Creating Architects of Justice: A Gift from Modern Ethics to *Brady* on Its 60th Anniversary

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Abstract

Sixty years ago, the U.S. Supreme Court announced the landmark decision Brady v. Maryland*, which aimed to create a fairer justice system. Those charged with crimes were promised that the government would turn over evidence favorable to the defense, ensuring that trials would be a fair contest between the two sides. But six decades later, public confidence in our court system is at an all-time low. In this article, career prosecutor and criminal procedure professor David A. Lord argues that the best way to honor* Brady *on its sixtieth anniversary is to reinvigorate exculpatory evidence jurisprudence by aligning constitutional analysis with professional ethical guidance from the* Model Rules of Professional Conduct. *This Article traces the historical development of* Brady *principles over time, including the ways they have been expanded and contracted by the Supreme Court. The Court's decisions are then contrasted with the ethical mandates regarding exculpatory evidence that are contained in the Model Rules. The Article argues that by aligning constitutional principles with some of the professional ethical expectations of prosecutors, public confidence in the criminal justice system can be restored.*

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INTRODUCTION

When I became a prosecutor in 2006, it was the heyday of the television show *Law and Order*. Created originally in 1990, the program was named one of the greatest shows of all time by *Rolling Stone and TV Guide* and spawned multiple spin-offs.[1] Viewers were mesmerized by seeing an ideal, cyclical version of events: "Bad man does bad thing, is captured and punished. Justice is served."[2] When I graduated from law school, it seemed like everyone wanted to become a prosecutor, and these positions were hard to come by. However, things have changed dramatically since then. Currently, confidence in the criminal justice system is at an abysmal level. The percentage of Americans who classify themselves as either extremely or very confident in the justice system as a whole sits at 35%.[3] Part of this crisis of confidence has its roots in the repeated tragic stories of individuals who have lost their lives at the hands of law enforcement. For example, Gallup found that during the civil unrest that transformed the country following the killing of George Floyd, confidence in police had fallen to 48%.[4] But the lack of public confidence in the criminal justice system is also significantly impacted by what happens once a case reaches the inside of a courtroom. Stories

1. Emma Bracy, *The Curious Appeal of "Law & Order," the Show That's Always On*, REPELLER (Jan. 18, 2019), https://repeller.com/a-history-of-law-and-order-fandom/ [https://perma.cc/LM47-JSRD].

2. *Id.*

3. *Do Americans Have Confidence in the Courts?*, WILLOW RSCH. (Mar. 27, 2019), https://willowresearch.com/american-confidence-courts/#:~:text=Public%20confidence%20in%20the%20courts%20is%20low.&text=Most%20Americans%20say%20that%20the,minorities%20are%20at%20a%20disadvantage [https://perma.cc/X6TE-97N].

4. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html [https://perma.cc/5NZK-LGQV].

about prosecutorial conduct that lead to long prison sentences for innocent people create an impression that the justice system is anything but just.[5] One review found prosecutorial misconduct (including the concealment of exculpatory evidence) occurred in 30% of cases in which DNA evidence exonerated a convicted defendant.[6]

Most prosecutors I know enter the profession looking to serve the public and improve society. When I ask colleagues why they became prosecutors, I frequently hear answers focused on community safety, protecting victims, and seeing that justice is served. But I can anecdotally say that the deteriorating public perception of the criminal justice system has had a devastating impact in my field. Where an entry-level job opening in a prosecutor's office would once attract well over one hundred applicants, we frequently find far fewer graduating law students looking to take on these roles now. Our office is not alone, as prosecutors' offices throughout the United States are struggling with high vacancy rates and a dearth of applicants.[7] In San Diego, for example, applications to the prosecutor's office fell by 28% in just three years.[8] The Salt Lake City District Attorney has had a vacancy rate as high as 20%.[9] Forward-thinking prosecutors across the United States are creating initiatives to help restore confidence in the justice system and to make our courts fairer.[10] But these reforms will have limited impact so long as stories persist about injustice being done at the hands of public officials.

In the landmark decision of *Brady v. Maryland*, the United States Supreme Court noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair. . . . The United States wins its point whenever justice is done its citizens in the courts."[11] The *Brady* decision and its progeny would go on to create a field of law that sought to improve the integrity of guilty verdicts and make trials fairer by ensuring that those charged with crimes have access to evidence favorable to their case. This evidence might help demonstrate the defendant's innocence, call into question the veracity of the government's witnesses, or

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5. *See*, *e.g.*, Innocence Staff, *Herman Williams Is Exonerated After Nearly Three Decades of Wrongful Conviction*, INNOCENCE PROJECT (Sep. 6, 2022), https://innocenceproject.org/herman-williams-is-exonerated-after-nearly-three-decades-of-wrongful-conviction/ [https://perma.cc/2B49-W38D]. Herman Williams' conviction for murder was set aside after he served twenty-nine years in prison. *Id.* The prosecutor's office in the case acknowledged that the conviction was tainted by the government's failure to disclose favorable evidence in the original trial and through misconduct during the investigation. *Id.* DNA evidence recovered on the victim subsequently pointed to a suspect other than the person who had been incarcerated. *Id.*

6. *Id.* The review looked at 2,400 cases. *Id.*

7. Disha Raychaudhuri & Karen Sloan, *Prosecutors Wanted: District Attorneys Struggle to Recruit and Retain Lawyers*, REUTERS (Apr. 13, 2022), https://www.reuters.com/legal/transactional/prosecutors-wanted-district-attorneys-struggle-recruit-retain-lawyers-2022-04-12/ [https://perma.cc/59S5-D4CM].

8. *Id.*

9. *Id.*

10. I discuss the topic of prosecutorial reform initiatives extensively in a law review article that will be published in 2023. David A. Lord, *In Defense of the Juggernaut: The Ethical and Constitutional Argument for Prosecutorial Discretion*, 31 AM. U. J. GENDER & SOC. POL'Y & L. (forthcoming 2023).

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

mitigate the amount of punishment they receive for the crime.[12] But as we approach the sixtieth birthday of this remarkable decision, there remains a stark contrast between the aims of the opinion and public perception of criminal justice. This gap compels us to ask how we can build a better system. In the *Brady* case, the Court noted that, when the prosecution withholds favorable evidence from a defendant, it "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[13] But just as impropriety can result in a prosecutor becoming an architect of injustice, when the spirit of *Brady* and its progeny is upheld by the prosecutor, the opposite result occurs. The prosecutor helps build a system in which the public can rest its confidence. That prosecutor becomes an architect of justice.

How can we build on the cornerstone of *Brady* to create the edifice of a criminal justice system that holds the confidence of the public? The answer to this question lies both in how the legal principles first announced by the Court in *Brady* have evolved over time, as well as the professional ethical regulations that govern prosecutors. This Article explores how *Brady* came to become the law of the land and how, in the six decades that followed, the Supreme Court expanded (and at times contracted) its reach. In Part I, the Article examines Supreme Court case law regarding discovery in criminal cases before the *Brady* decision. These cases were rooted in statutory (rather than constitutional) law but created the philosophical foundation upon which the *Brady* decision would come to rest. Part II looks at the *Brady* decision itself. Part III analyzes the ways in which the Supreme Court refined *Brady* in the six decades following the decision, including the scope of what is considered exculpatory evidence, changing norms regarding materiality, and whether *Brady* creates an affirmative duty to preserve evidence. Part IV shifts focus to the prosecutor's duty to provide exculpatory evidence under the rules of professional responsibility. Lastly, in Part V, I argue that if the Court aligned *Brady* jurisprudence with the mandates of the rules of professional conduct, the risk of injustice within criminal prosecution would be minimized and a fairer court system would result.

The rule this article proposes would create two significant changes. The first would pertain to when a prosecutor would have to disclose exculpatory evidence. Instead of the current constitutional standard, which does not require the provision of the bulk of exculpatory evidence until trial, prosecutors would be required to provide this evidence prior to the acceptance of a plea offer. This would ensure that defendants have access to critical evidence before making the monumental decision of whether to plead guilty to a criminal offense. Second, this change would expand the scope of what prosecutors must disclose to defendants by prohibiting a prosecutor from knowingly withholding *any* exculpatory evidence as a matter of constitutional law and would not require courts to go through a

12. *See infra* Section II.
13. *Brady*, 373 U.S. at 88.

materiality analysis. These proposed changes are consistent with the legal rationale for the *Brady* decision and are the best way to honor the spirit of that opinion on its sixtieth anniversary.

I. PRE-*BRADY* JURISPRUDENCE

The right to discovery in criminal cases would not be constitutionalized until the mid-twentieth century. Many of the Supreme Court's earlier cases regarding discovery in criminal matters centered on statutes. However, several of these decisions laid the philosophical foundation for the eventual landmark *Brady* ruling, which created a constitutional right for criminal defendants to receive exculpatory evidence. An example of the early reliance on statutes to determine what documents a defendant was entitled to receive was *United States v. Duzee*.[14] There, the petitioner was a clerk of a federal district court who sought to recover disputed expenses he had incurred in criminal cases.[15] The clerk had given copies of the indictments to defendants.[16] Typical indictments include information that is critical to defending a case, including the approximate offense date, the statute alleged to have been violated, and other important details of the alleged crime. While the Court noted that the Sixth Amendment provided defendants with a right to be informed of the nature of the accusations against them, federal law at the time only required that defendants be provided with a copy of the indictment in capital cases.[17] The Court acknowledged that litigants were not entitled to a copy of the indictment in non-capital cases; however, a trial court had the power to order that one be given to a defendant.[18]

Similarly, in *Logan v. United States*, a group of defendants was implicated in a conspiracy to kill a group of prisoners who had themselves killed the local sheriff.[19] One of the objections addressed on appeal was the failure of the Government to provide the defendants with a list of the witnesses against them.[20] In analyzing a federal statute addressing the issue, the Court looked to the English Statute of Anne, which required that persons charged with treason be given a list of the witnesses against them ten days before trial and that this act of discovery occur in front of two or more credible witnesses.[21] While it did not find for the defendant, the Court admonished the Government for its conduct and noted that the purpose of these provisions was to inform the defendants of the

14. United States v. Duzee, 140 U.S. 169 (1891).
15. *Id.*
16. *Id.* at 172.
17. *Id.* at 172–73.
18. *Id.* at 173.
19. Logan v. United States, 144 U.S. 263 (1892).
20. *Id.* at 304.
21. *Id.* at 305.

testimony that they would have to confront at trial and to enable defendants to prepare a defense.[22]

The Court showed a similar reluctance to overturn a murder conviction in *Thiede v. Utah Territory*.[23] In *Thiede*, the defendant argued that the combined failure to, first, create and file a transcript of a preliminary hearing in violation of a statute and, second, provide him with a list of witnesses rose to the level of reversible error.[24] The Court acknowledged that having a transcript would be helpful for the defendant to cross-examine witnesses, but reasoned the defendant could have subpoenaed the court reporter and simply relied on that testimony to get to the same result.[25] The Court also discounted the claim regarding the witness list, reasoning that the federal statutory requirement for the provision of this document did not apply in a territorial court and the defendant had never articulated he was surprised by the calling of any witness.[26]

By rooting the early analysis of discovery issues in statutory law, rather than constitutional principles, the Court consistently issued narrow holdings that disfavored radical change. About a decade before the *Brady* decision, however, the Court began to show an increasing concern for the government's failure to disclose evidence that defendants need to prepare for trial. In *Gordon v. United States*, a case involving stolen property where the defendants were implicated by an alleged coconspirator, the Court focused on whether it was legal error for the government to have refused to provide conflicting witness statements as well as relevant transcripts.[27] The cooperating witness testified that the defendants had assisted him in loading stolen films onto a truck.[28] The defendants, while acknowledging that they physically participated in the task, gave an innocent version of their behavior which denied knowledge of the films being stolen.[29]

During cross-examination of the government's cooperating witness, testimony was elicited that the defendant had made multiple statements following his arrest, but before his final interview with the government.[30] In the earlier statements, the witness had not implicated the defendants.[31] The defendants asked the Court to order the government to produce the earlier statements, but the trial court refused to do so.[32] The trial court also refused to allow the introduction of evidence showing that the judge who would be sentencing the cooperating witness had told him to make sure to tell the whole story about what had happened, even if it

22. *Id.* at 304.
23. Thiede v. Utah, 159 U.S. 510 (1895).
24. *Id.* at 512, 514.
25. *Id.* at 513–14.
26. *Id.* at 514–15.
27. Gordon v. United States, 344 U.S. 414 (1953).
28. *Id.* at 415.
29. *Id.* at 416.
30. *Id.*
31. *Id.*
32. *Id.* at 416.

implicated other people.[33] This type of evidence could be used to impeach the cooperating witness by potentially demonstrating that his testimony was expansive or embellished in order to impress or satisfy the judge who would be sentencing him.

The Supreme Court noted that had the defendants been provided with the cooperating witness's inconsistent statements, they clearly would have been admissible.[34] The Court also explained that in the absence of specific legislation addressing disclosure, it had to turn to the principles of common law as interpreted "in the light of reason and experience."[35] While recognizing that some states provided no right for a defendant to see documents in the hands of prosecutors, the Court was persuaded by the fact that this was not a "blind fishing expedition," but rather a reasonable request for documents that were known to exist and were material.[36] Within this context, the Court stated that the government should not have an interest in trying to preclude disclosure, unless it wanted to convict people on the "testimony of untrustworthy persons."[37] As such, the trial court should have ordered the documents turned over to the defense.[38] Unlike in its earlier cases, once the Court was willing to embrace legal principles beyond the strict letter of statutes, it showed an inclination to create mechanisms to render the criminal justice system more fair.

The Court dramatically advanced the cause of more transparent discovery in a case that was a significant precursor to the *Brady* decision: *Jencks v. United States*.[39] In that case, a defendant who was believed to be a member of the Communist Party was charged with perjury for having falsely executed an "Affidavit of Non-Communist Union Officer" with the National Labor Relations Board.[40] Because the party did not issue membership cards or keep membership records and minutes of meetings, the evidence of the defendant's party membership was circumstantial.[41]

Part of the evidence against the defendant included the testimony of two undercover FBI agents, who relayed to the court their conversations with the defendant about his party membership and about a lecture he gave in which he praised the Soviet Union's disarmament plan, blamed the United States for aggression in Korea, and urged individuals to read a Communist-friendly newspaper.[42] After it came to light that the agents had submitted reports to the FBI about their

33. *See id.* at 417.
34. *Id.* at 417–18.
35. *Id.* at 418.
36. *Id.* at 418–19.
37. *Id.* at 419.
38. *Id.*
39. *See* Jencks v. United States, 353 U.S. 657 (1957).
40. *Id.* at 658–59.
41. *Id.* at 659–60.
42. *Id.* at 663–64.

activities, the defendant moved for an order requiring the disclosure of the reports.[43] The trial court denied the defendant's request, siding with the Government's argument that the defense had not shown an inconsistency between the reports and the agents' testimony at trial, thus rendering the reports useless for impeachment.[44]

When overturning the verdict, the Supreme Court noted, as it had in *Gordon*, that the defendant was not engaged in a "broad or blind fishing expedition" with the hope of coming up with something he could use for impeachment.[45] Rather, the Court reasoned that the testimony of the two agents was critical and that they did not remember what they had put in their reports from several years earlier.[46] The Court opined that if a defendant was required to first show a conflict between the reports and the testimony, they would basically be rendered helpless in determining whether there was a discrepancy in the first place.[47] This practice would be incompatible with the administration of justice.[48] As a result, the Court held that the defendant was entitled to inspect all of the reports of the federal agents in the government's possession.[49] The Court went on to note that only the defendant would be adequately equipped to determine if the reports could be used to discredit the government's witnesses.[50] In response to the government's argument that disclosure could compromise "vital national interests," the Court stated that if the government wanted to assert such an evidentiary privilege, the defendant would have to go free, as it would be unconscionable to "deprive the accused of anything which might be material to his defense."[51]

Following the *Jencks* decision, Congress passed a law, 18 U.S.C. § 3500, which created a mechanism by which a defendant could move to order the federal government to produce witness statements and reports.[52] Following that enactment, the Supreme Court held that § 3500, rather than the *Jencks* decision, governed the production of statements to a criminal defendant in a federal trial.[53] The Court held that the documents that a defendant sought to have produced must be

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43. *Id.* at 665.

44. *Id.* at 665–66.

45. *Id.* at 667. In the offices I have worked in, prosecutors will frequently respond to a defendant's motion to compel the production of particular exculpatory evidence by arguing that the defendant is engaged in the proverbial fishing expedition. In those circumstances, the government argues that the defendant has no basis for believing that exculpatory evidence is being withheld. Instead, the prosecutor argues, the defendant is making broad discovery requests without a foundation for doing so in the hope that they randomly yield something of value.

46. *Jencks*, 353 U.S. at 667.

47. *Id.*

48. *Id.* at 668.

49. *Id.*

50. *Id.* at 668–69.

51. *Id.* at 669–71.

52. *See* 18 U.S.C. § 3500(b).

53. Rosenberg v. United States, 360 U.S. 367, 369 (1959).

relevant to the proceedings.[54] Where a document should have been disclosed and was not, the Court would then analyze whether the defendant was prejudiced by the omission.[55]

The decisions in *Gordon* and *Jencks* provided language praising the values of disclosure, which foreshadowed where the Court would soon head in addressing criminal defendants' discovery requests. But the language and reasoning of the decisions were not yet firmly and analytically rooted in constitutional law. The Court did recognize—in a very limited way—that it was unconstitutional for a conviction to be based on testimony that the government knew was perjured.[56] The Court also acknowledged that if perjury occurs during the cross examination, rather than direct examination, of one of the prosecution's witnesses, it is a constitutional violation for the prosecutor not to bring the perjury to the court's attention.[57] With these decisions, the Court began to recognize a seed that would later blossom into *Brady*—specifically, they acknowledged that when a prosecutor takes actions in a criminal case which prevent a defendant from effectively defending himself, it implicates the Due Process Clause.[58] Due process is intended to safeguard the liberty of citizens against action of the state and to embody the "fundamental conceptions of justice."[59] The Court would more fully flesh out this constitutional right in the case that has become synonymous with establishing a constitutional right to certain criminal discovery—*Brady v. Maryland*.[60]

II. THE *BRADY* DECISION

In *Brady*, two suspects, Brady and Boblit, committed a robbery where the victim was killed during the commission of the crime.[61]

Brady had admitted to being involved in the robbery, but claimed that Boblit had killed the victim.[62] Brady's attorney had previously asked to examine Boblit's out-of-court statements and was shown several by the government.[63] But one statement, in which Boblit admitted to committing the homicide, was excluded.[64] Brady's attorney did not find out about the statement until Brady had

54. *Id*. at 370.
55. *Id*. at 371.
56. *See* Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942); Napue v. Illinois, 360 U.S. 264 (1959).
57. *Napue*, 360 U.S. at 269.
58. *Mooney*, 294 U.S. at 108.
59. *Id*. at 112.
60. Brady v. Maryland, 373 U.S. 83 (1963).
61. *Id*. at 85.
62. *Id*. at 84.
63. *Id*.
64. *Id*.

been tried, convicted, and sentenced to death.[65] The trial court refused any post-conviction relief, but the Maryland Court of Appeals held that the suppression of the evidence constituted a denial of due process.[66] That court ordered a new hearing on the issue of punishment, but not on the issue of guilt, resulting in the appeal of that decision to the Supreme Court.[67] Because this was a state prosecution, and thus not implicated by *Jencks*,[68] which relied on federal statutes and common law, it brought squarely before the Court the issue of whether a defendant in a state prosecution is deprived of a right under the Constitution.[69]

The Supreme Court sided with the defendant, expanding its earlier case law regarding the knowing use of perjured testimony by prosecutors and giving constitutional dimension to a claim that the government withheld evidence favorable to the accused.[70] The ruling had both expansive and contracting qualifiers: "[w]e now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[71] The Court limited its holding by requiring that (a) the defendant make a request for the evidence and (b) the evidence at issue be material;[72] however, the Court ensured a broad ruling by holding that it did not matter whether the evidence was withheld by bad or good faith on the part of the prosecutor.

In announcing its decision, the Court utilized idealistic language: "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly."[73] If the prosecutor fails to disclose evidence that tends to exculpate the defendant or which could reduce the penalty, the prosecutor has become an "architect of a proceeding that does not comport with standards of justice."[74] The Supreme Court ultimately did not give the defendant a new trial, simply a new

65. *Id.*

66. *Id.*

67. *Id.*

68. The *Jencks* decision was not rooted in constitutional law. Rather, the Court was able to reach its ruling in that case by examining an interplay of common law evidentiary issues such as relevance, materiality and privilege. *See* Jencks v. United States, 353 U.S. 657, 662–64. Because *Jencks* did not involve or cite constitutional principles, it was not binding on prosecutions in state courts and instead only implicated federal prosecutions.

69. *Brady*, 373 U.S. at 88.

70. *Id.* at 87.

71. *Id.* at 85.

72. In looking at materiality in this case, the Court noted that, "[t]here is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury." *Id.* at 85. But the Court found itself hesitant to place itself in the position of the jury and assume whether it would matter who had done the actual killing. *Id.* It made the determination in this case that the withheld evidence was material, but "not without some doubt." *Id. See infra* Part III.B for an in-depth discussion of the materiality standard.

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

74. *Id.* at 88.

sentencing hearing, at which point he was sentenced to life in prison rather than to death.[75]

III. THE SUPREME COURT'S EXCULPATORY EVIDENCE: DECISIONS AFTER *BRADY*

Over the next six decades, the Supreme Court would define, expand, and contract the confines of the *Brady* decision in four areas: (a) the nature of the evidence that qualifies as exculpatory, (b) how the materiality requirement is established, (c) preservation of evidence, and (d) the timing of when the *Brady* right arises. Generally, but not always, these developments have limited the defense's ability to put on a robust defense. Defendants received an evidentiary boon when exculpatory evidence was expanded to include evidence that can be used to impeach the credibility of a witness. By contrast however, much of *Brady*'s progeny (through the materiality analysis) shields prosecutors, allowing them to justify their failure to disclose evidence by claiming, "no harm, no foul." The Court has also refused to create an expansive obligation on the government to preserve evidence that might be exculpatory to a defendant. Similarly, the Court has restricted *Brady*'s potential reach by not requiring disclosure earlier in the criminal justice process, which also undermines the utility of these principles in helping defendants prepare their case appropriately.

A. THE NATURE OF THE EVIDENCE THAT QUALIFIES AS EXCULPATORY

While much of the caselaw following *Brady* restricted the reach of the decision, there is one area in which the case has been greatly expanded—that is the clarification that impeachment evidence qualifies as exculpatory evidence. Just short of a decade after the *Brady* decision, the Supreme Court expanded the principles of exculpatory evidence in a case that, from my experience, has had the most dramatic impact in this area of the law—*Giglio v. United States*.[76] In this case, the defendant was convicted of passing forged money orders, based in part on the testimony of an alleged co-conspirator, who was a teller at the bank where the money orders were received.[77] At trial, the coconspirator testified that he was never told that he would not be prosecuted in exchange for his testimony and that he still could be charged with a crime.[78] The trial prosecutor went so far as to comment in closing arguments on the fact that the cooperating witness had

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75. Emily Langer, *E. Clinton Bamberger Jr., Lawyer Who Won "Brady Rule" for Criminal Defendants, Dies at 90*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/national/e-clinton-bamberger-jr-lawyer-who-won-brady-rule-for-criminal-defendants-dies-at-90/2017/02/17/97eb75dc-f461-11e6-8d72-263470bf0401_story.html [https://perma.cc/453W-JSYD]. Brady's attorney later remarked that it was always interesting that the Supreme Court had not actually overturned the lower court ruling, but that everyone had perceived him as winning, because of the creation of the *Brady* rule. *Id.*

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

77. *Id.* at 150–51.

78. *Id.* at 151.

received no promises that he would not be indicted.[79] It was subsequently determined, however, that a different prosecutor who had presented the case to the grand jury had promised the witness that he would not be prosecuted if he cooperated with the government.[80]

The issue before the Court was whether testimony that can be used to call into question a witness's credibility falls within *Brady*'s requirement for the disclosure of evidence favorable to the defendant.[81]

In answering this question in the affirmative, the Court began by citing the pre-*Brady* line of cases[82] as establishing the general proposition that deceiving the court and jurors through the presentation of knowingly false evidence is "incompatible with the rudimentary demands of justice."[83] As such, evidence that affects credibility was determined to fall within the ambit of *Brady*'s protections.[84] The Court further opined that it did not matter that the first prosecutor, who made the promise, failed to notify his coworkers or supervisors: "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes to the Government."[85] While acknowledging that this creates a burden on larger offices, the Court noted that policies and procedures could be put in place to ensure that the burden is satisfied.[86]

While perhaps less known or referenced than *Brady*, the *Giglio* decision arguably has had a greater impact. *Giglio* determined that impeachment evidence was encompassed by the term "exculpatory evidence." Because, in most states, a witness can be impeached based on bias, reputation for untruthfulness, certain criminal convictions, defects of capacity, and prior inconsistent statements, the world of conceptual exculpatory evidence expanded significantly.[87] Thus, the world of evidence that has a direct bearing on a defendant's guilt is being dwarfed by the world of evidence that can impeach a witness. Once *Giglio* was determined, it exponentially expanded the government's disclosure obligations. The other important emphasis in *Giglio* is the exclusion of an "ignorance is bliss" defense. If it does not matter whether the exculpatory evidence is known to only one prosecutor in an office, then each prosecutor is charged with all others' knowledge.[88]

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79. *Id.* at 152.
80. *Id.* at 152–53.
81. *Id.* at 153–54; *see also* Brady v. Maryland, 373 U.S. 83, 85.
82. *See supra* Section I.
83. *Giglio*, 405 U.S. at 153–54.
84. *Id.* at 154.
85. *Id.*
86. *Id.*
87. *See, e.g.*, FED. R. EVID. 608, 609; KENT SINCLAIR, THE LAW OF EVIDENCE IN VIRGINIA 679–732 (8th ed. 2018).
88. As the Court predicted, this can have significant implications in larger offices where a case can be passed between multiple prosecutors at different stages. I work in an office where we utilize "vertical prosecution," so

B. MATERIALITY ANALYSIS

Following *Brady*, materiality became an important focus for the Court in its exculpatory evidence doctrine. Materiality analysis focuses not on whether the evidence that was withheld was exculpatory but rather, assuming it is, whether the failure to disclose that evidence was sufficiently non-consequential so as to not require a new trial or other relief for the aggrieved defendant. This is an area that has significantly restricted the potential impact of *Brady*.

An early example of a case addressing materiality was *Moore v. Illinois*, a murder case out of Lansing, Illinois involving the death of a bartender.[89] There, a group of eyewitnesses identified the defendant as the person who had shot the decedent, and another witness identified him as someone who was in a different bar two days later, bragging that it was "open season on bartenders" and that he had shot one in Lansing.[90] The defendant claimed that a number of exculpatory facts were withheld from him by the prosecution, but most of the facts focused not on the eyewitnesses who had identified the defendant as the shooter, but on the additional witness who had identified him as someone making the inculpatory comments at a different bar.[91] The withheld evidence also tended to call into question some of the extraneous portions of that witness's testimony, rather than its central points.[92] The Court noted that it knew "of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."[93] The Court opined that the information at issue, "while somewhat confusing, is at most an insignificant factor," and thus was not material.[94]

Moore cuts to a core deficiency in the Court's materiality analysis. If a prosecutor has evidence in his possession that is helpful to the defendant, materiality analysis allows the prosecutor, after the fact, to argue that the evidence would not have had a significant impact on the verdict. This invites the Court to

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that, as a matter of practice, the same prosecutor handles a case from preliminary hearing through sentencing. During the course of my career as a prosecutor, I have come to view this as a "best practice." That is because vertical prosecution ensures that as the prosecutor prepares the case and meets with witnesses, there is a single individual associated with the case. This makes it easier to recognize, for example, when a witness makes an inconsistent statement. However, I also know from personal experience that not all prosecutor's offices are structured this way. I have seen that it is common, particularly in larger offices, for one prosecutor to handle a case in its preliminary stages and another prosecutor to handle it at trial. If this is how a prosecutor's office is structured, it becomes critical to ensure that there be a means for detecting and communicating between prosecutors any exculpatory evidence, such as inconsistent witness statements.

89. Moore v. Illinois, 408 U.S. 786, 788–89 (1972).

90. *Id.*

91. *Id.* at 791–93. An additional asserted violation pertained to a diagram that one of the eyewitnesses had created, which the defense claimed called into question his ability to have seen the shooter, but the Court rejected the argument that the diagram actually showed this. *Id.* at 798.

92. *See id.* at 795–96.

93. *Id.* at 795.

94. *Id.* at 798.

retroactively speculate on the impact of evidence in order to provide legal cover for the prosecutor's error.

The issue of how to define *Brady's* materiality requirement was also central to the Supreme Court's decision in *United States v. Agurs*.[95] This was a murder case where the defendant asserted self-defense and the prosecution did not turn over information about the victim's prior convictions because the defense had not made an "appropriate request" and because the government asserted the information was not material.[96] Where *Brady* had held that it is a constitutional violation for the prosecution to withhold exculpatory evidence "upon request" from the defense, in *Agurs*, the Court acknowledged that some evidence "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce" it, even if no request is made by the defense attorney.[97] However, because the Court was not imposing a constitutional duty on the prosecution to turn over its entire file to the defense attorney, it was unwilling to simply hold that any nondisclosure of exculpatory evidence was a constitutional violation.[98] Materiality analysis under *Agurs* focused on whether the omitted evidence actually created a reasonable doubt that otherwise did not exist.[99] In this case, the evidence of the victim's prior conviction did not contradict anything in the government's case and, when looked at in context with other evidence, showed that the victim was armed with a knife during the encounter.[100] Thus, the non-disclosed evidence was deemed immaterial and the failure to disclose did not constitute constitutional error.[101] *Agurs* again highlights the failings of materiality analysis. It condones what appears to be willfully bad or negligent prosecutor conduct by arguing that at the end of the day, the failure to turn over evidence would not have significantly impacted the outcome of the case. The pressure to not overturn a verdict will always be significant when dealing with a crime of violence, and materiality analysis creates an easy escape valve where the Court can keep a verdict intact by essentially ignoring misconduct.

The Court returned to analyzing the struggle over the materiality standard in *United States v. Bagley*.[102] This case involved defendants who were charged with narcotics and firearms offenses and requested information about whether witnesses had been given any promises or inducements in exchange for their

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

96. *Id.* at 99–101.

97. *Compare* Brady v. Maryland, 373 U.S. 83, 87 (holding that the suppression of evidence favorable to an accused "upon request" violates due process), *with Agurs*, 427 U.S. at 106–07 (noting that in many cases the prosecution will have exculpatory evidence in its possession that is unknown to the defense, such that no specific request for the material is made, but where the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of "a duty to produce").

98. *Agurs*, 427 U.S. at 111.

99. *Id.* at 112.

100. *Id.* at 114.

101. *Id.*

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

testimony.[103] The government not only failed to disclose any such promises, but it affirmatively stated that the information provided by witnesses was provided without any "promises of reward."[104] Following their conviction, the defendants made a Freedom of Information Act request to the government and obtained documents showing that certain witnesses had contracts with the government that required them to provide information to law enforcement, purchase evidence on the government's behalf, serve in an undercover capacity, assist in gathering evidence, and testify in court.[105] The witnesses were paid $300 in exchange for this.[106] In rejecting the defendant's request for a new trial, the district court concluded that, had the agreements been disclosed, it would not have had an effect on the verdict because the primary focus of the witness's testimony centered on the firearms charges (for which the defendant was acquitted) rather than the narcotics offenses (for which he was convicted).[107] In reversing the decision, the court of appeals concluded that, when the exculpatory evidence that the government fails to disclose involves impeachment material, automatic reversal is necessary because the failure to disclose impairs the right of effective cross examination.[108]

The Supreme Court rejected the idea of mandating automatic reversal for the failure to disclose impeachment material, finding that such evidence is treated no differently from other exculpatory evidence.[109] The Court reemphasized that materiality analysis is concerned with whether suppressed evidence "might have affected the outcome of the trial," and ruled that reversal should only occur where "its suppression undermines confidence in the outcome of the trial."[110] The case was remanded to the court of appeals to determine whether there was a reasonable probability that the result of the trial would have been different had the inducement to the witnesses been disclosed to the defense.[111]

While *Kyles v. Whitley*[112] did not overtly change the legal standards regarding materiality, its linguistic emphasis stands in contrast to the cases preceding it and points to potential areas where *Brady* could be expanded. *Whitley* was a death penalty case in which a victim was killed and her vehicle was stolen.[113] The police relied on eyewitness testimony, but much of the investigation centered on an individual who ultimately did not testify for the government but had told law

103. *Id.* at 669–70.
104. *Id.* at 670.
105. *Id.* at 671.
106. *Id.*
107. *Id.* at 673.
108. *Id.* at 674.
109. *Id.* at 676–78.
110. *Id.* at 674–75, 678 (citing United States v. Agurs, 427 U.S. 97, 104 (1976)).
111. *Id.* at 684.
112. Kyles v. Whitley, 514 U.S. 419 (1995).
113. *Id.* at 423.

enforcement that the defendant had sold him the stolen car.[114] The defense argued that this individual was the actual culprit and had framed the defendant.[115] The prosecution affirmed that there was "no exculpatory evidence of any nature," despite having inconsistent descriptions of the assailant from eyewitnesses, inconsistent statements about the event from the man the defense asserted did the actual killing, and evidence that would show the defendant's car was not left at the scene of the crime, in contravention of law enforcement's theory of the case.[116]

Citing back to the *Bagley* case, *Whitley* emphasized four components of how materiality should be understood when courts assess the impact of the failure to disclose exculpatory evidence.[117] First, a defendant does not have an obligation to demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in acquittal.[118] The Court noted that the "touchstone of materiality is reasonable probability" and that "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."[119]

Second, a court should not analyze materiality by subtracting the evidence that should have been suppressed from the total evidence and then examining whether the remaining evidence could support a conviction.[120] Rather, the question is whether the withheld evidence could cause the case as a whole to be viewed in a light that undermines confidence in the verdict.[121]

Third, an appellate court's traditional harmless error analysis is irrelevant when materiality has been established because demonstrating materiality necessitates a conclusion that the suppressed evidence had a "substantial and injurious effect or influence in determining the jury's verdict."[122]

Finally, a reviewing court should not look in a piecemeal fashion at each individual piece of excluded exculpatory evidence, but at the effect of the suppressed evidence collectively.[123] The Court again emphasized that it is irrelevant if the police have disclosed the exculpatory evidence to the prosecution because

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114. *Id.* at 424, 429.

115. *Id.* at 429.

116. *Id.* at 429–30.

117. *Id.* at 434.

118. *Id.*

119. *Id.* It is worth noting, however, that while "reasonable probability" falls short of a preponderance of the evidence standard, it is not so low as merely constituting a "reasonable *possibility*" that the disclosed evidence would have resulted in a different verdict. *See, e.g.*, Stickler v. Greene, 527 U.S. 263, 291 (1999).

120. *Whitley*, 514 U.S. at 434–35.

121. *Id.* at 435.

122. *Id.* In traditional harmless error analysis, a court is directed to look at "whether the error had substantial and injurious effect or influence in determining the jury's verdict" in deciding whether a legal error that occurred at trial is sufficient to warrant reversal on appeal. *See* California v. Roy, 519 U.S. 2, 5 (1996).

123. *Whitley*, 514 U.S. at 436.

prosecutors have the means to discharge the government's obligations under *Brady*.[124] Specifically, the Court pointed out that only the prosecution can "know what is undisclosed" and thus, it must assign to the prosecutor "the consequent responsibility" of knowing when the duty to disclose has arisen.[125] The Court also repeated its admonition from *Agurs* that a prudent prosecutor should resolve doubtful questions in favor of disclosure.[126] The Supreme Court found that when the court of appeals had reviewed the case, the judges placed far too much emphasis on dismissing particular items of evidence as immaterial, suggesting that *cumulative* materiality had not been the touchstone, as it should be.[127] The Supreme Court did its own in-depth materiality analysis, concluding that, when all of the withheld evidence was considered in its totality, the conviction had to be reversed, because the trial had not been fair.[128]

One of the more interesting characteristics of the *Whitley* decision was its analysis of the exculpatory information pertaining to an individual that was never actually called as a government witness.[129] The Court noted that the fact that the police had the information and did not act in a different fashion could be used to potentially attack the thoroughness and good faith of the investigation itself.[130] This implies that the admissibility of the withheld evidence is not the sole criterion for materiality analysis, since withheld evidence could be utilized by the defense, even if the evidence is not introduced in court directly.

Interestingly, in the same year that *Whitley* was decided, the Court issued *Wood v. Bartholomew*, a decision which emphasized the inadmissibility of withheld evidence in assessing materiality.[131] This case involved a murder committed as part of a robbery in which one of the government's witnesses was given a

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124. *Id.* at 438.

125. *Id.* at 437.

126. *Id.* at 439.

127. *Id.* In cases where the state's evidence rests primarily on a single witness, the Supreme Court may be more likely to find that withheld evidence is material. For example, in *Wearry v. Cain*, the conviction rested on a single witness providing evidence implicating the defendant and then circumstantially linking the suspect to the victim. Wearry v. Cain, 577 U.S. 385, 387–88 (2016). The Court called the state's case a "house of cards" built on the credibility of a single witness, such that evidence of relatively minor importance can create reasonable doubt. *Id.* at 393. In another case, a murder conviction was rooted in the testimony of a single witness. Smith v. Caine, 565 U.S. 73, 74 (2012). During post-conviction proceedings, the defendant obtained notes that drew into question the reliability of that witness's testimony. *Id.* at 75. The Court noted that "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict," but that is not the case where the witness at issue is the *only* evidence linking the defendant to the crime. *Id.* at 76.

128. *Whitley*, 514 U.S. at 454.

129. *Id.* at 445.

130. *Id.*

131. Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam). It should be noted that four justices dissented from this summary disposition but did not file an opinion stating their reasoning. As a result, it is impossible to tell if this is because of a belief that the holding was inconsistent with earlier case law or if they objected to it being handled in a summary fashion.

polygraph examination that indicated deception.[132] An examination of another witness produced inconclusive results.[133] The results of neither examination were disclosed to the defense.[134] The Supreme Court noted that the polygraph results were inadmissible under state law, even for impeachment, so they were not "evidence at all."[135] The Court thus opined that disclosure of the results could not have had a direct impact on the outcome of the trial.[136] The court of appeals had concluded that even though the results were inadmissible, had defense counsel known of the results, he would have had more reason to pursue an investigation of the witness's story and could have potentially deposed the witness. The Supreme Court dismissed this argument by noting that the defendant's entire theory of the case, even without the omitted evidence, was that the witness was lying and that there was no reason to believe that disclosure of the polygraph would have led to a different trial strategy.[137] The Supreme Court's analysis appears to leave open the possibility that inadmissible evidence might still be material because it would require a defense attorney to recover admissible evidence or change their trial strategy, though the defense in this particular case had not adequately explained why that would have been true. It would be a mistake, however, to read *Wood* as suggesting that the inadmissibility of exculpatory evidence automatically makes the evidence immaterial. Instead, the case stands for the proposition that admissibility is merely a factor that *can* be considered.

C. PRESERVATION OF EVIDENCE

While *Brady* established a duty to disclose exculpatory evidence, the decision was silent on the issue of whether the Constitution creates any duty for the government to preserve evidence that would be favorable to a defendant in the presentation of his case. Just as the materiality analysis permits misconduct by applying a harmless error analysis, this area of the law minimizes the substantive rights of defendants by focusing only on whether the prosecutor acted in bad faith. In 1984's *California v. Trombetta*, the Court squarely confronted the question of whether the Due Process Clause requires this.[138] In that case, the respondents had been charged with driving under the influence of alcohol and each had a blood alcohol level as measured on a breath test in excess of the state's legal limit. Despite its capacity to do so, the state had not preserved a sample of the respondents' breath.[139] The respondents claimed that, if the samples had been

132. *Id.* at 4–5.
133. *Id.* at 4.
134. *Id.*
135. *Id.* at 6.
136. *Id.*
137. *Id.* at 7.
138. California v. Trombetta, 467 U.S. 479 (1984).
139. *Id.* at 482–83.

preserved, they could have been used to impeach the breath test results.[140] The Court identified the broad field of case law pertaining to exculpatory evidence, as "constitutionally guaranteed access to evidence."[141] The Court noted that in past cases, it had recognized that there are some circumstances where the government violates the Constitution if it hampers a defendant's preparation for trial.[142]

In determining when the government's destruction of evidence takes on constitutional significance, the Court looked to whether the government actor was behaving in good faith or bad faith.[143] Reasoning that the state came into possession of the respondent's breath samples solely for the purpose of providing raw data to create the report on alcohol content, the Court concluded that the state did not destroy the samples as a "calculated effort to circumvent disclosure requirements established by *Brady v. Maryland* and its progeny."[144] The Court went on to opine that whatever duty to preserve evidence may exist, it "must be limited to evidence that might be expected to play a significant role in a suspect's defense."[145] Circling back to *Agurs*,[146] the Court noted that the primary question for resolving the constitutionality of destroyed evidence is whether the evidence was facially exculpatory before it was destroyed.[147]

The Court reemphasized *Trombetta* four years later in *Arizona v. Youngblood*.[148] Youngblood was charged with kidnapping and sexually assaulting a child.[149] After the victim reported the sexual assault, a forensic examination was conducted using a sexual assault kit, and the clothing that he wore during the assault was collected but not frozen or refrigerated.[150] Semen stains were subsequently found on the clothing, but attempts to identify a blood group substance in the stains were unsuccessful, leading to inconclusive results regarding the assailant's identity.[151] Expert witnesses for both the state and the defendant testified as to what the tests could have shown if they had been conducted immediately after the clothing was collected as evidence or if the clothing had been properly refrigerated.[152] The trial court instructed the jury that, if they found that the state had destroyed or lost

140. *Id*. at 483.

141. *Id*. at 485 (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

142. *Id*. at 486 (first citing United States v. Marion, 404 U.S. 307, 324 (1971); then citing United States v. Lovasco, 431 U.S 783, 795 n.17 (1977); and then citing *Valenzuela-Bernal*, 458 U.S. at 873).

143. *Id*. at 487 (citing Kilian v. United States, 368 U.S. 231 (1961) (rejecting a defendant's claim that a law enforcement officer's destruction of his preliminary notes was a constitutional violation when the purpose of the notes was merely to transfer the data to a subsequent investigatory report)).

144. *Trombetta*, 467 U.S. at 488.

145. *Id*.

146. For a discussion of this case, see *supra* notes 95–101 and accompanying text.

147. *Trombetta*, 467 U.S. at 489 (citing United States v. Agurs, 427 U.S. 97, 109–110).

148. Arizona v. Youngblood, 488 U.S. 51, 56 (1988).

149. *Id*. at 52.

150. *Id*. at 52–53.

151. *Id*. at 54.

152. *Id*.

evidence, they could "infer that the true fact is against the State's interest," but the jury convicted the defendant nonetheless.[153]

The Supreme Court noted that the government had complied with cases such as *Brady* and *Agurs* by disclosing all of the evidence and reports at issue.[154] While acknowledging that, under *Brady*, the government's good or bad faith in failing to disclose materially exculpatory evidence is irrelevant, the Court opined that the standard should be different in addressing a claim for failing to preserve potentially exculpatory evidence.[155] Relying on the language of the *Trombetta* decision, the Court held that, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[156] Because there was no evidence of bad faith and, at worst, the failure to preserve evidence in this case was negligent, the conviction was not unconstitutional.[157]

This principle was again reaffirmed in *Illinois v. Fisher*, where a defendant charged with possession of cocaine filed a motion requesting all physical evidence the state intended to use at trial.[158] He then failed to appear and remained a fugitive for ten years before the government apprehended him.[159] During the period when he had absconded, the state, in accordance with established procedures, had destroyed the narcotics from his arrest.[160] Because the police acted in good faith and pursuant to policy, the Court found there was no constitutional violation in the destruction of the evidence.[161]

D. TIMING OF THE RIGHT TO EXCULPATORY EVIDENCE

Yet another area where the reach of *Brady* has been unnecessarily constrained pertains to the timing of the obligation to disclose exculpatory evidence. By construing this as a trial right, which necessarily comes late in the adjudicative process, the Supreme Court has impaired the utility of the *Brady* doctrine in promoting fairer trials in two ways. First, by not requiring the disclosure of known exculpatory evidence prior to a defendant accepting a plea offer, the Supreme Court has granted constitutional sanction to a system where defendants unfairly accept plea offers, unaware that the government's case is far weaker than it might otherwise appear. Second, by placing the point of disclosure closer to trial, the Court has made it harder for defense attorneys to make full use of the disclosed evidence in the preparation of their case.

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153. *Id.*
154. *Youngblood*, 488 U.S. at 55.
155. *Id.* at 57.
156. *Id.* at 58.
157. *Id.*
158. Illinois v. Fisher, 540 U.S. 544, 545 (2004).
159. *Id.*
160. *Id.* at 546.
161. *Id.* at 548.

The issue of when a prosecutor's constitutional obligations under *Brady* arise was addressed in *United States v. Ruiz*, where the Supreme Court determined that the right to evidence that could be used to impeach a witness does not arise until a case proceeds to trial and thus does not have to be provided at the time a plea offer is extended and accepted.[162] This is another way in which the reach of *Brady* has been restricted.

In *Ruiz*, federal prosecutors made use of a "fast track" plea bargain process where a defendant waived indictment, trial, and appeal in exchange for a sentencing departure that would have reduced the defendant's sentencing range by six months.[163] While the plea terms included an affirmation that the government had turned over any facts establishing the "factual innocence of the defendant," it required the defendant to waive the right to receive impeachment information related to informants or other witnesses.[164] The defendant refused to agree to this provision, leading the offer to be withdrawn.[165] Later, the defendant pleaded guilty to the indicted charge but asked the Court to grant the same downward sentencing departure that it would have had she accepted the offer that required waiver of the receipt of impeachment evidence.[166] The trial court refused to do so.[167]

The Supreme Court noted that all plea agreements require the waiver of certain constitutional guarantees such as the privilege against self-incrimination, the right to confront one's accuser, and the right to trial by jury.[168] The Court opined that impeachment information is special in relation to the fairness of trial but does not have a bearing on whether a guilty plea is voluntary.[169] Reasoning that it was difficult to predict when impeachment evidence would or would not help a particular defendant, the Court refused to classify impeachment information as evidence that a defendant must always know before pleading guilty.[170] The Court explained that requiring the provision of impeachment information during plea bargaining could interfere with the government's interest in the efficient administration of justice, disrupt ongoing investigations, and expose prospective witnesses to serious harm.[171] It would also deprive the plea-bargaining process of its

162. United States v. Ruiz, 536 U.S. 622, 631, 633–634 (2002). In other words, while *Giglio* established a defendant's right to have access to information in the government's possession that helps with impeaching prosecution witnesses, that right only comes into play constitutionally if the case goes to trial. As a result, *Giglio* also does not impact plea offers.

163. *Ruiz*, 536 U.S. at 625.

164. *Id.*

165. *Id.*

166. *Id.* at 625–26.

167. *Id.* at 626.

168. *Id.* at 628–29.

169. *Id.* at 629.

170. *Id.* at 630.

171. *Id.* at 631–32.

resource-saving advantages by requiring the government to devote more time to cases in the plea bargaining state.[172]

IV. MODEL RULE 3.8 AND EXCULPATORY EVIDENCE

While the *Brady* decision is an important source of guidance to prosecutors, it is not the sole source of direction in this area. The *Model Rules of Professional Conduct* ("*Model Rules*"), which are proposed by the American Bar Association ("ABA") and have been adopted by state bar associations with individualized modifications, offer the ethical guidelines that state bar associations use in enforcing discipline against attorneys, including prosecutors.[173] Model Rule 3.8 pertains specifically to prosecutors and acknowledges that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[174] Among the additional provisions that bind a prosecutor, but not other attorneys, is a requirement that

> The prosecutor in a criminal case shall . . . (d) 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.[175]

This particular language has been adopted word for word by thirty-eight states.[176] In the remaining jurisdictions, with the arguable exception of North Carolina,[177] the modifications do not limit the demands made of prosecutors, because the alterations are either more demanding of prosecutors or are non-substantive, semantic changes.[178]

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172. *Id*. at 632.

173. MODEL RULES OF PROF'L CONDUCT (2018) [hereinafter MODEL RULES].

174. MODEL RULES R. 3.8 cmt. 1.

175. MODEL RULES R. 3.8.

176. *See* CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Nov. 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf [https://perma.cc/9ALZ-YQW9]. Note that this report does not include information on whether Vermont has adopted subsection (d) of Model Rule 3.8 in the form contained in the *Model Rules*. However, a comparison to the *Vermont Rules of Professional Conduct* shows that it has. *See* VT. RULES OF PROF'L CONDUCT R. 3.8 (2009). Additionally, while the report provides a word for word text of New Jersey, Ohio, and Washington's adoption of Model Rule 3.8, rather than merely stating as it does with other states, the language of each states' rule as listed is identical to the Model Rule. CPR POL'Y IMPLEMENTATION COMM., *supra*, at 14, 18–19, 24.

177. North Carolina's adoption of the rule mandates that the prosecutor make a "diligent inquiry" but appears to tie disclosure obligations more closely to case law by stating that a prosecutor shall, "after reasonable diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure or court opinions." CPR POL'Y IMPLEMENTATION COMM., *supra* note 176, at 16.

178. In Alabama, the prosecutor's substantive obligation is the same, but is simply phrased in the negative. *Id*. at 2. In California and Louisiana, the rule uses "knows or reasonably should know" in place of "known."

In 2012, the Virginia State Bar issued Legal Ethics Opinion 1862, which explained how Model Rule 3.8 can be read more expansively than the *Brady* decision and its progeny.[179] In this opinion, the Virginia State Bar was asked whether it was an ethical violation for a prosecutor, armed with exculpatory information in a case, to make a plea offer without disclosing the exculpatory evidence to the defense.[180] If the matter was resolved solely on constitutional grounds, under the *Ruiz* case,[181] it is unclear that the prosecutor would have any duty to disclose exculpatory evidence prior to extending a plea offer. The legal opinion notes, however, that the prosecutor's *ethical* duty to divulge exculpatory evidence is broader than his *legal* duty under the Due Process Clause.[182] Neither the text of Model Rule 3.8(d) nor its comments incorporate the *Brady* standards for disclosure, and the language used differs in two significant ways between Model Rule 3.8(d) and the *Brady* line of cases.[183]

First, Model Rule 3.8(d) is not limited to "material" evidence, but rather applies to *all* evidence that has an exculpatory effect on guilt or innocence.[184] Second, the rule only requires disclosure when a prosecutor has actual knowledge of the evidence, whereas *Brady* "imputes knowledge of other state actors, such as the police, to the prosecutor."[185] The Bar explained that these differences require

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Id. at 4, 10. The District of Columbia adds an expansive requirement mandating that a prosecutor shall not "intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense." *Id.* at 6. It also adds a requirement for subsection (d) violations that the defense make a request for the information and incorporates the "knows or reasonably should know" standard. *Id.* Georgia eliminates language regarding disclosure to the court. *Id.* at 7. Hawaii creates an additional affirmative duty, stating:

> 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, the prosecutor shall (1) promptly disclose the evidence to an appropriate court or authority; and (2) if the conviction was obtained in the State of Hawaii, promptly disclose that evidence to the defendant and the office of the public defender, unless a court orders otherwise.

Id. at 8. New York creates a similar burden and extends the obligation to cases in which a defendant appears without counsel. *Id.* at 15–16. In Maine, the rule specifies that it also pertains to juvenile cases, that the obligation also runs to defendants who appear without counsel, and that the prosecutor has an obligation to make "diligent inquiry," but limits the reach to evidence or information in the prosecutor's "possession or control." *Id.* at 10. North Dakota expressly replaces "timely" with "earliest practical time." *Id.* at 18. South Dakota uses the word "exculpate" instead of "mitigate." *Id.* at 21. Virginia also makes clear that the rule extends to cases in which a defendant appears without counsel. *Id.* at 23. Wisconsin exempts municipal prosecutors from the scope of the rule. *Id.* at 24–25.

179. Va. State Bar Standing Comm. on Legal Ethics, Op. 1862 (2012) [hereinafter Va. LEO 1862].

180. *Id.* Separately, the opinion also examined whether it was an ethical violation for the prosecution not to disclose the death of a primary witness.

181. *See supra* notes 158–168 and accompanying text; United States v. Ruiz, 536 U.S. 622, 622 (2002).

182. Va. LEO 1862, *supra* note 179. The opinion notes two Supreme Court decisions that either directly state or imply that the mandates of Model Rule 3.8 are more significant than the legal obligations under *Brady* and its progeny. *See* Kyles v. Whitley, 514 U.S. 419 (1995); Cone v. Bell, 556 U.S. 449 (2009).

183. Va. LEO 1862, *supra* note 179.

184. *Id.*

185. *Id.*

consideration of whether Model Rule 3.8(d) also requires earlier disclosure of exculpatory evidence than the *Brady* standard.[186] The opinion cited a Virginia Supreme Court decision reversing the disbarment of a prosecutor based on a conclusion that the prosecutor had technically complied with the requirements of *Brady* as they applied to the timing of disclosure.[187] In that case, a witness ultimately recanted his identification of the defendant as being near the scene of the crime, so he was told by the prosecutor that he would no longer be needed as a witness and that he could leave the courthouse.[188] The witness ended up contacting the defendant's attorney and agreed to testify on the defendant's behalf the next morning.[189] When the defense started to call the witness to the stand, the prosecutor verbally tried to get the defense attorney's attention, and when that was unsuccessful, the prosecutor attempted to write something on a legal pad, which the defense would not accept.[190] The prosecutor then stated for the record that the witness had changed their testimony in a way that would exculpate the defendant and that he had tried to give the information to the defense attorney, but the defendant attorney "didn't want to hear it."[191] The defense moved to dismiss the case for prosecutorial misconduct, and the motion was denied.[192] When a subsequent ethics complaint was filed, the disciplinary board recommended revocation of the prosecutor's license to practice law because of a failure to disclose exculpatory evidence.[193] The Virginia Supreme Court, however, concluded that there was no *Brady* violation because the defense knew of the change in testimony in sufficient time to make use of it at trial.[194] The Court went on to cite other decisions holding that there is no *Brady* violation so long as the disclosure is made such that it can be used *at trial*.[195]

In the legal ethics opinion, the Virginia State Bar held that, "the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard."[196] Citing to Model Rule 3.8(d)'s requirement for "timely" disclosure, the Bar opined that timely means "occurring at a suitable or opportune time" or "coming early or at the right time."[197] As a result, disclosure should be made "as soon as practicable considering all of the facts and circumstances of the case."[198]

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186. *Id.*
187. *See id.* (citing Read v. Va. State Bar, 357 S.E.2d 544 (1987)).
188. *Read*, 357 S.E.2d at 545.
189. *Id.* at 546.
190. *Id.*
191. *See id.*
192. *Id.*
193. *Id.*
194. *Id.* at 545.
195. *Id.* at 546–47 (citing United States v. Darwin, 757 F.2d 1193 (11th Cir. 1985); then citing United States v. Berhens, 689 F.2d 154 (10th Cir. 1982); then citing United States v. Stone, 471 F.2d 170 (7th Cir. 1972); and then citing United States v. Elmore, 423 F.2d 775 (4th Cir. 1970)).
196. Va. LEO 1862, supra note 179.
197. *Id.*
198. *Id.*

Intentionally delaying disclosure without lawful justification or good cause is improper, and a prosecutor cannot withhold exculpatory evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.[199]

Opinion 1862 offers not only a sound interpretation of the language of Model Rule 3.8, but also enhances the fairness of the criminal justice system by ensuring that defendants have access to information critical to their defense before they make an important decision such as whether to plead guilty. Additionally, should the case go to trial, it ensures that a defendant's attorney has access to information early enough in the litigation process to be meaningful.

V. ALIGNING CONSTITUTIONAL EXCULPATORY EVIDENCE STANDARDS WITH MODEL RULE 3.8

The discussion in Section IV highlighted two discrepancies between Model Rule 3.8 and *Brady* standards for disclosure. If *Brady* were aligned with the Virginia State Bar's analysis of Model Rule 3.8, it would make the criminal justice system fairer. Specifically, this would be to (1) mandate that if a prosecutor knowingly has possession of *Brady* or *Giglio* evidence, then he must *timely* disclose it to the defense, rather than at any point which allows its use at trial; and (2) expand the scope of exculpatory evidence law so that, when a prosecutor knowingly withholds exculpatory evidence, a new trial would be necessary, thereby doing away with traditional materiality analysis for evidence withheld by a prosecutor. By limiting this expansion to *knowing* violations by a prosecutor, the worst affronts to justice can be constrained without creating a parade of horrors. To be clear, exculpatory evidence maintained by other state actors that is not disclosed to the prosecutor should still be analyzed under the traditional materiality analysis so long as the prosecutor has exercised reasonable diligence to secure exculpatory evidence and has not stuck his head in the proverbial sand in order to avoid this information.

This compromise would create the correct incentive structure to avoid the types of injustice that bring the criminal justice system into disrepute before the public, while also avoiding the overturning of convictions where there is no evidence of misconduct by a prosecutor but where the police have failed to relay technically exculpatory but insignificant evidence. No longer would we be confronted by possible court decisions that allow prosecutors to intentionally withhold easily disclosable, favorable evidence from the defense. When a prosecutor intentionally withholds exculpatory evidence, there would need to be a new trial. By imposing a strict rule mandating a new trial in cases of intentional withholding of evidence, prosecutors would have a compelling incentive to always favor disclosure and not dance around the edge of materiality. When the prosecutor, one of the most powerful agents of the state, willfully elects to withhold favorable

199. *Id.*

evidence from the defense, it makes a mockery of the criminal justice system and contributes to the impression that the courts are not fair. That type of conduct by the government is simply not consistent with meaningful due process of law.

This proposed rule would also constitutionally mandate disclosure in a "timely" fashion as required by Model Rule 3.8, rather than the existing *Brady* standard. The way that timeliness was delineated in Virginia Legal Ethics Opinion 1862[200] is workable and just. It requires good reason for the prosecutor to delay the disclosure of exculpatory evidence but does not mandate disclosure as soon as the prosecutor comes into contact with the information. The prosecution could clearly delay disclosure until they have had time to investigate the information, ensuring that its disclosure does not otherwise compromise an investigation or endanger a witness.[201] But what the prosecution cannot do is hold onto exculpatory evidence simply because the trial has not begun. Timely disclosure of exculpatory evidence is critical to justice being done in the context of plea bargaining. As I have asked elsewhere, "[h]ow can a defendant evaluate the wisdom in accepting a plea offer if his defense attorney cannot meaningfully assess the likelihood of his prevailing at trial? And how can a defense attorney accurately gauge that question if he or she does not know of impeachable convictions and bias by the government's witnesses or evidence that could help lend credibility to the defense?"[202]

Finally, critics could hardly argue that this rule is unworkable. After all, the proposal is specifically structured to match the dictates of the *Model Rules*. In other words, it parallels the regulation imposed on prosecutors in order to avoid the suspension or revocation of their license. If prosecutors can manage to follow that guidance in order to remain gainfully employed, they surely must be able to adhere to the dictates in obtaining constitutionally sound convictions. Should we expect less of government attorneys seeking to convict and jail individuals than we expect of them to retain their ability to practice the law in the first place? A similar point was made by the Supreme Court in *Whitley* when the Court noted that the constitutional standard it was creating "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial

200. *See supra* Part IV.

201. This is an area that requires the delicate balancing of competing interests. For example, if the prosecution comes into contact with information that calls into question the veracity of a witness's statement, the government will naturally want to be able to investigate that evidence without fear that the defendant might contaminate or unduly influence the situation. The desire to promote objective investigations legitimizes this concern. On the other hand, as this Article has argued, it is imperative that exculpatory evidence be disclosed to defendants sufficiently early in the process so that their attorney can make effective use of it, rather than sharing it on the eve of trial. In those rare cases where the investigation of newly disclosed exculpatory evidence would require such late disclosure, I would argue that the government should be more inclined to agree to a continuance requested by the defense so that they have time to make appropriate use of the information.

202. David A. Lord, *Breaking the Faustian Bargain: Using Ethical Norms to Level the Playing Field in Criminal Plea Bargaining*, 35 GEO. J. LEGAL ETHICS 73, 95 (2021).

disclosures of evidence tending to exculpate or mitigate."[203] Harmonizing the constitutional and ethical disclosure requirements on prosecutors will not create unreasonable demands on prosecutors and will help develop a more fair criminal justice system.

The *Model Rules* have been written in a reasonable fashion that considers concerns that the government might raise. For example, as explained earlier, disclosure must be timely, not necessarily immediate. Similarly, while prosecutors would still have a constitutional duty to disclose all *material* exculpatory evidence in the possession of their agents (even if the prosecutor was unaware of its existence) the proposed standard for all other exculpating evidence would be a prohibition on it being *knowingly* withheld. This avoids a scenario where a verdict is overturned simply because the police are in possession of some minor and inconsequential information that is technically exculpatory, but which was not disclosed to the prosecutor. What the rule would do however, is preclude the government from willfully holding on to evidence that it knows exculpates the defendant and then trying to argue that this reprehensible conduct is constitutionally permissible simply because the evidence does not reach the materiality threshold. Again, as prosecutors manage to adhere to that norm in order to keep their law license, they surely must have the capacity to do the same when seeking to convict a defendant of a crime.

CONCLUSION

When the U.S. Supreme Court announced the *Brady* decision sixty years ago, it aimed to make our courts fairer by ensuring that prosecutors were not the architects of unjust proceedings. But despite the promise of that case, public sentiment is such that large portions of the population do not place significant confidence in the justness of our court system. This article has presented a way that we can honor the legacy of the *Brady* decision on its sixtieth anniversary: we should demand more of prosecutors, through the alignment of constitutional expectations with their ethical obligations under the *Model Rules*. There is no better way for us to wish a "happy anniversary" to this remarkable decision than to work to ensure that the values that led to it in the first place remain uncompromised. We should continually strive to ensure that verdicts coming out of the courts maintain the confidence of the public that justice was served.

203. Kyles v. Whitley, 514 U.S. 419, 436–37 (1995).