ACTIVATING A *BRADY* PRETRIAL DUTY TO DISCLOSE FAVORABLE INFORMATION: FROM THE MOUTHS OF SUPREME COURT JUSTICES TO PRACTICE

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I.

INTRODUCTION

On this fiftieth anniversary of *Brady v. Maryland*,[1] it is fitting that criminal procedure scholars take the *Brady* doctrine out and give it another sound beating.[2] While the *Brady* case itself held promise for the promotion of justice and fairness in criminal trials, its progeny, and the mistaken interpretations of that case law, decimated any such hope. *Brady* held that "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment."[3] The most

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

2. Indeed, one of the authors did this eight years ago. *See* Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133 (2005) (arguing that the current *Brady* doctrine reinforces the "good" prosecutor as a worthy adversary and not as an ethical guardian of justice).

3. 373 U.S. at 87.

straight-forward reading of *Brady* in context was that the word "material" meant "relevant," in the typical evidentiary sense, making the prosecutorial duty to disclose before and at trial familiar and easily understood by trial lawyers and judges.[4] If the information "would tend to exculpate [the defendant] or reduce the penalty,"[5] then it was a violation of due process if the prosecutor did not disclose the evidence. That reading of "material" did not last long.

Perversely, the Supreme Court's *Brady*-applied cases have encouraged a persistent and erroneous belief that prosecutors do not have a pretrial or trial duty to disclose favorable evidence to the defense. Prosecutors, along with many scholars, courts and other stakeholders in the criminal justice system, maintain that Brady allows prosecutors to suppress favorable evidence unless the prosecutor determines—pretrial—that it was "material," in that, as the Court subsequently defined the term, there is a "reasonable probability" that the evidence would change the outcome of the trial.[6]

This pervasive belief as to the content of the pretrial duty is not part of the holding of any Supreme Court case. Rather, it derives from the dictum of the Court in several cases. That dictum is that the appellate standard for reversal for prosecutorial suppression of *Brady* evidence is also "logically" the standard for

4. There are a few reasons why this is so. First, the Court in *Brady* made no mention of the due process violation relying on a showing of prejudice, but went to great lengths to express the breadth of the prosecutor's duty to disclose favorable evidence as a due process obligation. 373 U.S. at 86-87 (approving a Third Circuit Court of Appeals decision as stating the "the correct constitutional rule" when it construed the Court's previous cases to mean "that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process.") (citation omitted). Second, there was a question in *Brady* as to whether the exculpatory evidence went to the issue of guilt or simply to the issue of punishment of the defendant. It is in that sense, and after embracing the Third Circuit holding as a correct statement of law, that the Court held that suppression of favorable evidence violates due process where the evidence is "material either to guilt or to punishment," *id.* at 87, amounting to no more than a clarification that if the withheld favorable evidence was relevant only to punishment, it would still be a due process violation. Notably also, right after stating this, the Court waxed eloquent on the duty of a prosecutor to do justice. There was not a hint of a suggestion that "material" had some other meaning. Finally, and equally compelling, the Court used the word "material" again later in an entirely different context, when discussing a separate issue as to Maryland's constitutional provision making the jury judges of the law. The Court mentioned that there were exceptions and wrote, "One of those exceptions, *material* here, is that . . ." and went on to state the exception. *Id.* at 89 (emphasis added). There should be little question that the Court's use of material both times within the space of two pages meant no more than "relevant." See *also*, United States v. Bagley, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting) (citing to Weinstein's *Evidence* defining "material" as "a 'fact that is of consequence to the determination of the action'" and stating that nothing in *Brady* indicated a different meaning); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1556-57 (2010) (indicating plausible original meaning of "material" in *Brady* was "relevant"); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 646-47 (2002) (same).

5. 373 U.S. at 87–88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.]").

6. *See Bagley*, 473 U.S. at 682 (defining "material" as requiring a showing of a "reasonable probability" that the outcome would have been different).

disclosure pretrial.[7] While determination of the appellate standard was necessary to the holding in these cases, determination of the trial standard was not. Not only have prosecutors used this dictum as binding precedent, but scholars and judges have also made the mistake of believing that this is precedent. This language has wreaked havoc on any notion of fundamental fairness expressed in *Brady*.[8]

In Part I of this Article, we demonstrate that the language in the few Supreme Court cases stating that the appellate standard of review is also the standard for pretrial disclosure is dictum. Part II reiterates the basic arguments from commentators' decades-long and resounding criticism of the use of an appellate prejudice standard to determine pretrial disclosure. It is fundamentally perverse: it turns a due process right of the accused meant to ensure a fair trial into an entitlement of the prosecution to withhold favorable evidence.

In Part III, we discuss the oral argument in the 2012 Supreme Court case *Smith v. Cain*,[9] in which a majority of the current members of the Court indicated in separate comments their beliefs that the appellate prejudice standard is not, nor should be, the standard for disclosure at trial. This Part then describes several federal district court decisions on defendants' motions to compel disclosure of *Brady* material implementing this same understanding of a separate standard for disclosure at trial.

Finally, in Part IV, we urge that the timing is ripe for the Court to reconsider its dictum on pretrial disclosure under *Brady*, and we describe ways in which litigants could frame the issue to place the trial standard directly before the Court. Clarifying a *Brady* violation as a two-step process on appeal would ensure that appellate cases give prosecutors adequate instruction as to their disclosure obligations at trial. Such a two-step inquiry would determine first, whether there was error in that the prosecution withheld favorable evidence, and second, whether that error caused prejudice. In the meantime, we offer some advice to defense attorneys to force more *Brady* litigation at the trial level, not only to seek disclosure, but also to increase the opportunities for reconsideration of the trial standard on the appellate level.

II.

THE *BRADY* TRIAL STANDARD AS DICTUM IN SUPREME COURT PRECEDENT

The Supreme Court stated in a few cases, without any supporting reasoning, that the appellate standard for reversal on a *Brady* claim is also the standard

7. *See* United States v. Agurs, 427 U.S. 97, 108 (1976) ("Logically the same standard must apply at both times."). *See also* notes 12–35 and accompanying text *infra*.

8. *See Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

9. 132 S. Ct. 627 (2012).

triggering the prosecution's duty to disclose favorable evidence pretrial.[10] Scholars, judges and many practitioners proceed on the assumption that these statements are holdings with precedential value.[11] We explain here that these statements are actually obiter dictum, *i.e.*, "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."[12]

While the Court had been working at crafting an appellate standard for reviewing a *Brady* claim for years, it finally settled on the appellate standard in *United States v. Bagley*.[13] Creatively interpreting the word "material" from the language of *Brady v. Maryland* to read in a prejudice requirement, the *Bagley* Court held that undisclosed exculpatory evidence is not "material" unless there is a "reasonable probability that [if the evidence had been disclosed], the result of the trial would have been different."[14] *Bagley* itself did not make any statements

10. These cases, discussed herein, are *United States v. Agurs*, 427 U.S. 97 (1976), *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Cone v. Bell*, 556 U.S. 449 (2009).

11. *See, e.g.,* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 645-48 (2013) (discussing extent of prosecutor's constitutional duty to disclose favorable evidence and concluding "[i]f the information is not a potential game-changer, then the prosecution never has to disclose the information."), 652 (reiterating that "legal limitation that only material information must be disclosed" is the "constitutional floor."); Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 416 (2011) (arguing that post-*Brady* progeny held that *Brady* materiality requirement is also constitutional pretrial disclosure requirement); Medwed, *supra* note 4, at 1540-43 (assuming constitutional standard of disclosure pre-trial is dependent upon "materiality"); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009) ("*Brady*'s progeny have made clear that prosecutors are not constitutionally obligated to disclose all exculpatory evidence, or even all relevant exculpatory evidence" but only exculpatory evidence that "creates a reasonable doubt that did not otherwise exist.'); Sundby, *supra* note 4, at 650-51 (describing the "materiality" cases as defining "the constitutional standard regulating discovery" and as defining "*Brady*'s discovery obligation"); United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) (interpreting *Brady* progeny as restricting constitutional duty to disclose exculpatory evidence pre-trial to that which would have a reasonable probability of changing the outcome of the trial); Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006) ("We would be inclined to follow [*United States v.*] *Safavian*, [233 F.R.D. 12 (D.D.C. 2005) (holding pretrial duty not "materiality" but "favorable")] if we considered ourselves to be at liberty to do so. We believe, however, that the opinion in *Safavian* cannot be reconciled with *Agurs, Bagley*, and *Kyles*."); United States v. Causey, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005); notes 63-65 *infra* and accompanying text (describing Department of Justice position that "materiality" is constitutional standard for pretrial disclosure); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), *cited in* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1323 n.4 & 1326-27 (2011) (stating opinion that ABA Model Rule of Professional Conduct 3.8 requiring prosecutorial disclosure of favorable information, without regard to potential impact on the verdict, is separate from and more expansive than constitutional disclosure obligations).

12. BLACK'S LAW DICTIONARY 1102 (9th ed. 2009).

13. 473 U.S. 667 (1985).

14. *Id.* at 682. The Court adopted this appellate standard despite the Government's argument that a more lenient standard of review could apply if the defense made a specific request, which was ignored.

about the standard for disclosure at trial, but rather, was strictly concerned with determining the appellate standard for reversal.[15]

The first Supreme Court case equating a trial standard with an appellate standard pre-dated *Bagley*, but is still cited for this point.[16] In *United States v. Agurs*,[17] the Court glibly stated:

> First, in advance of trial, and perhaps during the course of the trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel. Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times.[18]

Establishing the standard for pretrial disclosure was not necessary to the holding of the case. As explained by Justice Stevens, writing for the majority, "The question before us is whether the prosecution's failure to provide defense counsel with certain background information about [a witness], which would have tended to support the argument that respondent acted in self-defense, deprived her of a fair trial under the rule of *Brady v. Maryland*."[19] The Court then ascertained that a "fair trial" under *Brady* involved a determination of "materiality" defined in terms of prejudice as to the outcome of the case.[20] Adopting that framework, the Court held that Agurs was not denied a fair trial because prejudice was not shown.[21] The establishment of a trial disclosure standard was not at issue in the case, was not necessary to the resolution of the case, and therefore was dictum.

15. While the Court stated in a footnote that "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor," *id.* at 675 n.7, the "rule" was the rule for *appellate* reversal, and the "burden" was a rule requiring reversal.

16. *See, e.g.,* Kyles v. Whitley, 514 U.S. 419 at 433-34 (1995) (discussing *Agurs* and the "triggering" of the constitutional duty to disclose under *Brady*); United States v. Coppa, 267 F.3d 1132, 1140 (2d Cir. 2001); United States v. Garrett, 238 F.3d 293, 302 (5th Cir. 2000) (Fish, J. concurring); Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006); United States v. Beckford, 962 F. Supp. 804 (E.D. Va. 1997); Green, s*upra* note 11, at 644-48 & 644 n.30 (citing *Agurs* for materiality standard and concluding materiality prevailing standard for pretrial disclosure); Burke, *supra* note 11, at 483 & 483 n.13 (citing *Agurs* for proposition that prosecutors can constitutionally withhold evidence that would not make difference in outcome); Medwed, *supra* note 4, at 1784; Sundby, *supra* note 4, at 647-50.

17. 427 U.S. 97 (1976).

18. *Id.* at 107–08.

19. *Id.* at 98–99.

20. *Id.* at 112–13.

21. *See id.* at 113–14 ("Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial[.]").

Kyles v. Whitley[22] is another case often cited for "holding" that the prosecutor's duty to disclose favorable evidence pretrial is limited to materiality.[23] In the portion of *Kyles* discussing a trial duty, the Court stated:

> On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.[24]

Again, this application of the appellate standard of "materiality" to the prosecution's duty of disclosure at trial was not necessary to the holding and is dictum. The holding in *Kyles* depended upon only the application of the appellate standard for reversal. As held by the Court, "Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial."[25]

Similarly, in *Cone v. Bell*,[26] commentators view several statements by the Supreme Court as indicative of a holding on the prosecution's pretrial duty of disclosure.[27] At one point, the Court stated that "favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[28] At another point, the Court stated, "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the

22. 514 U.S. 419 (1995).

23. *See, e.g.,* Cone v. Bell, 556 U.S. 449, 470 (2009); United States v. McVeigh, 954 F. Supp. 1441, 1450 (D. Co. 1997); United States v. Wells, 2013 U.S. Dist. LEXIS 130601 (D. Alaska 2013) (citing *Kyles* for applying materiality standard pretrial but ultimately adopting a broader rule of disclosure); Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006); Green, s*upra* note 11, at 644-48 & 644 n.30 & 646 n.34 (citing *Kyles* for materiality standard and concluding materiality prevailing standard for pretrial disclosure); Burke, s*upra* note 11, at 487 & n. 40 (same); Medwed, *supra* note 4, at 1784; Sundby, *supra* note 4, at 647-50.

24. 514 U.S. at 437. Further, the Court stated that "the rule in *Bagley* (and hence *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id*.

25. *Id.* at 421–22. *See also id.* at 441 ("[D]isclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.").

26. 556 U.S. 449 (2009).

27. *See, e.g.,* Serota, *supra* note 11, at 418-19 & 419 n.26 (citing *Cone* for establishing materiality doctrine that governs pretrial disclosure); Yaroshefsky, *supra* note 11, at 1326 & n.25 (citing *Cone* and *Kyles* for Court "acknowledg[ing]" that ethical obligation under ABA Model Rule 3.8 to disclose favorable evidence is broader than constitutional requirement of disclosure).

28. 556 U.S. at 470. The Court cites *Kyles v. Whitley*, *Strickler v. Greene*, 527 U.S. 263 (1999) and *Banks v. Dretke*, 540 U.S. 668, 698–99 (2004), for this proposition. The citation of *Banks v. Dretke* is curious as the case does not discuss the prosecutor's pretrial or trial duty to disclose, and the cited pages simply contain discussion of the materiality standard as applied on appeal. For a discussion of why *Strickler v. Greene* does not belong on this list, see notes 81-84 *infra* and accompanying text.

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."[29]

Again, both of these statements in *Cone* appear to indicate that the prosecutor's constitutional duty is satisfied if she withholds favorable evidence that she believes will not make a difference in the outcome of the case. However, this language is unnecessary and superfluous to the issue and the holding in the case. The Court's holding was that Cone's *Brady* claim was not barred from review, that the suppressed evidence was not material to Cone's conviction for first-degree murder, but that the lower courts erred in failing to assess the cumulative effect of the suppressed evidence with respect to Cone's capital sentence.[30] As with all of the other cases discussed, only an articulation and application of the post-conviction standard of review was necessary to the holding of the case, which means that any articulation of a trial standard is dictum.

By the very nature of appellate and post-conviction review, the Court has not had to decide the proper standard for the prosecution's pretrial duty to disclose favorable evidence. The statements the Court made in this handful of cases do not have precedential value. Yet they have been treated with the force of law, and prosecutors have hidden behind the cloak of materiality to avoid an obligation to disclose exculpatory evidence at the trial level.[31] The next section describes the core arguments explaining why employing a materiality standard as a trial standard is unworkable, perverse, and unjust.

III.

APPLYING MATERIALITY PRETRIAL: A PLAYGROUND FOR PROSECUTORS

Before discussing the absurdity and the unfairness inherent in applying the *Bagley* appellate standard to pretrial disclosure, it is worth pointing out that the appellate standard itself is uniquely harsh. The *Bagley* Court chose as its model the standard of review in *Strickland v. Washington*,[32] a Sixth Amendment ineffective assistance of counsel case, which places an extremely high burden on

29. 556 U.S. at 470 n.15.

30. *Id.* at 476.

31. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 548-50 (2007) (noting that "the lenient standard of materiality encourages prosecutorial gamesmanship by allowing prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court" and giving example from federal prosecution where prosecutor who withheld a confession to the crime by a third party until trial was almost over argued it was not material to the outcome); United States v. Safavain, 233 F.R.D. 12, 16 (D. D.C. 2005) (articulating prosecutor's position that government only has to produce pre-trial exculpatory evidence that is "material"); United States v. Acosta, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005) (same); Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006) (same).

32. 466 U.S. 668 (1984).

the defendant-appellant.[33] As practically insurmountable as the *Strickland* standard is for defendants, it still has advantages over the standard articulated by the Court in *Bagley* for *Brady* violations. The *Strickland* standard of review proceeds in two parts: first, whether there was error, shown by deficient performance of counsel; and second, whether the error was prejudicial.[34] The *Bagley* standard of review, on the other hand, is unitary. There is only error and hence a *Brady* violation if there was prejudice, *i.e.,* a reasonable probability that the outcome would have been different.[35]

The first glaring problem with making the prosecutor's duty to disclose at trial the same as the *Bagley* appellate standard of review is that it gives the prosecutor, and any reviewing trial judge, a literally impossible task. The "materiality" standard was designed for a post-trial review, where the appellate court has the ability to look at the entire record, including a transcript of the whole trial, to decide whether the withheld evidence would have made a difference.[36] From the pretrial perspective, it is absurd to ask a prosecutor to determine anything about the *outcome* of a trial that has not yet occurred.[37] As

33. *Bagley*, 473 U.S. at 682 ("We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). By contrast, in almost all other contexts, the standard of review for constitutional error is that, once error is established, the prosecution must show beyond a reasonable doubt that the error was harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967) ("[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). Justice Marshall argued in dissent in *Bagley* that this should be the appellate standard in *Brady* cases, 473 U.S. at 696 (Marshall, J., dissenting). One of us has recommended this standard, Hoeffel, *supra* note 2, at 1151–52, and the proposed Fairness in Disclosure of Evidence Act of 2012 suggested this standard, *see infra* note 65 and accompanying text.

34. 466 U.S. at 687. While courts can evade the determination of error by assuming error and deciding there was no prejudice, the *Strickland* standard nonetheless is clear that error and prejudice are separate determinations, and a court that wished to clarify what kind of deficient performance is trial error could do so.

35. *See* note 14 *supra* (giving *Bagley* test for prejudice); *see also* Burke, *supra* note 11, at 486-87 (making same point about *Bagley* as unitary test).

36. Even the ability of an appellate court to accurately perform this kind of retrospective harmless error analysis is questionable. For example, it is difficult to recreate and assess what avenues of investigation were foregone and what evidence or witnesses might been have uncovered if a trial lawyer had access to the favorable information. *See Bagley*, 473 U.S. at 706 (Marshall, J., dissenting) ("The appellate court's review of "what might have been" is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense does have access. Indeed the absence of a piece of evidence may affect the entire trial strategy.") (quoting Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORD. L. REV. 391, 412 (1984)).

37. *See* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) ("[A]pplying [*Brady*'s materiality]

descriptively summarized by the district court in *United States v. Safavian*:[38]

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that are simply unknown and unknowable before the trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support the defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).[39]

A prosecutor can do no more than speculate on the events of the future trial and the views of unknown jurors about the case.[40] The same intractable problem applies to the trial court charged with applying this standard pretrial. As one court aptly described, "[N]o one has the gift of prophecy. To argue that the [trial] court can apply a material-to-outcome test before trial is to argue a contradiction."[41]

Under the materiality standard, a prosecutor who is holding onto favorable evidence and planning to go to trial will speculate in her favor. Research on cognitive bias suggests that even a prosecutor acting in good faith "will overestimate the strength of the government's case against the defendant and

standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review.").

38. 233 F.R.D. 12 (D.D.C. 2005).

39. *Id.* at 16.

40. Justice Scalia commented on the absurdity of the standard in the oral argument in *Kyles v. Whitley*:

Prosecutor: The standard for the reviewing court, we submit, is to consider all of the trial and all of the evidence which was presented at trial, and the nondisclosed evidence, and consider the evidence cumulatively . . .

Scalia: That standard does not give much guidance to the prosecutor as to what its constitutional obligation is . . . under *Brady* it seems to me. . . .

Scalia: I can understand using a cumulative test after there has been an established violation of *Brady* . . . But you're not just urging that, you're saying there isn't even a violation until you consider all of the evidence cumulatively . . . .

Scalia: You can never say before the fact, I clearly have no obligation to turn this over, because it all depends . . . whether you do or do not depends upon whether, at the end of the trial, that piece of evidence plus all the other ones that help a little bit here, a little bit there, whether they all together would have made a difference. If so, then retroactively, you had an obligation to turn it over.

Prosecutor: I think that's what *Bagley* says.

Scalia: That's crazy, isn't it?

Oral Argument at 33:22. *Kyles v. Whitley*, 514 U.S. 419 (1995) (No. 93-7927), *available at* http://www.oyez.org/cases/1990-1999/1994/1994_93_7927#argument. (Justice Scalia is not identified but the voice is identifiable as his when listening to the oral argument.).

41. Lewis v. United States, 408 A.2d 303, 307 (D.C. Cir. 1979).

underestimate the potential exculpatory value of the evidence whose disclosure is at issue."[42] These scientific observations confirm what is already well known to anyone working in the criminal adversary system—both prosecutors and defense attorneys grow firmly attached to their view of the case. In fact, prosecutors believe the defendant is guilty and that the jury will find the defendant guilty or she would not be prosecuting the case.[43] As Scott Sundby has explained in describing the theoretical decision-maker who would disclose "material" evidence, "[T]he thought process posits a prosecutor who is capable of a Zen-like state of harmonizing objective and subjective beliefs, simultaneously recognizing that the evidence objectively creates a reasonable probability that a reasonable jury will entertain a reasonable doubt while still subjectively believing that continued prosecution is warranted."[44]

The second major problem with materiality as the standard for pretrial disclosure is that it actively encourages non-disclosure.[45] The adversary system celebrates the prosecutor who does justice by winning cases, and prosecutors' offices cultivate mistrust of defense attorneys (and vice versa).[46] The Court's

42. Burke, *supra* note 37, at 1612. *See also* Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?* 31 CARDOZO L. REV. 1943, 1950 (2010) (describing Dr. Maria Hartwig's conclusions on cognitive and confirmation bias in evaluating exculpatory evidence); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) (discussing prosecutorial tunnel vision); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2498-2504 (2004) (same).

43. *See, e.g.,* Burke, *supra* note 37, at 1605 -1609 (discussing prosecutors' cognitive bias towards guilt); Alafair Burke, *Neuroscience, Cognitive Psychology, and the Criminal Justice System: Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010) (same).

44. Sundby, *supra* note 4, at 653-54. *See also* Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial By Jury*, 82 N.Y.U. L. REV. 1780, 1784 (2007) (pointing out the other bizarre effect that, "under *Brady*, the guiltier a defendant seems before trial, the less disclosure he is legally owed.").

45. *See* Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 214 (2005-2006) ("In its present construction it not only does not affirmatively require any pretrial discovery of exculpatory information, it effectively discourages it."). Studies have confirmed that withholding of exculpatory evidence is an endemic problem. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23-24, 57 (1987) (citing data showing that 10% of 350 wrongful convictions involved suppression of evidence by prosecutors); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278 (2004) (showing that in the Innocence Project's first seventy-four exonerations, prosecutorial misconduct was a factor in 45% of the cases and most of that misconduct was destruction or suppression of exculpatory evidence).

46. One of the authors of this article participated as a facilitator in a training session for local prosecutors and defense attorneys in the New Orleans area in 2012. Some prosecutors were very clear that they did not trust the defense bar and, particularly, that the defense bar would take any disclosed inconsistency in the prosecution's case and twist it to unfair advantage to gain an acquittal of a guilty defendant. Laurie Levenson wrote of a similar experience at a retreat to repair the relationship between United States Attorneys and Federal Public Defenders in the Ninth Circuit. Laurie Levenson, *Discovery from the Trenches: The Future of* Brady, 60 U.C.L.A. L. REV. DISCOURSE 74, 85-86 (2013). *See id.* at 86 ("The greatest hurdle to overcome was the culture of distrust and gamesmanship."); *see also* Symposium, *New Perspectives on* Brady *and Other*

dictum tells prosecutors that it is not error to withhold favorable evidence.[47] In the rare case where there is trial litigation over undisclosed evidence,[48] a prosecutor can easily craft an argument that the requested evidence has no reasonable probability of affecting the outcome of the trial because there are so many unknown and unknowable variables, including the theory of defense and the evidence the defense may present.[49]

If a prosecutor does not disclose favorable evidence, he or she is aware chances are good it will never be discovered.[50] If it is, rather than being rebuked, prosecutors are told that the withholding will still not rise to the level of a constitutional error unless, with the benefit of hindsight and a conviction, the defense somehow manages to carry the high burden of showing a reasonable probability that the evidence would have made a difference. Prosecutors are aware that withholding will rarely, if ever, be considered error under the Court's

Disclosure Obligations: Report of the Working Groups on Best Practices, 31 CARDOZO L. REV. 1961, 1996-2002 (discussing ways to influence culture of prosecutors' offices to encourage disclosure).

47. *See* Part I *supra*.

48. *See*, *e.g.*, United States v. Beckford, 962 F. Supp. 804, 810-11 (E.D. Va. 1997) ("In this case, the question whether the Government has a *Brady* obligation to disclose the requested information arises in a somewhat unusual posture. In the ordinary *Brady* case, it is only after a judgment of conviction that a court reviews the failure of the prosecution to disclose material the defendant argues should have been admitted into evidence."); United States v. Cuthbertson, 651 F.2d 189, 199 (3rd Cir.) (Seitz, C.J., concurring), *cert. denied sub nom*. Cuthbertson v. CBS, Inc., 454 U.S. 1056 (1981) ("In this case, however, *Brady* issues have arisen before trial."). In state cases, most *Brady* information is not uncovered until after trial, through independent investigation or Freedom of Information Act requests. In the authors' experience, discovery of *Brady* information mid-trial is more common in federal court where prosecutors must comply with the Jencks Act and disclose witness statements just prior to testimony. Those statements often contain previously undisclosed favorable information.

49. For example, in *United States v. Causey,* 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005), in a remarkable twist of logic, the district court essentially concluded that there is no pretrial duty to disclose favorable evidence under *Brady*, nor, apparently could there ever be one, because materiality can never be determined pretrial. *Id.* at 699 ("Defendants have not demonstrated that the government is suppressing evidence favorable to the defense, the defendants could not show that there was undisclosed *Brady* material because no trial has occurred, and no trial date has been set in this case. Consequently, even 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."). Moreover, while most jurisdictions require the defense to provide some discovery, defense attorneys typically keep their defense close to their vests, out of mistrust but also because the prosecution bears the burden of proof and the defense will want to hear the prosecution's case before affirmatively deciding how and whether to proceed with a defense case. Thus, the prosecution is almost always in a position to claim, due to lack of knowledge, that favorable evidence will not affect the outcome.

50. *See* Gershman, *supra* note 31, at 536 & n.27 (noting and providing support for the "common[] belie[f] that most *Brady* evidence never gets disclosed); *see, e.g.,* Connick v. Thompson, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting) ("*Brady* violations, as this case illustrates, are not easily detected," because "but for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution," the exculpatory evidence would not have been discovered to exonerate him).

doctrine.[51] Even if withholding evidence is found to be error, the only repercussion is a retrial years later, during which time the defendant will have been serving any sentence. Thus, prosecutors have very little to lose and much to gain by erring on the side of non-disclosure.

Unlike the perverted and nonsensical materiality standard for pretrial disclosure, a requirement that prosecutors disclose all favorable evidence at the pretrial stage regardless of materiality has the benefit of being simple, sensible and just. The ABA Model Rules of Professional Conduct recognized this and implemented such a standard. ABA Model Rule 3.8(d) requires that prosecutors disclose evidence "that tends to negate the guilt of the accused or mitigates the offense."[52] Most states have followed suit and have similar ethical rules.[53] However, as the story now is oft-told, the ethical rules are meaningless as a motivator. Prosecutors frequently do not follow them, either because they do not know the rules well or in detail,[54] or, if they do, they know they will not be referred to the disciplinary committee and will not be sanctioned.[55] Prosecutors can comfortably assert that they only need follow the Court's dictum on the constitutional standard for pretrial disclosure.

Indeed, in 2012, the National District Attorneys Association ("NDAA") went on record challenging the legitimacy of the professional conduct rules. In its amicus brief filed in *Smith v. Cain*,[56] NDAA suggested that conduct rules that

51. *See* Burke, *supra* note 11, at 490 n.54 (2009) (citing a study finding reversal rate of less than 12% of all cases involving *Brady* allegations in 2004); *see also* Cerruti, *supra* note 45, at 213-14 ("[The *Brady* doctrine] might better be described as a novel doctrine of harmless conviction, for the Supreme Court has now made it perfectly clear that when a prosecutor operating within our competitive adversarial system fails both deliberately and unethically to disclose exculpatory material to the criminal defendant at the trial court level, it is not in itself even deemed to be error. It becomes error only when a reviewing court concludes that the nondisclosure of *its own accord* has produced a wrongful conviction *at trial*.") (emphasis in original).

52. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, 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 to a protective order of the tribunal.").

53. *See* Ellen Yaroshefsky, *supra* note 11 at 1326 & n.24 (2011). In addition, in some states, court rules require disclosure of "favorable" information. *See id.* at 1329 & n.36.

54. *See* Burke, *supra* note 11, at 498 & n.98 (arguing that prosecutors may feel bound by only constitutional and statutory rules and admitting, as a former prosecutor, that she did not know the ethical rules nor likely do many other prosecutors).

55. *See* Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 730 (1987) (finding that, in an entire volume of written disciplinary decisions, there were only nine in which a prosecutor was referred for suppression and only one which ended with a sanction, which was just a suspension); *see also* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992) (stating that complaints are rarely brought against prosecutors, for a variety of institutional reasons); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001) (noting lack of sanctions against prosecutors).

56. Brief for Nat'l Dist. Atty. Ass'n as Amici Curiae Supporting Petitioner, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145).

go beyond the obligations required by the Supreme Court may be unconstitutional[57] and claimed, without substantiation, that the rule would unduly burden prosecutors and threaten the safety of witnesses.[58] Bruce Green, a former federal prosecutor, found NDAA's vitriolic attack on the ethics rules troubling:

> [P]rosecutors' anti-regulatory arguments seem implausible. Taken together, they seem to convey that prosecutors should be immune from all external professional conduct rules and their enforcement – that is to say, "we don't need regulation."[59]

He pointed out that "anti-regulatory rhetoric is . . . likely to have a negative effect on prosecutorial cultures in individual offices"[60] and creates "perverse incentives . . . that is counterproductive to the goal of being more ethical."[61]

What started under *Brady* as a right of the defense to favorable evidence has become a prosecutorial entitlement to withhold it.[62] In 2012, the Department of Justice publicly and unabashedly advocated against any requirement to disclose favorable evidence.[63] In doing so, it defended materiality as the appropriate standard for disclosure by citing the Supreme Court's dictum as law.[64] At the hearings on the Fairness in Disclosure Act of 2012, which proposed a requirement that prosecutors disclose pretrial favorable evidence without regard to materiality, the Deputy Attorney General testified against the requirement. He argued that the new rule would jeopardize victims and witnesses, opening them up to risk of retaliation or intimidation, invite interference into ongoing investigations, and compromise national security.[65]

57. Brief for NDAA as Amici Curiae Supporting Petitioner, *Smith v. Cain*, as summarized and cited in Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 886 (2012). Of course, this argument was based on the assumption that the Court's language as to a prosecutor's trial duty of disclosure is a holding of constitutional dimension and not dictum. NDAA also disparaged the ABA as "left-wing lobbying group." *Id.*

58. *See* Green, *supra* note 57, at 887 (summarizing NDAA's arguments and observing that "NDAA sought to portray Model Rule 3.8(d)—which had been adopted by the overwhelming majority of state courts—as the product of the ABA's partisan advocacy on behalf of criminal defense interests," further illustrating NDAA's animosity toward the regulation).

59. *Id.* at 898.

60. *Id.* at 902.

61. *Id.*

62. *See* Sundby, *supra* note 4, at 645 ("[I]t is the Court's materiality decisions that essentially have robbed *Brady* of any pre-trial superhero powers and transformed the doctrine from a pre-trial discovery right into a post-trial remedy for government misconduct.").

63. *See* Bruce A. Green, *Defining and Enforcing the Federal Prosecutor's Duty to Disclose Exculpatory Evidence*, 64 MERCER L. REV. 639, 655 (2013) (summarizing testimony).

64. *Id. See also* Yaroshefsky, *supra* note 11, at 1336 n.75 (quoting from the 2009 Department of Justice United States Attorneys' Manual that "[e]xculpatory and impeachment evidence is material to a finding of guilt– and thus the Constitution requires disclosure– when there is a reasonable probability that effective use of the evidence will result in an acquittal").

65. Green, *supra* note 63, at 655. The bill died in Committee. *See* https://www.govtrack.us/congress/bills/112/s2197.

Bruce Green pointed out that the claims were based on "an unproven empirical assumption that these countervailing interests would be seriously jeopardized by broader disclosure."[66] First, it is unlikely a defendant would threaten a witness providing favorable information and, in any event, the Act allowed for protective orders.[67] Also, as he noted, many jurisdictions require disclosure of witness lists and there is no evidence of increased witness tampering.[68] Therefore, the unspoken concern may be "that the defense will make effective use of the favorable information" and that defense will make more out of the favorable information and create reasonable doubt where none exists, but "[d]isclosure law cannot be predicated on the assumption that juries are irrational."[69]

Given the myriad and substantial problems with using materiality as a trial standard, one wonders why the Court reached out to comment on the standard for disclosure before and at trial in the few cases where it did. Because the issue of a pretrial standard was not directly before the Court, it was never briefed or argued. The Court has not had an opportunity to revisit the negative ramifications of this standard. Hence, as the next section describes, when the issue arose in oral argument in *Smith v. Cain*, members of the Court were incredulous upon the articulation of such a preposterous trial standard.

IV.

AGAINST A PRETRIAL MATERIALITY STANDARD: CURRENT SUPREME COURT JUSTICES AND FEDERAL DISTRICT COURT JUDGES SPEAK OUT

In an oral argument in 2012, a majority of the current Justices appeared to agree that *Brady*'s pretrial standard of disclosure should not encompass a prejudice hurdle. In *Smith v. Cain*,[70] the Orleans Parish District Attorney's office in New Orleans, Louisiana withheld evidence that the only eyewitness to identify the defendant as the murderer had previously made inconsistent statements that he could not identify anyone.[71] In oral argument, the District Attorney's office defended the suppression as constitutionally authorized because, while favorable, the evidence was not material.

As an initial matter, it is notable that there was much confusion among the Justices over the term "material." Justices Ginsburg and Kennedy understood "material" in its original *Brady* sense, as meaning simply "helpful" or "useful" to the defense, and were dumbfounded that the prosecution argued that this clearly

66. Green, *supra* note 63, at 669.
67. *Id.* at 670.
68. *Id.* at 670-71.
69. *Id.* at 675.
70. 132 S. Ct. 627 (2012).
71. *Id.* at 629-30.

helpful impeachment would not be "material."[72] At last, Justice Breyer cleared the air by suggesting "we can forget the word 'material,'" and instead use the term "prejudicial."[73]

Even after the air cleared, however, members of the Court expressed their individual understandings that *Brady*'s standard of disclosure at trial has to be whether the evidence is favorable and not whether it would make a difference in the outcome. Justice Sotomayor clearly articulated a two-part *Brady* test:

> Justice Sotomayor: The two components to *Brady*, should they have been turned over? And if they had, is there a reasonable probability of a different outcome? . . . . Should they have been turned over? That's the question that I think my colleague asked you, and you're saying no.
>
> . . . .
>
> Prosecutor: No. I believe a prudent prosecutor would have[74] . . .
>
> Justice Sotomayor: All right, now articulate what legal theory . . . would say these are not, these are not materials that needed to be turned over[.]
>
> [Prosecutor begins to describe it from the view of all of the evidence in the case]
>
> Justice Sotomayor: This is all jury argument. Tell me why they didn't on their face constitute *Brady* materials that needed to be turned over.
>
> Prosecutor: Because if they had been presented . . . to a jury, the . . . outcome would have remained the same . . . .
>
> Justice Sotomayor: It is disconcerting to me that when I asked you the question directly should this material have been turned over, you gave an absolute no. It didn't need to be. It would have been prudent, but it didn't need to be. That's really troubling . . . . Should it have been turned over? Yes . . . . I said there were two prongs to *Brady*. Do you

72. Justice Ginsburg said that for the prosecutor to assert that the prior inconsistent statement was not "material" was "not plausible": "You can argue that it should be given diminished weight, but an inconsistent statement by the only eyewitness seems to me most material and useful to the defense in cross-examining the eyewitness." Justice Kennedy agreed with Justice Ginsburg "on the materiality point," making the same argument as to its obvious usefulness at trial. Transcript of Oral Argument, *Smith v. Cain*, http://www.oyez.org/cases/2010-2019/2011/2011_10_8145.

73. *Id.*

74. The "prudent prosecutor" reference is from *Agurs*, where the Court stated that while a prosecutor's duty to disclose turned on materiality, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." 427 U.S. at 108. The plethora of *Brady* litigation since *Agurs* has shown "the prudent prosecutor" to be a fiction. As we discuss in this article, the Court bears substantial responsibility for this through *Bagley* and post-*Bagley* dictum in *Kyles* and *Cone*. *See, e.g.,* Serota, *supra* note 11, at 419 (noting "the Court has made clear that a prudent prosecutor's best practices are not constitutionally binding").

> have to turn it over, and second, does it cause harm. And the first one you said not.[75]

Justice Kennedy agreed that *Brady* encompasses both a pretrial duty for the prosecutor to turn over favorable evidence and a prejudice standard for appeal:

> Justice Kennedy: And with all respect, I think you misspoke when you—when you were asked what is—what is the test for when *Brady* material must be turned over. And you said whether or not there is . . . 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 of a *Brady* violation. You're transposing two very different things. And so that's incorrect.[76]

Justices Ginsburg, Scalia and Alito all also expressed belief that there is a prosecutorial duty under *Brady* to disclose favorable evidence at trial, regardless of materiality:

> Justice Alito: They have to be examined, and if there's anything in them that's—that is impeachable material, they have to be turned over to the defense.[77]
>
> . . . .
>
> Justice Ginsburg: There was a prior inconsistent statement. Shouldn't that be the end of it? A prior inconsistent statement, one that is favorable to the defense, has to be turned over, period. That's what I thought was what *Brady* requires.
>
> Justice Scalia: [M]ay I suggest that . . . you stop fighting as to whether it should have been turned over? Of course it should have been turned over. I think the case you are making is that it wouldn't have made a difference.[78]

Five Justices, then—a majority—individually expressed the view that *Brady* requires a prosecutor to disclose pretrial favorable evidence, regardless of materiality.[79]

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75. Transcript of Oral Argument, note 72 *supra*.

76. *Id.*

77. *Id.*

78. *Id.*

79. Showing frustration with the case, two of the Justices suddenly interrupted the prosecutor at various points to ask as follows:

Justice Kennedy: Did you concede there was a *Brady* violation in this case?

Prosecutor: -- Did we concede?

Kennedy: Do you now concede –

Prosecutor: No.

Kennedy: --there was a *Brady* violation in this case?

Prosecutor: No.

. . .

Justice Kagan: Ms. [Prosecutor], did your office ever consider just confessing error in this case?

Unfortunately, this understanding of the pretrial disclosure duty by a majority of the individual Justices did not make its way into the written opinion in *Smith v. Cain*, authored by Chief Justice Roberts and joined by all but Justice Thomas. There is no mention of a pretrial *Brady* disclosure standard. In a short, cursory opinion, Chief Justice Roberts only discussed that the withheld evidence was "material" in that there was a reasonable probability that, had it been disclosed, the result of the proceeding would have been different.[80]

Language from the Court's 1999 *Brady* case, *Strickler v. Greene*,[81] foreshadowed, and lends support to, the views of these five Justices in the *Smith v. Cain* oral argument. In *Strickler*, after highlighting the duty of the prosecutor to do justice above an interest in winning cases,[82] the Court said:

> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that *not every violation of that duty necessarily establishes that the outcome was unjust* . . . . [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.[83]

Properly understood, the Court in *Strickler* therefore claimed a broad duty of pretrial disclosure by the prosecutor, even if on appeal non-disclosure would not necessarily lead to a reversal.[84]

Some federal district court judges have been bolder than the Court in articulating a standard for pretrial disclosure of exculpatory evidence consistent with the original meaning of *Brady*. Taking the lead, federal district Judge Pregerson, in *United States v. Sudikoff*,[85] rejected a pretrial materiality standard,[86] noting that "[t]his analysis obviously cannot be applied by a trial

Id. Arguably, Justice Kagan is a sixth Justice agreeing with the other five if by "error" she meant the suppression of favorable evidence as indicated in the first part of the two-part *Brady* test articulated by Justice Sotomayor.

80. 132 S. Ct. at 630. Of course, discussion of a pretrial standard was not necessary to the opinion and would have been dictum just as it had been in the previous cases.

81. 527 U.S. 263 (1999).

82. *Id.* at 281 (noting the special status of the prosecutor as the representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice shall be done.") (citation omitted).

83. *Id.* at 281 (emphasis added).

84. *See* Boyd v. United States 908 A.2d 39, 59-60 (D.C. Cir. 2006) ("the italicized language demonstrates [that] the Supreme Court in *Strickler* contemplated the existence of a broad 'duty of disclosure,' but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material."). *But see id.* at 60 n.31 (explaining United States Attorney's Office took different interpretation of same language of *Strickler*).

85. 36 F. Supp. 2d 1196 (C.C. Cal. 1999).

86. *See id.* at 1198 ("This [materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial

court facing a pretrial discovery request."[87] Instead, he held that it is error to suppress evidence favorable to the accused.[88] Fleshing out the disclosure standard, he stated:

> [T]he Court relies on the plain meaning of "evidence favorable to an accused" as discussed in *Brady*. The meaning of "favorable" is not difficult to determine. In the *Brady* context, "favorable" evidence is that which relates to guilt or punishment . . . and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses[.][89]

On the defendant's motion to compel disclosure of documents relating to contacts between the government and its cooperating witnesses, Judge Pregerson ordered disclosure of more than just the ultimate agreement. Recognizing that "[n]either the government nor the Court is aware of the details of the defense strategy and therefore neither the government nor the Court can accurately determine which variations are important,"[90] he required disclosure of an array of information that could help the defense establish the motives of the witnesses and the inconsistent or increasingly embellished stories told by them in the negotiation process.[91]

Judge Pregerson is not alone in holding "favorable evidence" as the pretrial discovery standard.[92] *United States v. Safavian* is another such case.[93] When the

can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material.").

87. *Id.* at 1199.

88. *See id.* ("Just as unreasonably deficient assistance of counsel is improper even if it does not meet the prejudice prong of *Strickland* and result in a Sixth Amendment violation, so suppression of exculpatory evidence is improper even if it does not satisfy the materiality standard of *Brady* and result in a due process violation. Though an error may be harmless, it is still error.").

89. *Id*.

90. *Id.* at 1201.

91. Judge Pregerson ordered disclosed all statements that reflected an indication of the witness's possible testimony, any notes or documents created by government reflecting this information, material that indicated variations in proffered testimony, and any information that revealed the negotiation process. *Id*. at 1206.

92. United States v. Acosta, 357 F. Supp. 2d 1228 (D. Nev. 2005) (quoting *Sudikoff* with approval and requiring prosecution to follow court rule requiring pretrial disclosure identical to Model Rule 3.8(d)); 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. 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."); United States v. Carter, 313 F. Supp. 2d 921 (E.D. Wis. 2004) (following *Sudikoff* and ordering disclosure of inconsistent statement made by cooperating co-defendant); *id.* at 925 ("The judge cannot know what possible effect certain evidence will have on a trial not yet held. In most cases, the judge will have only a vague approximation of what the proof will be; thus, he cannot meaningfully evaluate how the addition of other evidence would alter the trial."); United States v. Peitz, 2002 WL 226865 (N.D. Ill. 2002) at *3 (quoting *Sudikoff*'s pretrial disclosure standard). *See also* United States v. McVeigh, 954 F. Supp. 1441, 1449-50 (D. Colo. 1997) ("There is not established procedure for the due process disclosures required by *Brady*. The information should be given to the defense as it

United States Attorney's office moved for a reconsideration of the court's position on pretrial *Brady*, urging that the pretrial duty be limited to "materiality," the district court judge had some choice words for its position:

> The Court fully understands that its reading of the term "favorable to the accused" under *Brady* and its opinion that the post-trial "materiality" standard is irrelevant to pre-trial and in-trial *Brady* decisions to be made by prosecutors and trial judges are inconsistent with the way some Justice Department lawyers have approached their *Brady* obligations in the past. But there is no need for clarification. There simply is a need for the Justice Department to change the mindset of its trial prosecutors to assure that its approach to *Brady* is broad and open, "consistent with the special role of the American prosecutor in the search for truth in criminal trials."[94]

In *United States v. Acosta*,[95] the government actually argued, not simply that materiality was the trial standard, but that it could not be expected to look for evidence "that tends to negate guilt" without regard to materiality.[96] This is a strikingly bold argument in its backwardness and reveals how entrenched the Department of Justice is in defending the standard. The government was essentially making the absurd assertion that, for example, it could not know whether a deal made with a witness in exchange for his testimony was information favorable to the defendant (of course it is) without knowing all of the other evidence at trial. The district court judge responded that "this burden is already imposed by *Brady*,"[97] and quoted *Kyles v. Whitley* that "'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'"[98]

In sum, at least five current members of the Supreme Court, several federal district court judges, and the ethical rules of conduct all recognize the absurdity of applying *Bagley*'s post-trial prejudice standard to a prosecutor's pretrial disclosure obligations and prefer a pretrial standard of disclosure of "favorable evidence." Only that standard fulfills the spirit of fairness authored by the Court in *Brady v. Maryland* fifty years ago. Applying the appellate standard at trial is

becomes known to the government, since the information and the material must be available to the defense in sufficient time to make fair use of it . . . . Indeed, it is not possible to apply the materiality standard in *Kyles* before the outcome of the trial is known."). Also, some courts have adopted court rules requiring this standard. *See* Yaroshefsky, *supra* note 11, at 1329 & n.36; *see, e.g.,* Ill. Sup. Ct. R. 412(c) (court rule mandating that prosecutors disclose evidence that "tends to negate the guilt of the accused.").

93. 233 F.R.D. 12, 16 (D.D.C. 2005)

94. *Id.* at 206-07 (quoting *Strickler v. Greene*, 527 US 263, 301-02 (1999)).

95. 357 F. Supp. 2d 1228 (D. Nev. 2005).

96. *Id.* at 1234.

97. *Id.*

98. *Id.* (quoting *Kyles*, 514 U.S. at 437).

not seriously defensible as a matter of logic or reason. Where to go from here? That is the subject of the next section.

V.

ACTIVATING THE *BRADY* PRETRIAL STANDARD OF DISCLOSURE OF FAVORABLE EVIDENCE

Given the oral argument in *Smith v. Cain*, the timing seems right to try to get the issue of the pretrial standard for disclosure directly before the United States Supreme Court. The Court did not take the opportunity in the written opinion to make the standard plain in dictum, so litigants will have to be creative to force the issue.

The Supreme Court case of *United States v. Armstrong*[99] illustrates one possible method. In *Armstrong*, the African American defendants were indicted for possession of crack cocaine and submitted a motion for discovery on the theory that the prosecution used race as a primary factor in deciding what cases to charge.[100] Though the federal district court granted the motion, the government refused to comply with the order, and the court dismissed the case.[101] After the Court of Appeals affirmed the district court, the government appealed to the Supreme Court.[102] In this way, the Court had no choice but to rule directly on a pretrial motion for discovery.

Similarly with a *Brady* claim, if a federal district court granted a motion to compel information it deemed exculpatory—*i.e.,* favorable but not material—and the government refused to comply, this issue could be placed squarely before the Supreme Court in several ways. The two most likely ways would be if the trial court dismissed the case and the government appealed, or if the trial court held the prosecutor in contempt and the government appealed.[103]

99. 517 U.S. 456 (1996).

100. *Id.* at 459.

101. *Id.* at 459-61. The district court ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. *Id*. at 459.

102. *Id.* at 461.

103. There are few other ways to place the issue of the standard of pretrial disclosure directly before the Court. As another possibility, defense counsel could frame a trial court's denial of a request for exculpatory evidence as a collateral order, which would allow its review. The required elements for a "collateral order" were described by the Supreme Court in *Johnson v. Jones,* 515 U.S. 304, 311 (1995), as follows:

The requirement that the issue underlying the order be "effectively unreviewable" later on . . . means that failure to review immediately may well cause significant harm. The requirement that the district court's order "conclusively determine" the question means that appellate review is likely needed to avoid that harm. The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to

Because this is a limited avenue and prosecutors have perceived the Court's dictum as law, litigants should also follow the lead in *Smith v. Cain* and continue to engage the Court in discussions of the standard for pretrial disclosure. If the Court is faced with the argument that its previous discussions have all been dictum and do not stand as precedent to be overturned, members of the Court may be more likely to include discussion in a written opinion.

Further, litigants should follow Justices Sotomayor and Kennedy's suggestion and insist that the *Brady* analysis on appeal is not a one-step process. There is strong precedent for this position in *Strickler v. Greene* where the Court indicated a several-step process: "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[104] The Court then undertook this three-step process, finding the first step met because one of the witnesses' inconsistent statements qualified as impeachment,[105] even as it ultimately found that the lack of disclosure was not prejudicial.[106] Later, in *Banks v. Dretke*,[107] Justice Ginsburg's majority opinion reiterated this three-step process.[108] Again, she took the opportunity to establish the first step and held that the undisclosed evidence was favorable to the defendant.[109] The Court simply needs to clarify that the first step—nondisclosure of favorable information—constitutes error.

If the courts engage in a two-step process on appeal, litigants and trial judges will gain a body of law outlining what kind of evidence is favorable and therefore must be disclosed at the trial level. While there will always be appellate courts that will opt out of determining the first step by simply finding a lack of prejudice,[110] there will also be courts that will not. Published opinions

delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending).

Labeling a ruling on a *Brady* motion as a collateral order would be novel but it does appear to meet the spirit of the requirements. A second doctrine that may be of some use in supporting an interlocutory appeal comes from the "mootness" doctrine, which allows appeals in cases that would otherwise be moot except that the issue is one that is "capable of repetition" while "evading review." Turner v. Rogers, 131 S. Ct. 2507 (2011). While there is not exactly a "mootness" issue with the *Brady* trial standard, it remains true that the question of the standard remains open and evades review.

104. 527 U.S. at 281-82.

105. *See id.* at 282 (stating that "[t]he contrast between (a) the terrifying incident that [the witness] confidently described in her testimony and (b) her initial perception of that event 'as a trivial episode of college kids carrying on' that her daughter did not even notice, suffices to establish the impeaching character of the undisclosed documents.").

106. *Id.*

107. 540 U.S. 668 (2004).

108. *Id.* at 691.

109. The State had not disclosed that one of its witnesses was a paid police informant, and had not disclosed a pretrial transcript revealing that the other witness' trial testimony had been "intensively coached" by prosecutors and law enforcement officers. *Id*. at 675.

110. *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 6 85-

establishing what is "favorable" are first steps to providing proper guidance to prosecutors, defense attorneys, and trial judges. One could argue that "bad seed" prosecutors would suppress the information under any standard and that the decent prosecutors would still face cognitive barriers to finding that the information they hold is actually "favorable" to the defense.[111] As to the prosecutor with bad intentions, a different standard might make little difference at the pretrial level.[112] As to the prosecutor trying to follow the law and also win her case, however, we believe it would.[113]

There is little hope of training prosecutors to disclose exculpatory and impeaching information if there is no law establishing what is favorable evidence and no rule of law requiring them to disclose it.[114] A majority of the Court "blink[ed] reality" when it wrote in 2011 in *Connick v. Thompson*[115] that prosecutors are adequately trained on their *Brady* obligations through law school, the Bar examination and required continued education.[116] Even if future and new prosecutors do read the relevant law, what they appear to glean from the *Brady* cases is that they may withhold favorable evidence.[117] For this reason, it

6 (2002) (explaining that because courts often decide conduct was harmless before deciding whether there was error, harmless error leads to the stagnation of constitutional law and fails to deter prosecutors from committing harmless errors).

111. *See* Medwed, *supra* note 4, at 1540 (arguing that "favorable" is a vague term difficult for a prosecutor to apply).

112. Gershman, *supra* note 31, at 538-64 (describing a litany of egregious examples of prosecutorial deceit and deliberate gamesmanship in withholding favorable information).

113. Some prosecutors are already on record in support of this practice. As Bruce Green noted, in *Connick v. Thompson*, 131 S. Ct. 1350 (2011), an amicus filed by an association of New York state prosecutors "acknowledged that both ethically and in practice prosecutor should disclose 'all evidence helpful to the defense,' not just material evidence." Green, *supra* note 57, at 901.

114. To give the good-faith prosecutor guidance, the word "favorable" should be further refined. Better than "favorable" is the language of ABA Model Rule 3.8(d) that the information "tends to negate the guilt of the accused or mitigates the offense." It is also important to add impeachment to the definition. *See* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437-40 (2011) (arguing that a determination of materiality with regard to impeachment evidence is more complex than "other forms of exculpatory evidence"); Yaroshefsky, *supra* note 11, at 1333 (noting that it may be important to more specifically define, and give examples of, "impeachment" for clarity in what must be disclosed). More prosecutors will be able to recognize this information in their files rather than information that has a reasonable probability of affecting the outcome of the trial.

115. 131 S. Ct. 1350 (2011).

116. *Id.* at 1361-62. *See id.* at 1386 (Ginsburg, J. dissenting) ("The majority's suggestion that lawyers do not need *Brady* training . . . 'blinks reality' and is belied by the facts of this case.") (citation omitted).

117. *See* notes 56-65 *supra* and accompanying text (discussing National District Attorneys' Association and Department of Justice positions as exactly that); note 74 *supra* and accompanying text (excerpting *Smith v. Cain* oral argument with State's position as exactly that). *See also* Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 932, 933 (2012) (noting that, to satisfy the requirement of training on *Brady*, the current Orleans Parish District Attorney Leon Cannizzaro said he "instructed lawyers on his staff to study the Supreme Court decisions relating to prosecutorial misconduct [including *Kyles*]" and that the continued practice of the prosecutors in the office was only to disclose

is the responsibility of the courts to provide positive law on the pretrial obligation to disclose favorable evidence.

In order to get more cases in a posture where the Supreme Court can pass on *Brady* standards, defense attorneys should strive to litigate more *Brady* claims before trial courts. Well-resourced public defenders, particularly federal public defenders, and the private bar are best placed to engage in this litigation, as it requires the time, support and lower case loads lacked by many overburdened state public defenders. Additionally, trial courts are more likely to get involved if a defense attorney can make her request for information as specific as possible.[118] In a motion to compel exculpatory evidence, "[t]he defense has to provide a road map articulating, with as much precision as can be mustered within the confines of sound trial strategy, all of the facts supporting the defense and all of the information thought to be relevant to advancing that defense which might be located in government files."[119]

In federal court, it appears likely that the Department of Justice will continue to hide behind the veil of "materiality." If the trial judge is inclined to agree, a defense attorney should urge the enforcement of the ethical standards and the warnings of the Supreme Court that prosecutors looking to disclose pretrial should err on the side of disclosure.[120] She should also continually educate the trial judges that the Court's statements that materiality is the trial disclosure standard are dictum and inform the judge of the opinions of five of the Justices as expressed in the oral argument in *Smith v. Cain*. Persistence and logic, and making a record, can be effective strategies.

VI.

CONCLUSION

After fifty years of litigating *Brady*, prosecutors continue to withhold favorable evidence from the accused, which can cause wrongful convictions. Of the various causal factors at play in the systemic failure to comply with *Brady*, one of the major culprits is the Supreme Court's language in several cases suggesting that the prosecution is entitled to withhold favorable evidence unless she believes that disclosure would change the outcome of the trial.

information if it would be deemed "material" by an appellate court, as reported by one prosecutor, who said: "We ask, 'will this get reversed if we don't turn it over?'").

118. *See* Robert S. Mahler, *Extracting the Gate Key: Litigating* Brady *Issues*, 25- MAY Champion 14 (2001) (making this suggestion).

119. *Id.* As illustrated in the opinion by Judge Pregerson in *Sudikoff*, not only should a cooperating witness's agreement be disclosed as impeachment, but it is possible to articulate reasons that proffers taken during the negotiations showing embellishment or inconsistency are also impeachment. *See supra* notes 90-91 and accompanying text.

120. *See, e.g., Kyles*, 514 U.S. at 439 ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"); *Agurs*, 427 U.S. at 108 ("the prudent prosecutor will resolve doubtful questions in favor of disclosure.").

In this Article, we have demonstrated that this language by the Court is dictum. In cases where the Court was presented with only the question of whether there was a "reasonable probability" that the suppressed evidence would have made a difference in the outcome of the trial, the Court nonetheless needlessly proclaimed that the standard for disclosure at trial is the same as the appellate standard. This proclamation has been wrongly treated as if it has precedential value. It does not.

Further, it is reckless dictum. Imposing on prosecutors or reviewing trial courts a requirement that they determine, pretrial, the disclosure obligations from the view of prejudice—looking at all of the evidence submitted in the case—is patently absurd. The trial has not yet begun. Such a standard encourages withholding favorable information, even by prosecutors acting in good faith. To believe that the evidence would actually change the outcome of the case would mean the prosecutor cannot in good faith prosecute the case. The standard is impossible and perverse.

Five Justices of the Supreme Court indicated as much in oral argument in *Smith v. Cain*. *Brady* should obligate the prosecutor to disclose all favorable evidence pretrial, regardless of its materiality. Only when an appellate court finds that favorable evidence was not disclosed should it then assess prejudice. Several federal district courts have held this to be the law in their courts. While the Court avoided further dictum clarifying the trial standard in the *Smith v. Cain* opinion, the time has come to press the Court into the service of justice on this issue. Because its previous statements were only dictum, the Court is not bound by them. Litigants can create opportunities for the Court to either revisit the dictum by raising the issue on appeal after conviction or by placing the trial standard directly at issue in front of the Court through other mechanisms before conviction. The *Brady* doctrine is long overdue for a sustained second look.