th Cir. 2008) (finding police and laboratory technician could be liable under Section 1983 for withholding Brady material from prosecutors and thereby from the defense).

Seventh Circuit: Newsome v. McCabe, 319 F.3d 301, 304 (7th Cir. 2003).

Eighth Circuit: White v. McKinley, 605 F.3d 525 (8th Cir. 2010) (affirming denial of defendant-detective's various post-judgment motions and allowing jury award of $14 million in actual damages and $1 million in punitive damages).

[2] See, e.g., Walker v. City of New York, 974 F.2d 293, 300 (2d Cir.1992) ("[A] complete failure by the DA in 1971 to train ADAs on fulfilling Brady obligations could constitute deliberate indifference sufficient to give rise to § 1983 municipal liability.")

[3] For a discussion of absolute immunity, see § 5.13[1] *infra*.

[4] Connick v. Thompson, 131 S. Ct. 1350, 179 L.Ed.2d 417 (2011).

[5] *Id*. at 1370. Note that on June 13, 2011, the Supreme Court granted *certiori* in Smith v. Cain (No. 10-8145), also involving alleged *Brady* violations by the New Orleans District Attorney's Office. The defendant, Juan Smith, was convicted of multiple murders after a jury trial during which an eyewitness solidly identified him as the perpetrator. At a post-conviction hearing, Smith's lawyers submitted evidence that they argued had been withheld by the prosecution, including the eyewitness's statement, the night of the murders, that he could not identify any of the perpetrators and the statement of another witness that Mr. Smith was not in fact a perpetrator. The Louisiana state courts denied post-conviction relief.

[6] Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). In Pottawattamie County, Iowa v. McGhee, 547 F.3d 922 (8th Cir. 2009), *cert. granted*, 556 U.S. 1181 (2009), the U.S. Supreme Court heard oral arguments on whether a prosecutor who procured false testimony from witnesses and introduced the same false testimony at trial was entitled to absolute immunity. This question was not answered since the parties settled before a decision. Pottawattamie County, Iowa v. McGhee, 130 S. Ct. 1047, 1047, 175 L.Ed.2d 641 (2010).

[7] Burns v. Reed, 500 U.S. 478, 492, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

[8] Kalina v. Fletcher, 522 U.S. 118, 126, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997).

[9] Imbler v. Pachtman, N. 6 *supra*, 424 U.S. at 427; see also, Campbell v. Maine, 787 F. 2d 776 (1st Cir. 1986) *cert. denied*, 451 U.S. 916 (1981) (no exception to *Imbler v. Pachtman* even where prosecutor acted in bad faith).

[10] Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993).

[11] Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[12] Bad faith required:

Fourth Circuit: Jean v. Collins, 221 F.3d 656 (4th Cir. 2000).

Eighth Circuit: Villasana v. Wilhoit, 368 F.3d 976, 980 (8th Cir.2004) (holding that recovery against law enforcement officers for *Brady* violations requires a finding of bad faith).

Eleventh Circuit: Porter v. White, 483 F.3d 1294 (11th Cir. 2007) ("hold[ing] that the no-fault standard of care *Brady* imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process").

Lesser showing permitted:

Sixth Circuit: Moldowan v. City of Warren, 578 F.3d 351, 363 (6th Cir. 2009).

Ninth Circuit: Tennison v. City and County of San Fran*cisco*, 570 F.3d 1078, 1089 (9th Cir. 2009) ("[A] § 1983 plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors.").

[13] Monell v. Department of Social Services, 436 U.S. 658, 685-690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1977).

[14] *Id.*, 436 U.S. at 694.

[15] City of Canton v. Harris, 489 U.S. 378, 387, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009) (holding that a municipality could be liable under Section 1983 for failing to train its police officers on the *Brady* rights of criminal defendants).

[16] City of Canton v. Harris, N. 15 *supra*, 489 U.S. at 388.

[17] Connick v. Thompson, 131 S.Ct. 1366, 179 L.Ed.2d 417 (finding no liability on a "failure to train" theory where there was no evidence of a pattern of Brady violations).

Criminal Discovery

In This Issue

September 2012
Volume 60
Number 5

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

H. Marshall Jarrett
Director

The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

Managing Editor
Jim Donovan

Law Clerks
Carmel Matin
Jeremy Summerlin

Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

Send article submissions and address changes to Managing Editor,
United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors' Discovery Obligations

Kelly A. Zusman
Appellate Chief
United States Attorney's Office
District of Oregon

Daniel Gillogly
Senior Litigation Counsel
United States Attorney's Office
Northern District of Illinois

Agatha Christie's fictional detective, Hercule Poirot, was a master of perception. The significance of the charred remains of a hotel receipt, overlooked by Inspector Japp and his subordinates, was never lost on the Belgian sleuth. Such minor details usually held the key to solving the mystery and identifying the true killer. Moreover, the killer was always someone the police never suspected. Such fictional accounts, unfortunately, form the basis for many a criminal defense attorney's concern that materiality ought not to rest in the hands of the prosecution team. Yet the criminal discovery rules and case law still support the basic precept that the prosecution has an obligation to produce material, potentially exculpatory evidence to the defense, and yes, the prosecution team makes that call. The Supreme Court has stated that the "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [Government's] files." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (citations omitted). The government is typically the "sole judge of what evidence in its possession is subject to disclosure." *United States v. Presser*, 844 F.2d 1275, 1282 (6th Cir. 1988).

While department policy and the USAM direct that prosecutors take a broad view of our discovery obligations, *Brady* material is and should remain uniquely limited to evidence that is either exculpatory or impeaching of a key witness. *See* Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf (Ogden Memo). Litigation efforts to expand the definition of *Brady* to include anything favorable to the defense— regardless of materiality— should be resisted. As Deputy Attorney General James M. Cole recently explained to the Senate Judiciary Committee, expanding criminal discovery to eliminate or dilute the materiality

requirement threatens to undermine other key aspects of the criminal process, including the need to protect the privacy and security of victims and witnesses, and national security. Witnesses have, unfortunately, been threatened or killed based upon information produced in discovery. Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

Prosecutors, who are intimately familiar with the facts and particular security risks associated with their cases, are in the best position to manage both the culling and timing of discovery. And courts are well-equipped to assess when and whether prosecutors misstep. But while it is well-established *who* must first determine whether a report, statement, or tangible item is material, judges who must ultimately decide *whether* we have made the correct call are often confronted with a myriad of interpretations for what constitutes "material" material. The materiality requirement appears in *Brady v. Maryland*, 373 U.S. 83 (1963), and although the wording of the test for materiality is sometimes phrased in different ways by different courts, the test generally refers to information that would "put the whole case in . . . a different light . . . ." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also United States v. Ferguson*, 2012 WL 511489, at *16 (E.D. Mich. Feb. 16, 2012) (explaining that *Brady* material refers to information relevant to guilt or innocence, and it does not encompass anything and everything that might aid a defendant's trial preparation). Since *Kyles v. Whitley*, the Court has consistently described the test for a constitutional violation as whether the information at issue is of such significance that its nondisclosure "undermines confidence in the outcome of the trial." *Whitley*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). "[The] touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. Any effort to require a lesser showing by a defendant who argues that undisclosed information rendered his trial unfair should be vigorously opposed as a clear and unwarranted departure from the Court's teaching. "[S]trictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

Materiality is among the most litigated issues when it comes to determining whether the government has satisfied its obligations under *Brady*. *Compare Smith v. Almada*, 640 F. 3d 931, 940 (9th Cir. 2011) (holding that an officer's failure to disclose a witness's false account was immaterial because that witness's testimony was not "crucial" at trial), *with United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) (holding that additional impeachment material regarding a key government witness was material). The Supreme Court recently addressed the materiality element of *Brady* in *Smith v. Cain*, 132 S.Ct. 627 (2012), and during oral argument several of the justices made clear their view that *Brady* and disclosure have two different aspects depending upon whether one views the obligation prospectively or retrospectively. Deputy Attorney General Cole also addressed this issue in his recent testimony before Congress. When asked whether the *Brady* standard was too vague and subjective, DAG Cole explained that while the *Brady* prejudice standard was used for appellate review,

> going into trial, looking at it prospectively, that's not the standard we use in the Justice Department . . . . [O]ur standard is any evidence that is inconsistent with any element of any crime charged against the defendant, turn it over; any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses' testimony, turn it over; and that we tell people, err on the side of disclosure.

Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

Brady was a death penalty case in which there was no dispute that Brady and a compatriot robbed and killed a merchant. What the prosecution failed to reveal at the death penalty phase of Brady's trial was that the co-defendant had confessed that he, and not Brady, was the actual shooter. The evidence was immaterial to guilt or innocence under the felony-murder rule but was highly relevant to the question of punishment. Thus, the *Brady* case itself involved undisclosed evidence that was unquestionably relevant and material to punishment. Prosecutors and courts have struggled with the line-drawing ever since. What forms the contours of materiality for purposes of *Brady* is still being debated 40 years later, even in the Supreme Court.

In the recent Supreme Court case of *Smith v. Cain*, 132 S.Ct. 627 (2012), the crime involved an armed raid on a stash house that resulted in the death of five of the home's occupants. Of the three survivors, only one was able to positively identify Smith as one of the shooters. The prosecutors had police reports that included statements from the surviving victim, taken while he was still at the scene, that stated he could not identify any of the shooters and that he would not recognize any of them if he saw them again. Later that same night at the police station, the victim told an officer that one of the shooters (the one who pointed a gun in his face) had a sloping haircut and a gold "grill" (gold teeth). The victim's trial testimony about the gun that he saw also became more specific at trial—he told the officers at the scene only that he had seen a gun, but at trial he testified that it was a 9mm, which happened to correspond to the testimony of the state's ballistics expert.

During oral argument for *Smith v. Cain*, the Court was incredulous when the state's attorney attempted to argue that the victim's initial statement to the police was not "material." Justice Ginsberg asked, "But how could it not be material? Here is the only eyewitness . . . , and we have inconsistent statements. Are you really urging that the prior statements were immaterial?" Transcript of Oral Argument at 29, *Smith v. Cain*, 132 S.Ct. 627 (2012) (No. 10-8145), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf. Justice Kennedy also expressed surprise at the state's position: "And you say that's immaterial. I find that just incredible." *Id.* at 33. Justice Scalia added to the pile-on: "[M]ay I suggest that . . . you stop fighting as to whether it should be turned over? Of course, it should have been turned over. I think the case you're making is that it wouldn't have made a difference." *Id.* at 51-52. Justice Breyer commented that the report was facially exculpatory, and Justice Kagan pointedly asked the lawyer if her office had ever considered conceding the point. Justice Sotomayor commented that *Brady* has two distinct components: "Should they [the reports] have been turned over? And if they had, is there a reasonable probability of a different outcome?" *Id.* at 46. Justice Kennedy emphasized this point when he stated: "I think you mis-spoke when you . . . were asked what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." *Id.* at 49.

The Court reiterated the *Kyles* test of whether favorable information undisclosed and unknown to the defendant merits relief: would the undisclosed information have placed the case in such a different light as to undermine confidence in the outcome of trial? Ultimately, Louisiana was unable to convince the Court that the failure to disclose the material was not prejudicial, and the state lost this case 8-1. Like *Brady*, the exculpatory value of the undisclosed evidence was readily apparent— so much so that one might even say that a defense attorney who possessed such a report would be considered deficient for failing to use it when cross-examining the victim. But this still leaves an open question: if the test for *Brady* production differs from the test for *Brady* violation as Justices Sotomayor and Kennedy affirmatively stated, what is that preliminary test?

Cases like *Brady* and *Smith* provide some guidance to prosecutors tasked with reviewing the products of an investigation with a view towards disclosure, but that guidance is limited by its retrospective (if not omniscient) viewpoint. The Court in those cases had the benefit of an entire trial record by which they could comfortably make an educated guess about the probable effect of non-disclosure. It does not take a lot of creativity to imagine what a reasonably competent defense attorney would have done with the police reports in the *Smith* case: he would have cross-examined the victim extensively about both his prior claim that he could not identify the shooter and his failure to provide specifics about the gun, and the defense attorney would have emphatically argued to the jury that this one eyewitness to the events in question could not be trusted, given his shifting accounts. Regarding it as speculation as to which version a jury might believe, the majority declined to engage in the dissent's analysis that continued beyond the unremarkable conclusion that the undisclosed witness statement had impeachment value to the defendant. The dissent went on to assess in some detail the likely impact of the impeachment considering other evidence, including other statements the witness made close in time. What factors are properly considered in determining the materiality of undisclosed information present another question for another article, but the fact of post-trial litigation itself emphasizes the point that prosecutors are almost always better served dealing with information before or at trial, rather than afterwards.

At the pre-trial stage, assessing materiality is a greater challenge, and, as a consequence, some trial courts have conflated the approach that appears in the DOJ policy and ABA standards with the constitutional standard governing materiality under *Brady*. In *United States v. Mohamud*, 3:10-cr-475-KI (D. Or. Nov. 26, 2010), the district court recently adopted a pretrial disclosure standard under the auspices of *Brady* that encompassed all evidence "favorable to the defense." *See also United States v. Phair*, No. CR 12-16RAJ (W. D. Wash. June 19, 2012) (requiring disclosure of all evidence favorable to the defense or likely to lead to favorable, admissible evidence); *United States v. Zinnel*, 2011 WL 5593109 (E.D. Cal. Nov. 16, 2011) (rejecting materiality as a factor governing disclosure obligation and concluding that prosecutor is obliged to turn over anything exculpatory or impeaching); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (holding that prosecutor should not view his discovery obligation "through the end of the telescope" that an appellate court would use, but instead must disclose what is "favorable"); *Boyd v. United States*, 908 A.2d 39, 60 (D.C. Cir. 2006) (interpreting *Strickler v. Greene*, 527 U.S. 263, for the proposition that a prosecutor has a duty to disclose even when information turns out not to be material). While the *Strickler* Court refers to a "broad duty" of disclosure, it cites nothing in support of that proposition, and the Second Circuit vacated a district court order requiring disclosure of all impeaching and exculpatory information without regard to materiality. *United States v. Coppa*, 267 F.3d 132, 142-44 (2d Cir. 2001). The Department of Justice, as a matter of policy, requires a broad view of materiality (USAM 9-5.001), but our policy position should be viewed as just that— guidance designed to facilitate effective discharge of the constitutional obligation— and should not be confused or conflated with the obligation itself. This approach by some trial court judges may be a result of a judge's philosophy about discovery or an attempt to formulate a bright line rule intended to eliminate discovery disputes; yet such conflation does not reflect the constitutional rule or typify the prevailing practice. *See, e.g., United States v. Ruiz*, 536 U. S. 622, 629 (2002) (rejecting a defense claim to entitlement to impeachment material before entering a guilty plea, noting that "the Constitution does not require the prosecutor to share all useful information with the defendant"). In addition to the guidance set forth in the Ogden Memo, this article offers some tips that prosecutors should keep in mind when responding to overly broad and unduly burdensome discovery requests that range far beyond the scope of *Brady*, Rule 16, and the critical requirement of materiality:

1. The Defendant is responsible for establishing the materiality of his request by making a prima facie showing. *See United States v. Stevens,* 985 F.2d 1175, 1180 (2d Cir. 1993); *United States v.*

Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) (Rule 16); *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984); *United States v. Messina*, 2011 WL 3471511, at *2 (E.D.N.Y. Aug. 8, 2011); and *United States v. Pottorf*, 769 F. Supp. 1176, 1178-79 (D. Kan. 1991); *see also United States v. Gatewood*, 2012 WL 2286999, at *2 (D. Ariz. June 18, 2012) (rejecting a defense request for social security numbers, addresses, and phone numbers of witnesses based upon absence of proof any of this information was material to the defense, noting that defendant has "no general right to unredacted discovery"). As a consequence, prosecutors should resist requests that are vague or seemingly disconnected from the issues in the case and demand that the requester explain his theory of how and why the documents he seeks are material. While the *Brady* disclosure requirement is self-executing for those bits of evidence that are readily recognized as exculpatory (for example, someone else confessed), by analogy to Rule 16 cases, some courts require a prima facie showing for everything else. *See United States v. Agurs*, 427 U.S. 97, 110 (1976); *see, e.g., United States v. Fiel*, 2010 WL 3291826, at *2 (E.D. Va. Aug. 19, 2010) (rejecting defense requests that appeared in the form of interrogatories, noting that many of the requests were facially irrelevant). Thus if a prosecutor is pursuing an arson charge against a rancher and that defendant demands copies of every National Environmental Policy Act impact statement ever issued in the state for any prescribed burn permit, the prosecutor may and should demand an explanation for how and whether such documents bear any relevance to any claim or defense in the case. *See, e.g., United States v. Reese*, 2010 WL 2606280, at *20-21 (N.D. Ohio June 25, 2010) (denying a *Brady* demand for ATF guidelines because defendant's request was based on speculation and lacked a specific purpose); *United States v. Beard*, 2005 WL 3262545, at *3 (E.D.Mich. Nov. 30, 2005) (holding that internal Project Safe Neighborhoods program guidelines were not material to preparing the defense under Rule 16 or to guilt or punishment under *Brady*). Courts have made clear that the *Brady* rule is not a lever to crack open the government's files, and the judiciary has rejected defense discovery requests deemed to be "fishing expeditions," "utter speculation," or "shots in the dark." *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976); *United States v. Rodriguez-Rivera*, 473 F.3d 21, 26 (1st Cir. 2007); *United States v. Sloan*, 381 F. App'x. 606, 608-09 (7th Cir. 2010); *see also Gray v. Netherland*, 518 U.S. 152, 168 (1996) (" '[T]here is no general constitutional right to discovery in a criminal case, and *Brady*,' which addressed only exculpatory evidence, 'did not create one.' ") (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

2. Defendants must be reasonably specific. Document requests must be "framed in sufficiently specific terms to show the government what it must produce." *Marshall*, 532 F.2d at 1285 (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)). When a defendant makes only a general demand for "all potentially exculpatory material," the prosecutor properly decides what must be disclosed, and absent a more specific request, the prosecutor's decision is final. *United States v. DeCologero*, 530 F.3d 36, 75 (1st Cir. 2008). The Supreme Court has recognized that the specificity of the defense request is relevant to an assessment of whether the prosecutor has an obligation to disclose the information. *See United States v. Bagley*, 473 U.S. 667, 680-83 (1985); *Agurs*, 427 U.S. at 103-08. If the defense fails to request information or if the request is general, the prosecutor is expected to produce evidence when the exculpatory nature of such evidence is "obvious." "[W]hen the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Bagley*, 473 U.S. at 682 (quoting *Agurs*, 427 U.S. at 106). Specific requests give prosecutors notice of the value of certain items of evidence, and courts have observed that a defense attorney may reasonably assume that a prosecutor's failure to respond to a specific request means that no such evidence exists. *See id.*

3. Be wary of the "star witness" designation. Nothing makes a witness more critical to a prosecution than undisclosed potential impeachment evidence. Prosecutors should (and generally do) handle obviously key or critical witnesses with particular care when it comes to gathering, reviewing, and producing evidence that may be relevant to impeach such witnesses. But not every witness on the

government's list is properly subject to such rigor, and courts have recognized this practical reality. *See, e.g., United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004) (observing that *Brady* encompasses impeachment information that undermines a "significant" witness). Once a judge or the facts of the case pin a star on a witness's lapel, however, our obligations are heightened. Consequently, it is important to resist the label when it really is not appropriate because the witness relates to a collateral point. Key factors in the determination of whether a witness has a starring or supporting role include whether the witness's testimony related to an element of the offense and whether that witness was the only witness who testified about an essential element of the offense. *Compare Smith v. Cain*, 132 S.Ct. at 630 ("[Witness's] testimony was the *only* evidence linking Smith to the crime. And [witness's] undisclosed statements directly contradict his testimony . . . ." (emphasis in original)), *with United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008) ("[Witness's] testimony played such a small role in the trial that it was immaterial whether the jury might have discredited it based on evidence from the misconduct investigation.").

4. Be wary of the "thousand cuts." In contrast with most law enforcement, bank tellers, records custodians, and parish priests, just about every cooperating witness has baggage. Examining the bad stuff about a witness in isolation may lead to misjudgments about the total package. When an appellate court reviews the record on the back-end, it will view impeachment material about our star witnesses collectively. *See, e.g., United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011).

5. Consider submitting material to the district court for *ex parte* review. If your case agent was arrested in college 17 years ago for using his roommate's identification to get into a bar, or if a witness has an eight-year-old misdemeanor DUI, you should consider this option to avoid unnecessary embarrassment to your witnesses. Remote evidence that a defense attorney might be anxious to use, but which would be inadmissible for impeachment purposes, may be reviewed preliminarily by a trial court judge should there be any question about the need for disclosure. *See, e.g., United States v. Allen*, 416 F. App'x 875, 879 (11th Cir. 2011) ("The prosecutor may mark potential *Brady* material as a court exhibit and submit it to the court for an *in camera* inspection if its qualification as *Brady* material is debatable."); *United States v. Blackman*, 407 F. App'x. 591, 596 (3d Cir. 2011) (affirming trial court's *ex parte* decision that certain information concerning local police officer witnesses, which the government had submitted "in an abundance of caution," need not be disclosed to defendants).

In addition to these practice tips, it will be important going forward to assure trial courts that we are fulfilling our legal and ethical obligations to provide relevant, material discovery to the defense. By complying with department policy, we should handily meet any prospective definition of materiality regardless of how the trial court defines that term. Meeting the more expansive standard should neither dilute the constitutional principle nor chill our ability to protect victims and witnesses. Materiality should mean that the item of evidence actually matters—that is, it relates to a real and important issue at trial, and its absence could well change the jury's view of the case. Cumulative evidence, impeachment evidence regarding collateral witnesses, and evidence that "might," but does not lead to evidence relevant to the development of a defense should never be considered *Brady* material simply because a defendant thinks it "might" be helpful to his case. But while the "cumulative" impeachment rule is alive and well, be attentive to information that provides a defendant with a new or different line of impeachment. *See, e.g., Gonzales v. Wong*, 667 F.3d 965, 684 (9th Cir. 2011) (noting that "impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. Where the withheld evidence opens up new avenues for impeachment, it can be argued that it is still material"); *United States v. Wilson*, 481 F.3d 475, 481 (7th Cir. 2007) ("evidence that provides a new basis for impeachment is not cumulative"). The bottom line is that our production should be consonant with basic fairness and consistent with the *Kyles* test for materiality. As Justice Kennedy observed during the oral

argument in *Smith,* there is a difference between an obligation for production of exculpatory or impeachment information and the determination of whether the failure to produce such evidence constitutes a *Brady* violation.

The latter formulation comes into play when an appellate court decides whether a defendant is entitled to any relief. By the same token, the different views do not and should not alter the basic premise that what falls within the definition of *Brady* evidence must be both material and exculpatory. Thus, before the charred remains of the hotel receipt that Poirot salvaged from the ashes of a fireplace may be deemed *Brady* material, the defense must reveal its reasoning and prove, in a substantive way, that the withheld evidence actually changes the landscape of the case. If prosecutors use their little gray cells and take the broad view of materiality urged by department policy, there should be no surprise endings.❖

ABOUT THE AUTHORS

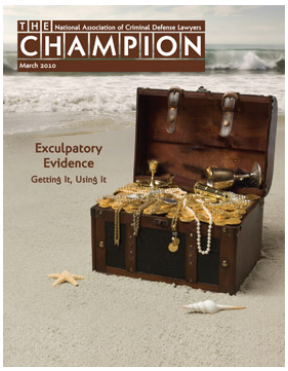
❑**Kelly A. Zusman** is the Appellate Chief for the United States Attorney's Office in the District of Oregon. Following a federal district court clerkship, she joined the Department and has worked in the civil and criminal trial divisions, also serving as the office's Senior Litigation Counsel and Criminal Discovery Trainer/Coordinator. She teaches appellate advocacy, evidence, and legal writing at the National Advocacy Center and the Northwest School of Law at Lewis & Clark, serves as the Ninth Circuit representative to the Appellate Chiefs Work Group to the Attorney General Advisory Committee.✠

❑**Daniel Gillogly** has been an Assistant United States Attorney for the Northern District of Illinois since 1976, working in both the civil and criminal divisions. He currently serves as that office's Senior Litigation Counsel and has actively participated as a faculty member for numerous courses with the Office of Legal Education for the past three decades. He regularly lectures on topics related to criminal discovery at the National Advocacy Center, and has taught at the John Marshal Law School and the Northwestern School of Law. In addition to prosecuting many criminal cases, Mr. Gillogly also spent a detail with the Webster Commission for the Review of FBI Security Programs.✠

The Champion

March 2010 , Page 20

Search the Champion Looking for something specific?



The Prosecutors Duty of Disclosure Under ABA Model Rule 3.8(d)

By Theresa Newman, James E. Coleman Jr

The American Bar Association (ABA) has now officially clarified that the ethical duty of disclosure under Rule 3.8(d) of the Model Rules of Professional Conduct is broader than the constitutional obligation established by Brady v. Maryland and its progeny.[1] In Formal Opinion 09-454, which took effect Jan. 1, 2010, the ABA settled the point, which for years had created some confusion and uncertainty among courts, state Bar Associations, and even prosecutors. The Opinion explained that, although the disclosure obligation under Rule 3.8(d) may overlap with prosecutors' other disclosure obligations, it is "separate from" any imposed under the "Constitution, statutes, procedural rules, court rules, or court orders."[2] This clarification continues the ABA's recent, commendable effort to revise the Model Rules to help prevent and rectify wrongful convictions.[3]

The Obligation

The language of Model Rule 3.8(d) has not changed:

A prosecutor in a criminal case shall[4]:... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Although most courts and prosecutors were widely believed to appreciate the broader disclosure obligation imposed by this language, few courts discussed the obligation in their published opinions, and, of those that did, a number got it wrong — incorrectly assuming it merely mirrored the Brady obligation. State and local ethics opinions also only rarely offered helpful clarifications, and because few prosecutors are disciplined for disclosure violations — perhaps because of the previous incorrect interpretations of the duty — there are few disciplinary opinions from which to draw guidance. The ABA Standing Committee on Ethics and Professional Responsibility decided to set things straight with Formal Opinion 09-454.

The scope of the disclosure obligation under Rule 3.8(d) is rooted in the ABA's long recognition that, as the Supreme Court also reasoned in fashioning the constitutional disclosure obligation,[5][a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.[6]

The Formal Opinion reasons that the heightened obligation is necessary to level the playing field in criminal proceedings. The American adversarial system is based on the premise that "the truth will emerge when each side presents the testimony, other evidence, and arguments most favorable to its position." Yet, "in criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false

convictions."[7] This is a simple recognition that, at least as a matter of professional ethics, the special role of the prosecutor requires even greater adherence to the principles of justice and fair play.

'Information' but No 'Materiality'

The most significant distinction between the Brady and Rule 3.8(d) disclosure obligations is their scope. Under Brady, a prosecutor must turn over to the defense all exculpatory (including impeachment) evidence that is material. The disclosure obligation under Rule 3.8(d) is broader: (1) it applies to both "evidence" and "information," and (2) it is not limited to that which is "material." In addition, disclosure is mandated under Rule 3.8(d) when the evidence or information either independently meets the articulated standard or meets it when viewed in light of other evidence or information known to the prosecutor.[8]

The Rule 3.8(d) disclosure obligation specifically includes favorable "information," because, even if not admissible itself, the information may well lead "to admissible testimony or other evidence or assist [the defense] in other ways, such as in plea negotiations."[9] The example given in the Formal Opinion is that an anonymous tip that someone else committed the crime may be inadmissible hearsay, and therefore not "evidence" within the meaning of Brady et al., but the tip nevertheless would allow the defense to investigate the possible guilt of the alternative suspect. For this to occur, however, disclosure must be sufficiently full to allow an effective investigation: "It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker."[10]

Rule 3.8(d)'s lack of a materiality requirement also significantly expands the prosecution's disclosure obligation. As the criminal defense bar well knows, "materiality" under Brady is a high threshold. It is established only when "prejudice to the accused ensues" and where the non-disclosure is "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[11] In making disclosures, then, prosecutors may fail to predict accurately whether that reasonable probability exists and err on the side of non-disclosure,[12] and then gain protection after the fact because of the difficulty of such predictions.[13]

The disclosure obligation in Rule 3.8(d) is simpler, considerably broader, and certainly better designed to help level the playing field for criminal defendants and prevent wrongful convictions. It "requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome."[14] The only criterion then is whether the evidence or information is "favorable" to the defense. In the pretrial and trial stages, that is evidence or information that "tends to negate the guilt of the accused or mitigates the offense." According to the Formal Opinion, that standard is met when the evidence or information "would be relevant or useful to establishing a defense or negating the prosecution's proof."[15]

In making these assessments, prosecutors are not limited to disclosing evidence and information relevant to the defenses disclosed by defendants and their counsel. Rather, they must also consider "any other legally cognizable defenses," and disclose any favorable evidence or information relevant to the full range of defenses available. Without such full disclosure, a defense may seem unavailable to the defendant and therefore would not have been identified by the defense as one that would be raised.[16]

Finally, under Rule 3.8(d), any favorable evidence or information must be disclosed even if the prosecutor believes it is highly unreliable or in some other way will only minimally negate the defendant's guilt. "Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure obligation. … The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use."[17]

Actual Knowledge

Rule 3.8(d)'s disclosure requirement is limited to evidence or information "known to the prosecutor." The standard is "actual knowledge," but, importantly, the determination is not a deferential, subjective test. Whether evidence is "known" to the prosecutor can be inferred from the circumstances.[18]

To comply with the rule, prosecutors need not investigate or search for all qualifying evidence or information, "thus limit[ing] what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law."[19] But they may not turn a blind eye to such evidence and information. For example, although prosecutors ordinarily need not review large files or obtain all police files before a guilty plea, they must do so if they know or can infer that the files contain favorable evidence. The Formal Opinion also explains that other law may require a prosecutor to seek and review information not yet known to her, and Model Rules 1.1 (competence) and 1.3 (diligence) may separately require her to conduct such searches and investigations.[20]

Timely Disclosure

"Timely disclosure" under Rule 3.8(d) requires that the evidence or information "be made early enough that [it] can be used effectively." The Formal Opinion reasons that "[b]ecause the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed … as soon as reasonably practical." If disclosure is delayed, defense efforts may be hindered in a number of pretrial activities, including conducting an effective investigation, deciding whether to raise an affirmative defense, or developing an overall defense strategy.[21]

The Formal Opinion notes that one of the most significant purposes for the disclosure requirement is to assist the defendant in determining whether to plead guilty: "Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case," disclosure must be made before a guilty plea proceeding.[22]

If disclosure would frustrate an ongoing law enforcement investigation or jeopardize a prosecution witness, the rule permits prosecutors to seek protective orders to withhold the information.

During Sentencing

Rule 3.8(d)'s disclosure obligations in the sentencing context differ in several important ways from the rule's more general disclosure requirements. In connection with sentencing, the prosecutor must "disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Thus, although the knowledge requirement is the same, the information that must be disclosed is different: "unprivileged mitigating information" rather than "evidence or information … that tends to negate the guilt of the accused or mitigates the offense." For example, "mitigating information" may be any "information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness)."[23] The distinction in what must be disclosed is based on the narrower purpose of sentencing proceedings and the assumption that any other favorable evidence and information was disclosed previously, at the pretrial and trial stages.

The corollary distinction is that this "mitigating information" need only be disclosed in connection with sentencing; Rule 3.8(d) does not require its disclosure before or during the trial. That said, the "timely disclosure" requirement does dictate that the information be disclosed sufficiently in advance of the sentencing to allow the defense and the tribunal to use it effectively.

In this context, the prosecutor must also disclose the evidence or information to the tribunal, not just the defense, but this requirement is satisfied if disclosure is made in a presentence report submitted to the relevant agency rather than directly to the tribunal. It is assumed that the tribunal will be made aware of the evidence and information when the report is ultimately submitted to the tribunal for consideration.

Finally, whereas the rule dictates that privileged evidence and information may be withheld during the pretrial and trial stages only with a protective order, it allows such to be withheld without an order in connection with sentencing.

The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence.[24]

No Consent to Non-Disclosure

Prosecutors may not avoid Rule 3.8(d) obligations even if the defendant consents to non-disclosure. As the Formal Opinion explains, the rule "is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions."[25] Given that allowing non-compliance based on consent "might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty, with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions," prosecutors "may not solicit, accept, or rely on the defendant's consent."[26]

Of course, as noted above, if the prosecutor is seeking to avoid disclosure because of a "legitimate and overriding purpose," she may seek a protective order to limit her disclosure obligations. Alternatively, the prosecutor may seek an agreement from the defense to maintain the confidentiality of the evidence and information at issue.[27]

Will the Clarification Make a Difference?

Now that the intended meaning of ABA Model Rule 3.8(d) is clear, what remains to be seen is whether the clarification will make any difference in

practice. Some states — such as North Carolina — have open-file discovery in many cases, thus, perhaps, limiting the significance of Rule 3.8(d)'s mandatory disclosure and timing requirements. Yet, even in such states, the recognition of a separate ethical obligation to help level the playing field for criminal defendants should be welcome. The various State Bars should now adopt Formal Opinion 09-454's reasoning in interpreting their own disclosure obligations and, equally important, enforce those obligations through appropriate disciplinary actions. The norm might soon be — or at least eventually be — full disclosure by the prosecution of all known favorable evidence and information in every case. This is a fitting goal for the criminal justice system's "ministers of justice."

Notes

Brady v. Maryland, 373 U.S. 83 (1963); see also, e.g., Giglio v. United States, 405 U.S. 150 (1972). Although not discussed in the text, ABA Formal Opinion 09-454 also imposes a duty on supervisory personnel in a prosecutor's office to "take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation." Id. at 8 (noting need for appropriate training and other internal office procedures to ensure compliance).

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (effective Jan. 1, 2010) (hereinafter ABA Formal Opinion 09-454), available at http://www.abanet.org/cpr/09-454.pdf. Although ABA Formal Opinions are merely advisory, they can be and are incorporated by the states into their own codes of ethics and they can be given legal effect by courts that, for example, adopt them as the official interpretation of a corresponding state rule or otherwise use them as support for a court action. Given that 49 states now base their ethics codes on the Model Rules, see ABA Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html, the ABA Formal Opinions can have a significant impact on how the various duties are interpreted.

The ABA already amended Rule 3.8 to include new requirements for prosecutors who learn of new evidence of innocence. See ABA Model Rule 3.8(g) & (h). Regrettably, as a nod to finality, the ABA adopted a much higher threshold in that section of the rules, even when the obligation imposed is only disclosure of the new evidence of innocence. There, disclosure is required only "when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." That is a much higher, arguably inappropriately so, threshold than the general obligation under Model Rule 3.8(d).

An interesting issue has already arisen concerning the revised Rule 3.8's limitation to "prosecutors in criminal cases," rather than, for example, to all government lawyers involved in criminal litigation, such as lawyers at cooperating or participating agencies. At least one commentator has posited that the combination of Rule 3.8(d) and other, more general ethical rules (e.g., against engaging in conduct prejudicial to the administration of justice and inducing another lawyer to breach her own ethical duties) makes it "reasonable to suggest that any government lawyer … should take steps to ensure that exculpatory evidence known by the government be made available to the prosecution and to the defense." Audrey Strauss, 'Brady' Obligation Extends Beyond Prosecutor's Office¸ in Corporate Update, N.Y. L.J. (Nov. 5, 2009) (in a section discussing the Brady rule; hence the use of "evidence").

See Strickler v. Greene, 527 U.S. 263, 281 (1999) (noting "the special role played by the American prosecutor in the search for truth in criminal trials"); Kyles v. Whitley, 514 U.S. 419, 439 (1995) (reasoning that the American prosecutor serves a sovereignty interested "not that it shall win a case, but that justice shall be done" (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

ABA Model Rules of Prof'l Conduct R. 3.8 cmt. 1.

ABA Formal Opinion 09-454, supra note 2, at 3-4.

Id. at 5.

Id.

Id. at 5 & n.23.

Strickler, 527 U.S. at 281-82.

See, e.g., United States v. Coppa et al., 267 F.3d 132, 142 (2d Cir. 2001) (discussing the difficulty of such predictions).

Federal District Court Judge Paul Friedman has rejected this approach to determining what must be disclosed under Brady at the trial level. He has reasoned that [the] prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2006).

ABA Formal Opinion 09-454 at 4. Therefore, a court's determination that a prosecutor's non-disclosure did not violate Brady because the withheld evidence or information was not material does not resolve the question whether the prosecutor violated his ethical obligations under Rule 3.8(d). Id. at n.20 (citing, as an example, United States v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding a statement not material but favorable to defense)).

Id. at 5.

Id.

Id.
ABA Model Rules of Prof'l Conduct R. 1.0(f).
ABA Formal Opinion 09-454, supra note 2, at 5.
Id. at 6 & n.27.
Id. at 6.
Id. (pointing out that the proceeding may occur as early as the arraignment).
Id. at 7.
Id. at 8 n.38.
Id. at 7.
Id.
Id. at n.37

1660 L St. NW • 12th Floor • Washington, DC 20036 • Phone: **(202) 872-8600** / Fax: **(202) 872-8690**

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information[1]

A. Where to look–The Prosecution Team

Department policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

---

[1] For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges.

This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[2] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[3] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[4] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment

---

[2] How to conduct the review is discussed below.

[3] Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[4] Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or

interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (*see, e.g.,* Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets
  - Stays of deportation or other immigration status considerations
  - S-Visas
  - Monetary benefits
  - Non-prosecution agreements

  - Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf

- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties

- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[5] should be memorialized by the agent.[6] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may

[5] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6] In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.