NOTES

THE RIGHT TO A COMPLETE DEFENSE: A SPECIAL *BRADY* RULE IN CAPITAL CASES

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I. INTRODUCTION

In 1980, twenty-one-year-old Delma Banks, Jr. was convicted of murdering sixteen-year-old Richard Whitehead outside of Nash, Texas and was sentenced to death for his crime.[1] During the penalty phase of Banks's trial, the question that would determine whether Banks was eligible for a death sentence was whether a probability existed that he would commit other violent crimes and continue to pose a threat to society if allowed to live.[2] Robert Farr was an essential witness for the prosecution on this point.[3] Farr testified that, before Banks was arrested, Farr had traveled with Banks to Dallas to pick up a pistol that he and Banks needed to commit a series of robberies they were planning. "According to Farr, Banks 'said he would take care of it' if 'there was any trouble during these burglaries.'"[4] On cross-examination, Farr perjured himself twice when asked if he had provided information about the trip to a deputy sheriff, answering that he had not. The state remained silent during this questioning.[5]

In 1999, Farr finally admitted that he had helped the deputy sheriff in

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1. Banks v. Dretke, 540 U.S. 668, 676, 682 (2004).
2. *Id.* at 679.
3. *Id.* at 678.
4. *Id.* at 680.
5. *Id.*

exchange for about $200 and the hope that he would be let off on drug charges. In a plan to help the deputy sheriff locate Banks's gun, which law enforcement believed had been used in the murder of Whitehead, Farr had instigated the trip to Dallas with Banks. To this end, Farr falsely told Banks that he planned to commit a robbery for which he would need the gun.[6] The only other evidence offered to support Banks's future dangerousness at trial was another witness's testimony that, at one point, "Banks had struck him across the face with a gun and threatened to kill him."[7] Thus, the prosecution had relied heavily on Farr's testimony to secure a death sentence.

In 1996, Banks filed a petition for a writ of habeas corpus in the Eastern District of Texas, alleging, among other things, that the prosecution had violated his constitutional rights by withholding material exculpatory information regarding Farr's status as a police informant in violation of *Brady v. Maryland*.[8] A magistrate judge recommended that Banks's sentence, but not his conviction, be overturned based on the evidence of Farr's informant status.[9] The District Court agreed.[10] In an unpublished per curiam opinion, the Court of Appeals for the Fifth Circuit reversed the District Court, in part because it found the evidence of Farr's informant status immaterial.[11] The United States Supreme Court reversed, finding that, "[h]ad Farr not instigated, upon [the sheriff's] request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to 'continue' committing violent acts."[12] Thus, the evidence in question, which was important for impeachment purposes, was found to be material, and the prosecution's failure to disclose it constituted a constitutional violation that invalidated Banks's sentence.[13]

In 2012, the prosecution agreed to stop pursuing a death sentence, and Banks agreed to accept a life sentence.[14] He will be eligible for parole in

6. *Id.* at 678.

7. *Id.* at 679–80.

8. *Id.* at 683–84; Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

9. *Banks*, 540 U.S. at 686.

10. *Id.*

11. *Id.* at 687–88.

12. *Id.* at 699.

13. *See id.* at 702–03.

14. Jordan Smith, *Delma Banks Takes Life Sentence*, AUSTIN CHRON. (Aug. 10, 2012), http://www.austinchronicle.com/news/2012-08-10/delma-banks-takes-life-sentence.

2024.[15] Thus, the Court's determination that a *Brady* violation had occurred spared Banks's life.[16] But the Supreme Court cannot be relied upon to swoop in at the last minute and save the day for all defendants. This case illustrates a problem with *Brady*: the materiality requirement can sometimes prevent relief for defendants who have been denied access to important information because the standard for materiality is strict and not entirely clear, even to federal judges.[17] These problems are particularly troubling when a defendant's life is at stake.

One major area of concern regarding capital punishment is the fairness of the death penalty system and the possibility that innocent defendants will be executed.[18] The Court, acknowledging the uniqueness of the death penalty, has also expressed concerns over the fairness and reliability with which it is imposed.[19] One potential method of ensuring that defendants who are sentenced to death are in fact guilty and truly deserve the ultimate punishment is to give capital defendants greater access to information that may assist them in presenting their case at trial. Currently, however, the Constitution provides capital defendants, like all other defendants, a right to only material exculpatory or impeachment evidence possessed by prosecutors.[20]

Part II of this note describes the evolution of the rule requiring the disclosure of material exculpatory evidence first set out in *Brady v. Maryland*. It then describes some problems with the rule's materiality standard, focusing on the importance of favorable evidence possessed by the prosecution, the difficulty of determining what evidence is material, and the current inability to ensure prosecutorial compliance with *Brady*.

15. *Id.*

16. *See id.* (noting that the Court's 2004 decision in *Banks* was a turning point in the case).

17. Even the Supreme Court was not unanimous as to whether the evidence was material. Justices Thomas and Scalia did not find the withholding of the evidence to be "prejudicial." *Banks*, 540 U.S. at 708–09 (Thomas, J., concurring in part and dissenting in part).

18. In fact, Illinois Governor George Ryan, a one-time supporter of the death penalty, in 2003 issued a state moratorium on the punishment and commuted 167 death sentences, citing concerns about the possibility of executing innocent death-row inmates and the fairness of the death penalty system. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html.

19. *See, e.g.*, Atkins v. Virginia 536 U.S. 304, 321 (2002) (prohibiting the death penalty for mentally retarded defendants); Coker v. Georgia, 433 U.S. 584, 592–93 & n.4 (1977) (prohibiting the death penalty for the crime of raping an adult); Gregg v. Georgia, 428 U.S. 153, 192–95 (1976) (discussing the information and guidance that must be provided to a jury for a capital sentencing scheme to be constitutional); Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) (noting the death penalty's unique severity).

20. Brady v. Maryland, 373 U.S. 83, 87 (1963); Strickler v. Green, 527 U.S. 263, 281–82 (1999).

Part III sets out a proposed special *Brady* rule that would eliminate the materiality requirement when a defendant's life is at stake. It then explains how this special rule would help to rectify the problems with the materiality standard and considers both constitutional and legislative frameworks for enacting the rule.

II. THE *BRADY* RULE AND ITS PROBLEMS IN THE CONTEXT OF THE DEATH PENALTY

A. THE EVOLUTION OF THE *BRADY* RULE

The adversarial system in the United States is designed to elicit the truth. Thus, a prosecutor's role is not to win each case; it is to seek justice.[21]

> [A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[22]

The Court has recognized that a prosecutor who withholds potentially exculpatory evidence helps to shape the trial in a way that "does not comport with standards of justice."[23] As such, the Court has established guidelines for determining when such action rises to the level of a constitutional violation by denying defendants their rights under the Due Process Clause of the Fourteenth Amendment.[24]

Brady v. Maryland established that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[25] In *United States v. Bagley*, the Court expanded on this holding, stating that evidence is material for the purposes of *Brady* only if there is a reasonable probability that its disclosure to the defense would have changed the result of the proceeding.[26] He then defined reasonable probability as "a probability

21. Berger v. United States, 295 U.S. 78, 88 (1935).

22. *Id.*

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

24. *E.g.*, *Brady*, 373 U.S. at 87; United States v. Bagley 473 U.S. 667, 682 (1985); Kyles v. Whitley, 514 U.S. 419, 434–38 (1995).

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

26. *Bagley*, 473 U.S. at 682 (Blackmun, J.). Justice Blackmun's reasoning as to the issue of materiality was supported by three other Justices in a concurrence. *Id.* at 685 (White, J., concurring in part and concurring in the judgment).

sufficient to undermine confidence in the outcome."[27] *Bagley* also made clear that this standard applies regardless of whether the defense makes a request for the relevant information.[28] Finally, *Bagley* determined that impeachment evidence is treated the same as exculpatory evidence for the purposes of the test.[29]

In *Kyles v. Whitley*, the Court again elaborated on the materiality requirement for *Brady* violations, making clear that the defense need not show that withheld evidence would have resulted in acquittal by a preponderance of the evidence.[30] Instead, the materiality requirement is met by showing that, because the evidence was withheld, the defendant did not receive a fair trial.[31] The Court also made several related holdings in *Kyles*. First, in determining materiality, the cumulative effect of all withheld evidence must be assessed, rather than examining the materiality of each withheld item individually.[32] Next, the Court established that prosecutors have a duty to learn any information that could be favorable to the defendant that is known by others acting on behalf of the government in the case.[33] Finally, the Court in *Kyles* held that, once a reviewing court has identified a Brady violation, there is no need for the court to proceed with harmless-error review, since the *Brady* violation itself establishes that there is a sufficient basis for granting a new trial.[34]

Most recently, in *Strickler v. Greene*, the Court further clarified the requirements for *Brady* violations by listing three factors that must be found for a constitutional violation to have occurred: (1) the evidence must be favorable to the defendant in that it is exculpatory or impeaching; (2) the evidence must have been suppressed by the government willfully or inadvertently; and (3) the defendant must have suffered prejudice as a result of the suppression.[35]

At the time the Court decided *Brady*, the case could be regarded as a "constitutional superhero that not only would ensure that a criminal defendant had access to all important exculpatory evidence before facing the State at trial, but also embodied the prosecutor's ethical duty to pursue

27. *Id.* at 682 (Blackmun, J.).
28. *Id.* at 682–83.
29. *Id.* at 676 (majority opinion).
30. Kyles v. Whitley, 514 U.S. 419, 434 (1995).
31. *Id.* (describing a fair trial as one "resulting in a verdict worthy of confidence").
32. *Id.* at 436.
33. *Id.* at 437.
34. *Id.* at 435–36.
35. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

'justice' and not simply victory in the courtroom."[36] The evolution of *Brady* described above might, at first glance, suggest that its scope has broadened over the years, making it an even more effective tool for these purposes. However, as the range of governmental behavior and evidence covered by the *Brady* rule has broadened, the materiality standard has grown stricter.[37] "Thus, while the breadth of *Brady*'s coverage may have expanded to cover matters like impeachment evidence, that expansion is somewhat illusory because the compass of impeachment evidence that actually would qualify as material under *Brady* is now so circumscribed."[38] These changes have robbed *Brady* of its ability to serve as the powerful pre-trial discovery tool that many had hoped it would be.[39]

The original materiality language used in *Brady* left the term undefined, but it could have plausibly been interpreted to mean simply "relevant."[40] Some of the language in the opinion lends support to this interpretation. "[F]or instance, Justice Douglas stated the obligation in words that resonate with the idea of relevance: '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.'"[41] But, over time, the Court strayed from that potential interpretation, instead favoring stricter definitions like those set out in *Bagley*, *Kyles*, and *Strickler*. These later formulations of the *Brady* standard are outcome-determinative, which has increased the burden defendants bear in showing that a constitutional violation has occurred.[42] The result is that today some question exists as to

36. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002).

37. *Id.* at 645.

38. *Id.* at 645–46.

39. *Id.* at 645.

40. *Id.* at 646.

41. *Id.* (emphasis in original) (quoting Brady v. Maryland, 373 U.S. 83, 87–88 (1963)).

42. Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1308–09 (1988). "A reviewing court that uses outcome-determinative analysis determines whether a given error or event affected the outcome of lower court proceedings." *Id.* at 1298 n.1. Using such analysis, the defendant bears the burden of proving the impact of an error on the outcome of a proceeding. *Id.* at 1308. The standard for materiality established in *Bagley* (evidence is material only if there is a reasonable probability that its disclosure to the defense would have changed the result of the proceeding) means that, unlike with harmless error analysis, "convictions will stand when neither party would be able to carry the burden of proof." *Id.* at 1308. This creates a substantial obstacle for defendants, and some have even gone so far as to claim that such outcome-determinative tests are "equivalent to requiring the defendant to prove his innocence." *Id.* at 1308–09 & n.62. *Brady* is "the only area of constitutional criminal procedure in which the fairness of a prosecutor's pretrial decision is governed by an outcome-determinative standard." Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming* Brady, 56

whether *Brady* provides defendants with any meaningful access to information at all. When the materiality standard is so high that disclosure is only required when withholding the evidence would undermine confidence in a conviction, the standard lies somewhere near the point at which the prosecution should stop asking whether disclosure is necessary and instead consider dismissing the charges.[43] As such, the majority of evidence disclosed to the defense, in practice, may be merely "evidence which the prosecutor believes could be seen as exculpatory and therefore discloses . . . to be on the safe side or out of ethical considerations (or both), but which the prosecutor does not actually believe could objectively undermine confidence in a guilty verdict if not revealed."[44] But these kinds of disclosures are made as a matter of judgment or out of a sense of ethical obligations, not to comply with a constitutional obligation.[45] Thus, for criminal defendants to have any meaningful access to information guaranteed by the Constitution, further development of the *Brady* materiality standard is necessary.

B. PROBLEMS WITH *BRADY*'S MATERIALITY STANDARD

1. The Significance of Favorable Evidence Gathered By the Government

An effective criminal defense depends on the ability to present the facts of the case in a manner that exculpates the defendant. Thus, a defendant's access to information that may help in developing this presentation is critical. Despite this, the Court has made it clear that "[t]here is no general constitutional right to discovery in a criminal case."[46] *Brady* and its progeny did not grant a right to discovery in criminal matters; they merely established a right to the information necessary for a fair trial.[47]

A number of reasons have been articulated for withholding a general right to discovery from criminal defendants. However, the bases for these claims are not entirely sound. First, some suggest that pre-trial discovery would lead to perjury and suppression of evidence on the part of the

N.Y.L. SCH. L. REV. 969, 975 (2012).

43. Sundby, *supra* note 36, at 655–56.

44. *Id.* at 656.

45. *Id.*

46. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

47. Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1104, 1140–41 (2004).

defense.[48] However, since such discovery has generally been prevented, there is little empirical evidence to support this point.[49] Furthermore, broad discovery has been allowed in civil cases without perjury running rampant.[50] In fact, experience suggests that broad discovery prevents perjury and the fabrication of evidence.[51] Second, some argue that, if criminal defendants are given the names of witnesses called to testify against them at trial, the defendants might seek to silence the witnesses.[52] However, these concerns are largely quelled by judicial discretion over when such information should be withheld because of special dangers present in particular cases.[53] Third, some object that the Fifth Amendment's protection against self-incrimination would make a criminal right to discovery a "one-way-street" that would benefit defendants without helping prosecutors.[54] But this argument ignores the fact that prosecutors generally have extensive investigative resources at their disposal, and therefore overestimates the advantages criminal defendants would have at trial.[55]

The arguments against criminal discovery have been weakened further in recent years, as several states have granted criminal defendants at least a limited right to discovery.[56] For example, in 1996, North Carolina granted death row inmates complete access to files possessed by police and prosecutors during the appeals process.[57] In 2004, North Carolina went a step further, granting all criminal defendants "pre-trial access to the prosecution's files, including police reports and witness statements."[58] Florida, Colorado, New Jersey, and Arizona have also passed legislation permitting criminal discovery to different extents.[59] These jurisdictions

48. William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASHINGTON U. L.Q. 279, 289 (1963).

49. *Id.* at 290–91 & n.39.

50. *Id.* at 291.

51. *Id.* at 291 n.40.

52. *Id.* at 289.

53. *Id.* at 292.

54. *Id.* at 289.

55. *Id.* at 292–93.

56. THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 15–17 (2007), *available at* http://www.prearesourcecenter.org/sites/default/files/library/expandeddiscovery incriminalcasesapolicyreview.pdf (discussing reform efforts in this area in North Carolina, Florida, Colorado, New Jersey, and Arizona).

57. *Id.* at 15 ("In the five years following the enactment of the legislation, the convictions of five death row inmates were overturned, and the inmates were granted new trials and eventually exonerated. In all five cases, the prosecution in the original trials had suppressed material evidence including witness statements and deals with jailhouse informants.").

58. *Id.*

59. *Id.* at 15–17.

have not seen the increases in perjury or witness intimidation feared by opponents of criminal discovery and seem content with the changes they have made.[60] However, regardless of whether or not one believes the concerns over criminal discovery are legitimate, there is no denying that the lack of a general right to discovery in criminal cases imposes constraints on a defendant's ability to gather evidence.

The government has a number of investigative advantages over the defense in preparing its case: the government is able to begin gathering evidence immediately after the crime is discovered; the government has experienced personnel with expert training, sophisticated investigative equipment and facilities, and cooperation from other law enforcement agencies; the government "usually has the cooperation of citizens" in gathering evidence and witnesses; and the government can use pretrial procedures (such as grand jury investigations or coroner inquests) as information gathering tools.[61] In contrast, defendants often have very limited resources. It is estimated that "between 80 and 90 percent of all state criminal defendants rely on [the] indigent defense system for counsel."[62] Similarly, over 90 percent of those charged with capital crimes are indigent.[63]

This imbalance makes it likely that the government will gather information that the defense will never see because it lacks the resources necessary to discover it independently. *Brady* requires only that the government disclose material, exculpatory evidence. Obviously, obtaining such evidence is critical to a defendant's case given its lack of investigative resources, but even seemingly trivial evidence favorable to the defendant may provoke further investigation into a certain area, or elicit a different line of argument from defense counsel.[64] Withholding non-material,

60. Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 221 (2011).

61. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 694 n.2 (1987).

62. *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Robert Scott, Chairman, H. Subcomm. on Crime, Terrorism, and Homeland Security).

63. Bill Ong Hing, *Kill the Death Penalty*, HUFFINGTON POST (May 16, 2011), http://www.huffingtonpost.com/bill–ong–hing/kill–the–death–penalty_b_861892.html.

64. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 565 (2006). Prosser notes that this idea was alluded to in Justice Thurgood Marshall's dissent in *McCleskey v. Zant*, 499 U.S. 467 (1991). *Id.* at 565–66 n.84. In that case, the defendant had filed an unsuccessful federal habeas petition without raising a claim under *Massiah v. United States*, 377 U.S. 201 (1964). He later filed a second habeas petition, raising a *Massiah* claim, after new evidence—a key witness's statement regarding his involvement in the case—

exculpatory evidence constrains the defense's ability to present an effective case and creates an unnecessary risk of injustice. In the context of a capital trial, in which the defendant's life is on the line and the Constitution demands a higher degree of reliability, the defense's ability to gather exculpatory evidence should not be impeded.

2. The Difficulty of Assessing Materiality

Having established the importance of exculpatory evidence gathered by the government, it is appropriate to examine the effects of *Brady*'s materiality requirement. An investigation by the *Chicago Tribune* published in 1999 found that, since the time *Brady* had been decided, sixty-seven capital defendants across the nation had had their convictions overturned due to prosecutors withholding exculpatory evidence or presenting evidence they knew to be false.[65] The events following the reversals of these convictions demonstrate the true significance of *Brady* evidence. Ten of the cases were still pending at the time the investigation was published, but of the remaining fifty-seven defendants, twenty-four were ultimately freed because their charges were dropped, they were acquitted, or they were granted full pardons; three pled guilty in exchange for their immediate release from prison; one pled guilty and agreed not to sue for wrongful arrest in exchange for being released in one year without parole; twenty-five were convicted again, but were not sentenced to death; and only four were convicted and resentenced to death.[66] Thus, when a *Brady* violation is found in a death penalty case, there is a high likelihood it

came to light which suggested the government might have coordinated with the witness in order to elicit an incriminating statement from McCleskey while he was in prison. *McCleskey*, 499 U.S. at 472–74. In his dissent in the case, Justice Marshall stated:

> [T]he importance of the [witness's] statement lay much less in what the statement said than in its simple *existence*. Without the statement, McCleskey's counsel had nothing more than his client's testimony to back up counsel's own suspicion of a possible *Massiah* violation; given the state officials' adamant denials of any arrangement with [the witness], and given the state habeas court's rejection of the *Massiah* claim, counsel quite reasonably concluded that raising this claim in McCleskey's first habeas petition would be futile. All this changed once counsel finally obtained the statement, for at that point, there was credible, independent corroboration of counsel's suspicion. This additional evidence not only gave counsel the reasonable expectation of success that had previously been lacking, but also gave him a basis for conducting further investigation into the underlying claim.

McCleskey, 499 U.S. at 526–27 (Marshall, J., dissenting).

65. Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html.

66. *Id.* A separate study of capital convictions between 1973 and 1995 showed that state post–conviction courts had found prosecutorial suppression of evidence relevant to either guilt or sentencing in one out of every six cases in which the conviction was reversed. David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211–12 (2011).

will affect the ultimate fate of the defendant.[67]

Although *Brady* evidence is exceptionally important, the Court has defined materiality for *Brady* purposes stringently, and it is relatively rare for convictions to be overturned based on alleged violations.[68] A 2001 *Los Angeles Times* article identified only 270 instances in the preceding forty years of convictions being overturned or a new hearing being ordered because of prosecutors withholding documents.[69] Another study found that fewer that 12 percent of *Brady* challenges actually succeed.[70] It would thus seem that the materiality requirement poses a substantial hurdle for defendants. On its face, that may not seem like a problem. After all, what harm could result from withholding only immaterial evidence? Materiality, however, is a nebulous term, and a court's determination that evidence is immaterial does not mean that it would not have affected the outcome of a trial.[71]

The value of withheld evidence to a defendant "is not always obvious in a post-trial review."[72] Reviewing courts make their decisions based on the records developed in lower courts, which likely do not include all of the information known by the parties.[73] Thus, it is possible that, had the defense been given access to suppressed information in the course of the litigation, it may have pursued different, more effective strategies; but this is very difficult for a reviewing court to assess.[74]

There are also more subtle reasons that appellate courts may tend to favor labeling evidence as immaterial. Confirmation bias may lead reviewing courts, which begin their analysis knowing that defendants have

67. For instance, only 7 percent of the fifty-seven defendants for whom data was available in the *Chicago Tribune* investigation were eventually resentenced to death.

68. Roberts, *supra* note 47, at 1140–41 ("The Supreme Court has defined 'materiality' stringently: as a reasonable probability that, had the evidence been disclosed, the outcome would have been different.").

69. Richard A. Serrano, *Withheld Evidence Can Give Convicts New Life*, L.A. TIMES (May 29, 2001), http://articles.latimes.com/2001/may/29/news/mn-3771 (discussing a study undertaken by the Habeas Assistance and Training Project).

70. Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2129 (2010) (discussing a study undertaken by Professor Stephanos Bibas).

71. Leslie Kuhn Thayer, Comment, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 WIS. L. REV. 1027, 1036 (2011). Some factors that courts may look to in determining materiality include "the importance of the exculpatory evidence, the strength of the government's case, and other sources of evidence available to the defense." *Id.* ("The stronger the government's case, the less likely it is that a particular item of evidence will be construed as material." (quoting Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1541 (2010)).

72. Prosser, *supra* note 64, at 565.

73. *Id.* at 565 n.84.

74. *Id.* (noting that this was Justice Marshall's point in his dissent in *McCleskey*).

already been found guilty beyond a reasonable doubt, to interpret the information presented in a manner consistent with the prior verdict.[75] Similarly, hindsight bias may lead reviewing courts to believe the verdict was "more likely, more inevitable, and even more correct" than it would have appeared before the trial began.[76] Political pressure can also make it difficult for courts to overturn convictions because of the potential fallout if the defendant is released and goes on to commit other crimes.[77]

Courts continue to struggle with the question of when evidence is material. One need only look to the numerous cases in which judgments deeming evidence immaterial for the purposes of *Brady* have been overturned on appeal for proof.[78] When experienced judges, the ultimate authorities on the law within our legal system, frequently disagree on how to apply the materiality test, it calls into question the wisdom of maintaining the standard, particularly when a defendant's life in on the line. Furthermore, when one considers these different arguments together (capital defendants whose convictions are overturned based on *Brady* violations are rarely resentenced to death, *Brady*'s materiality requirement makes violations rare, and materiality is an imprecise standard), it seems probable that defendants have been executed after losing a *Brady* claim, despite the existence of evidence that could have persuaded a judge or jury to spare their lives.

3. Prosecutorial Conduct and *Brady*

Although prosecutors are charged with seeking justice, it is also true that they are not wholly impartial. The Court has expressed a hope that

75. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605–06 (2009).

76. *Id.* at 606. "[Confirmation and hindsight] biases are likely reflected in the many cases in which appellate courts have expressed confidence that the defendants before them were guilty, or that the evidence of guilt was 'overwhelming,' even where DNA later proved that the defendants were in fact innocent." *Id.*

77. *Id.* at 606–07 ("The empirical evidence indicates that pressures to be 'tough on crime' do have a significant impact on judges, especially in jurisdictions, like most, where the judges are elected.").

78. *E.g.*, Smith v. Cain, 132 S. Ct. 627, 630–31 (2012) (holding that statements made by a witness that contradicted that witness's testimony at trial were material since the witness's testimony was the only evidence linking the defendant to the crime); Banks v. Dretke, 540 U.S. 668, 698–703 (2004) (holding that evidence of a witness's informant status was material, since the state's case hinged on that witness's testimony at trial); Silva v. Brown, 416 F.3d 980, 990–91 (9th Cir. 2005) (holding that a plea agreement offered to a witness to secure his testimony at defendant's trial was material impeachment evidence, given that the agreement was conditioned on witness not undergoing a psychiatric evaluation before testifying, thereby preventing the jury from learning that the witness may not be competent to testify).

prosecutors will err on the side of caution when determining what evidence to disclose.[79] However, the opposite is often true because prosecutors in possession of favorable evidence are free to "gamble that, even if the evidence comes to light after trial, the defendant's conviction will be affirmed because the defendant will not be able to meet the high standard of materiality."[80] The withholding of *Brady* evidence occurs for a number of reasons, some of which are innocent (such as a prosecutor's failure to understand the significance of the evidence to the defense, or simple unawareness of the evidence possessed by other government officials) and some of which are the result of bad faith.[81] Regardless of what causes evidence to be withheld in a specific instance, it seems clear that prosecutors are unlikely to be held responsible for *Brady* violations in any meaningful way.

Prosecutors are absolutely immune from damages under 42 U.S.C. § 1983[82] in suits stemming from *Brady* violations.[83] Thus, one of the major potential methods of constraining prosecutorial misconduct of this kind is wholly ineffective at preventing the suppression of exculpatory evidence. Section 1983 also permits plaintiffs to sue municipalities for constitutional violations, which could also potentially serve to constrain the actions of individual prosecutors. However, to win on such claims, plaintiffs must generally show that their rights were violated due to some official municipal policy or custom.[84] This is very difficult in the context of *Brady* violations and is unlikely to factor heavily into the decisionmaking process of prosecutors.[85]

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

80. Prosser, *supra* note 64, at 566.

81. *Id.* at 567–70.

82. 42 U.S.C. § 1983 is the federal statute permitting individuals to sue for money damages when someone acting under color of state law violates their rights under the U.S. Constitution.

83. Imbler v. Pachtman, 424 U.S. 409, 431–32 & n.34 (1976) (refusing to draw a distinction for purposes of prosecutorial immunity between willful suppression of exculpatory evidence and other forms of prosecutorial misconduct).

84. *E.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166 (1993) ("[A] municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury."). It is also possible for plaintiffs to win § 1983 claims against a prosecutor's office based on its failure to adequately train employees regarding "their legal duty to avoid violating citizens' rights." Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011). However, the Court has held that a single *Brady* violation by a prosecutor's office is not enough to establish a claim under this theory. *Id.* at 1361–64.

85. *See* Samuel R. Wiseman, Brady, *Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 452–53 (2012) ("It will be the rare case indeed in which a plaintiff is able to produce a pattern of factually similar, judicially identified *Brady* violations.").

Criminal sanctions for prosecutorial misconduct are another possible means of constraint, but such sanctions are extremely rare.

> The 1999 Illinois trial of the so-called 'DuPage Seven,' [in which] police officers and prosecutors [were] accused of perjury and obstruction of justice for allegedly framing an innocent defendant in a capital murder case, appears to be the *first* time in American history that a felony prosecution of former prosecutors for misconduct reached the verdict stage.[86]

All of those defendants were acquitted.[87] Similarly, only one prosecutor has ever been convicted under 18 U.S.C. § 242, which establishes criminal liability for government officials who violate constitutional rights, since it was adopted in 1866.[88] One possible explanation for the infrequency of these cases is that criminal punishments are seen as too harsh for "technical errors made by people with demanding and stressful jobs."[89] Another is that criminal convictions generally require

86. Keenan et al., *supra* note 66, at 217.

87. *Id.* at 217–18. Even in cases in which police and prosecutorial misconduct appears flagrant, there may not be a criminal investigation into the wrongs committed. *E.g.*, Raymond Bonner, Op-Ed., *When Innocence Isn't Enough*, N.Y. TIMES (Mar. 12, 2012), http://www.nytimes.com/2012/03/04/opinion/sunday/when-innocence-isnt-enough.html. In 1982, Edward Lee Elmore was convicted of sexually assaulting and murdering an elderly woman in Greenwood, South Carolina and sentenced to death. Elmore's trial was riddled with investigatory failures. Witnesses for the state could not agree on the number of hairs collected at the crime scene and the evidence bag containing the hairs was not sealed, meaning that the hairs could have been "put in by anyone at any time, and could have included those yanked from Mr. Elmore's groin at the police station after he was arrested." Furthermore, investigators took no pictures of the bed where the hairs were found and where parts of the crime were believed to have been committed, nor did they collect the sheets for testing. Finally, a critical piece of evidence used to secure the arrest of Elmore, a so-called "Negroid" hair that had been found on the victim's body, was never presented to the defense at trial. It wasn't until 16 years later that it turned up in a investigator's filing cabinet, where it was admitted that it had been all along. An expert then examined the hair and it was determined to be Caucasian. Elmore was eventually granted a new trial by the Fourth Circuit Court of Appeals, who noted in its opinion that there had been "'persuasive evidence that the agents were outright dishonest,' and there was 'further evidence of police ineptitude and deceit.'" *See generally id.* In 2013, Elmore filed a civil lawsuit for wrongful conviction, alleging that police and prosecutors

> "conspired to and, in fact, fabricated inculpatory evidence, ignored clear leads inconsistent with the prosecutions' theories, withheld material impeachment information, misled a grand jury, and offered fabricated evidence at trial in complete disregard of the integrity and respect owed not only to the criminal justice system but also to M[r]. Elmore, all with a purpose to ensure his wrongful arrest, trial, conviction, and punishment by death."

Complaint at 3, Elmore v. City of Greenwood, 2013 WL 3789905 (D.S.C. June 26, 2013) (No. 3:13-cv01755-DCN-TER). Even if Elmore's lawsuit succeeds, however, any relief granted would come decades after the harm was caused and will likely be inadequate to compensate Elmore for the great injustice that he has suffered.

88. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 71 (2005).

89. Keenan, *supra* note 66, at 218 (internal quotation marks omitted).

proving a willful civil rights violation.[90] As a result, convicting a prosecutor for a *Brady* violation requires proving both that the suppressed evidence met *Brady*'s high materiality threshold and that the prosecutor intentionally suppressed the evidence in an effort to undermine the defendant's constitutional rights *beyond a reasonable doubt*.[91] This is not an easy task. However, regardless of the true reason, criminal sanctions are too scarce to effectively control prosecutorial conduct.

Finally, professional disciplinary action offers no more hope of constraining prosecutorial misconduct than the aforementioned remedies. In the same *Chicago Tribune* investigation referenced earlier,[92] 381 homicide cases were examined in which the suppression of evidence or the presentation of false evidence resulted in the reversal of a conviction. None of the prosecutors responsible were publicly sanctioned by a state disciplinary agency in connection with those cases.[93] Similarly, a study by the Center for Public Integrity identified 2012 appellate cases decided between 1970 and 2003 in which there was a dismissal, sentence reduction, or reversal due to prosecutorial misconduct. However, prosecutors in just forty-four of those cases faced disciplinary action, and seven of those disciplinary actions were dismissed.[94]

The lack of an effective mechanism for holding prosecutors responsible for their misconduct is troubling when one considers the pressure that many prosecutors face to get convictions. Most of the nation's chief prosecutors are elected officials.[95] Prosecutorial elections often push candidates to take a "tough on crime" stance, and they frequently focus on conviction records and the speed at which cases are processed.[96] Increased coverage of significant cases by the media in recent years has exacerbated this problem.[97] Not even unelected prosecutors are immune from these

90. Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1967 (2008).

91. *Id.*

92. *See supra* text accompanying notes 65–66.

93. Armstrong & Possley, *supra* note 65.

94. Keenan et al., *supra* note 66, at 220.

95. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 13 (2009) ("Forty–seven states elect their prosecutors, and in the remaining three, an elected attorney general appoints the local chief prosecutors.").

96. *Id.* at 13–14. "Indeed, a recent study of prosecutorial elections bluntly concluded that prosecutor 'candidates believe that voters care more about the speed and quantity of work' than they do about whether the outcomes were just or unjust." *Id.* at 14 (quoting Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 604 (2009)).

97. *Id.* at 12.

political pressures. The performance of appointed prosecutors, such as United States Attorneys, is often evaluated, at least in part, on prosecution and conviction rates.[98] Similarly, even non-elected assistant prosecutors sometimes feel pressure to win cases because their professional advancement or funding for their office may be tied to conviction statistics.[99]

These pressures to obtain convictions have influenced the culture of many prosecutors' offices and can lead prosecutors to engage in misconduct in order to secure a win.[100] Evidence of this problematic culture can be observed where offices engage in practices like calculating "batting averages" for each attorney, or publicly tracking wins and losses as a means of motivation.[101] These types of practices conflict with the notion that prosecutors seek justice rather than convictions.

These pressures are more extreme than ever in the context of capital cases. When a murder has taken place, prosecutors and law enforcement are under "tremendous pressure to solve the crime and punish the perpetrator, harshly."[102] In fact, success or failure at securing a death sentence can make or break a prosecutorial election.[103] Similarly, capital cases are more likely to draw media attention. When a prosecutor seeks the death penalty, it is likely because there is "an especially unusual and heinous" homicide at issue, and these are exactly the kinds of cases that are heavily publicized.[104] Thus, public pressure to secure a death sentence can be quite high.

With so much riding on the outcome of capital cases, it is easy to see why prosecutors may be tempted to violate *Brady*. In some rare instances, these pressures may lead prosecutors to consciously suppress evidence that is material under *Brady* because they believe it threatens their ability to win the case. After all, such conduct, though unconstitutional, may not seem inherently immoral. Presumably, most prosecutors are convinced that

98. *See id.* at 15 (noting that the appointment and confirmation process for United States Attorneys is "inherently political," and that there is evidence of politics playing a role in the hiring and firing of these officials).

99. *Id.* at 16.

100. *Id.*

101. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 137 (2004).

102. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078–80 (2000).

103. *See id.* at 2080–83 nn.139–40.

104. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 494 (1996).

capital defendants are guilty or they would not be prosecuting the case. Withholding evidence may thus seem necessary, not only to obtain their desired result, but also to obtain the correct result. This line of reasoning may sound particularly persuasive to someone whose professional interests happen to align with securing a conviction. However, the pressure need not have such a dramatic impact to be problematic. All it must do is lead prosecutors to push the limit of what constitutes withholding material evidence under *Brady*. And with a considerable grey area surrounding the definition of materiality, prosecutors can rationally withhold evidence that could potentially alter the outcome of a proceeding. Assuming the evidence is ever discovered, the ambiguity of the materiality standard makes it unlikely that the prosecutor will be deemed unethical for doing so and, as already noted above, it is extremely unlikely that the prosecutor will face any meaningful repercussions if a *Brady* violation is found.

III. A PROPOSED SPECIAL *BRADY* RULE FOR CAPITAL CASES

Currently, the requirement that the prosecution disclose evidence relevant to the issues of guilt or punishment is subject to a materiality test. The policy justifications behind this are obvious. New trials consume time and resources that are often in short supply. Even the Court has acknowledged the burden that granting numerous new trials can impose on the states.[105] Thus, *Brady*'s materiality standard is an attempt at a pragmatic approach to protecting a defendant's right to information. However, this pragmatism comes at a cost. When the prosecution withholds exculpatory evidence, no matter how significant, the defense's ability to present its case is constrained and the jury is left with an incomplete picture.

A. THE PROPOSED RULE AND ITS INTENDED FUNCTION

Death is the harshest punishment available in the United States and it is unique in its finality.[106] As such, society should demand a higher degree of reliability when imposing it.[107] One way to accomplish this is to ensure

105. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 402–04, 417 (1993) (noting in particular the burden of staging a new trial many years after the alleged crime has taken place, since evidence may be lost or deteriorated, and memories may have faded).

106. *See* Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) ("Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.").

107. The Court has already acknowledged that capital sentences require a higher degree of reliability in terms of process under the Eighth Amendment. *E.g.*, *Herrera*, 506 U.S. at 405. However, many argue that increased protections are needed. Such demands for increased reliability in capital cases come in many different forms. *See, e.g.*, Emanuel Margolis, *Habeas Corpus: The No-Longer*

that capital defendants have access to all information that could, even potentially, absolve them of their alleged crimes or reduce their culpability in the eyes of a jury. This could be effectively accomplished by removing the materiality requirement from *Brady* in capital cases, thereby granting capital defendants a right to all favorable information. Because the Constitution does not mandate a new trial when favorable but non-material evidence is withheld, and because policy concerns make it impracticable to require such action from a legislative perspective, capital defendants are unlikely to have their conviction overturned based on suppressed, non-material evidence. But, since society's heightened concern for accuracy is limited to its imposition of the ultimate punishment, reversing the verdict is unnecessary. Instead, society's interests in preserving the efficiency of the judicial system and protecting individuals from wrongful executions can be satisfied by simply commuting death sentences and replacing them with sentences of life without the possibility of parole whenever favorable evidence is withheld from defendants, unless the prosecution is willing to acquiesce to a new trial.

This special *Brady* rule in capital cases would help to alleviate the shortcomings of the current materiality standard when a defendant's life is on the line. Capital defendants would have the right to access all potentially exculpatory evidence gathered by the government, regardless of their own investigative resources. The rule would also eliminate the need for prosecutors and reviewing courts to speculate as to how particular evidence may impact a trial. As such, capital defendants would be ensured the ability to present a complete defense based on all the information gathered.

Finally, this special *Brady* rule would help to reduce the threat of prosecutorial misconduct. As discussed above, many prosecutors feel pressure to secure convictions, particularly in capital cases, and current control mechanisms are inadequate to ensure that they act ethically in this pursuit. The relaxed *Brady* standard would help to counterbalance this pressure by creating a much higher likelihood that death sentences will be overturned on appeal, which would no doubt be taken into consideration by a prosecutor's supervisors or the general public, who are responsible for holding prosecutors accountable for their actions. Although turning favorable evidence over to the defense may still have some negative impact

Great Writ, 98 DICK. L. REV. 557, 625 (1994) (advocating the use of strict scrutiny in capital habeas cases); Kevin Michael Miller, Note, Romano v. Oklahoma*: The Requirement of Jury's Sense of Responsibility and Reliability in Capital Sentencing*, 44 CATH. U. L. REV. 1307, 1345–46 (1995) (advocating an expansive approach to interpreting the requirement that juries have a sense of responsibility for issuing a death sentence).

in capital cases with respect to the likelihood of conviction itself, prosecutors would have to balance that concern against the very real threat of a reduced sentence on appeal. Furthermore, the increased publicity that often comes with capital cases would become a double-edged sword. Publicity at trial would still heighten the pressure to punish murderers swiftly and harshly, but a later reduction in the defendant's sentence could make headlines as well. A prosecutor would then be faced with not only a public disappointed by the reduced sentence, but also the appearance of having acted inappropriately when a defendant's life was at stake. Thus, altering the *Brady* materiality standard may have positive effects from a policy standpoint beyond increasing fairness to individual defendants at trial: by increasing the incentive for prosecutors to disclose evidence to the defense, the special rule would likely increase compliance with *Brady* in capital cases. The result of such a rule would be a greater confidence that those sentenced to death are both guilty of their charged crimes and deserving of the ultimate punishment.

B. THE CONSTITUTIONAL BASIS FOR A SPECIAL *BRADY* RULE

1. Death-is-Different Doctrine

Despite the aforementioned policy justifications for an altered *Brady* rule in capital cases, making the argument that such a rule is required by the Constitution is unquestionably difficult and requires walking a very fine line between different regions of the Court's jurisprudence. The Court has an extensive history of treating death penalty cases uniquely. The idea that death is different first gained Constitutional traction in *Furman v. Georgia*.[108] Justice Potter Stewart expressed this notion eloquently when he explained that death differs from all other punishments "not in degree but in kind" because it is irrevocable, it rejects the principle of rehabilitation, and it departs from our concept of humanity.[109] This simple idea sparked a new line of jurisprudence from the Court that has dramatically altered the landscape of death penalty cases across the country.

Furman established that death sentences are cruel and unusual "in the same way that being struck by lightning is cruel and unusual" when applied arbitrarily.[110] Thus began a long line of cases mandating guidance for juries in capital cases by limiting their discretion as to which classes of

108. *Furman*, 408 U.S. at 239–40 (per curiam).
109. *Id.* at 306 (Stewart, J., concurring).
110. *Id.* at 309–10 (Stewart, J., concurring).

individuals may constitutionally be sentenced to death.[111] At the same time, the Court set to work creating another line of cases mandating individualized sentencing by requiring that juries be allowed to consider a broad spectrum of aggravating and mitigating factors in determining which defendants deserve death, thereby enhancing their discretion.[112] The tension between these two lines of precedent did not go unnoticed,[113] but both analyses remain important in capital cases today. The result is a pyramid-like, multistage analysis for assessing whether a given defendant may be sentenced to death. At the base of this pyramid lie the defendants whom a jury might sentence to death. However, many of these criminals, such as all non-homicide offenders, are made ineligible by the first line of precedent limiting jury discretion. Next, the number of defendants who may constitutionally be executed having been significantly reduced, individualized sentencing guidelines are applied as required by the second line of precedent, thereby determining which defendants out of this group truly *deserve* to be executed. Thus, at the apex of the pyramid, where one finds the small group of defendants who are actually sentenced to death, there is greater confidence in the reliability of the sentences, as is required by the Constitution. These cases created an elaborate system of process requirements that were entirely unique to death penalty cases at the time, and serve as strong evidence that capital defendants are afforded heightened constitutional protections.

Although the developments above are probably the most dramatic way in which capital trials differ from their non-capital counterparts, the Court has extended a number of other rights to capital defendants as well. For

111. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 192–94 (1976) (Stewart, Powell, and Stevens, J.J.) (discussing the information and guidance that must be provided to a jury for a capital sentencing scheme to be constitutional); Coker v. Georgia, 433 U.S. 584, 592 (1977) (White, J.) (prohibiting the death penalty for the crime of raping an adult); Atkins v. Virginia 536 U.S. 304, 321 (2002) (prohibiting the death penalty for mentally retarded defendants).

112. *E.g.*, Woodson v. North Carolina 428 U.S. 280, 304 (1976) (Stewart, Powell, and Stevens, J.J.) (arguing that mandatory death sentences are prohibited because the Eighth Amendment requires consideration of the individual defendant's characteristics and the circumstances of the crime); Jurek v. Texas, 428 U.S. 262, 271 (1976) (Stewart, Powell, and Stevens, J.J.) (finding that the Eighth Amendment requires that sentencing authorities consider mitigating circumstances before imposing a sentence of death); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that the Eighth Amendment requires that the sentencer in a capital case generally not be precluded from considering the defendant's character or record, or other circumstances, as a basis for sentence reduction); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (affirming the rule that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor.").

113. Walton v. Arizona, 497 U.S. 639, 656–57 (1990) (Scalia, J., concurring in part and concurring in the judgment) (describing the Court's Eighth Amendment jurisprudence as having split into "two incompatible branches").

example, the Court has held that, under the Sixth Amendment's guarantee of effective representation, defense counsel for capital defendants must make "reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial," even if the defendant and his family members have "suggested that no mitigating evidence is available."[114] No similar protection has yet been articulated for non-capital defendants. The Court has also granted all capital defendants accused of interracial crimes the right to question potential jurors about racial prejudices.[115] Non-capital defendants, on the other hand, must convince a judge that some special circumstances in their case, beyond the fact that an interracial crime is at issue, have raised the risk that racial prejudices will contaminate the proceeding before such questioning will be permitted.[116] As a final example, the Court has explicitly held that capital defendants are entitled to have the jury permitted to consider lesser-included non-capital offenses when the evidence would support such a finding.[117] The Court declined to decide whether such an instruction is constitutionally required in non-capital cases.[118] These heightened process requirements suggest that it would be consistent with the Court's jurisprudence for capital defendants to be afforded a unique *Brady* protection.

These holdings reflect a belief that the Constitution "requires increased reliability of the process by which capital punishment may be imposed."[119] The heightened protections help to ensure that those who are sentenced to death truly deserve the ultimate punishment, both because they are guilty and because the nature of their crimes and their individual characteristics justify their execution. The proposed special *Brady* rule is consistent with these policies. It would grant capital defendants a right to more information and help to ensure that the trier of fact is presented with a complete picture before making a determination that death is appropriate.

2. Is Death Still Different?

At first glance, the recently decided case of *Miller v. Alabama*[120] calls into question the idea that death is truly different, and that capital

114. Rompilla v. Beard, 545 U.S. 374, 377 (2005).

115. Turner v. Murray, 476 U.S. 28, 36–37 (1986).

116. *See id.* at 53 (Powell, J., dissenting) (noting that the special circumstances rule still applies in non-capital cases).

117. Beck v. Alabama, 447 U.S. 625, 627 (1980).

118. *Id.* at 638 n.14.

119. Herrera v. Collins, 506 U.S. 390, 405 (1993).

120. Miller v. Alabama, 132 S. Ct. 2455 (2012).

defendants deserve constitutional protections greater than those of non-capital defendants. In *Miller*, the Court held that mandatory sentences of life without the possibility of parole for offenders who are under the age of eighteen at the time their crimes are committed are prohibited by the Eighth Amendment's ban on cruel and unusual punishments.[121] In it's analysis, the Court invoked two lines of precedent.[122]

First, *Roper v. Simmons* and *Graham v. Florida* established that "children are constitutionally different from adults for purposes of sentencing."[123] This idea is grounded in three fundamental differences between juveniles and adults: (1) juveniles are less mature and have a less developed sense of responsibility that leads to "recklessness, impulsivity, and heedless risk-taking"; (2) juveniles are more susceptible to negative influence and pressure, have limited control over their environment, and are often unable to remove themselves from settings that induce criminal activity; and (3) juveniles have less defined characters, meaning their criminal actions are less probative of their capacity for reformation.[124] These differences "diminish the penological justifications for imposing the harshest sentences on juvenile offenders."[125] The case for retribution is weaker because juveniles are less culpable; the case for deterrence is weaker because juveniles are less mature and less likely to consider potential punishments; the case for incapacitation is weaker because it is impossible to determine which juveniles will continue to pose a threat to society; and the case against rehabilitation is weaker because juveniles have a greater capacity to change.[126]

The second line of precedent is those cases requiring individualized sentencing in capital cases.[127] These cases are relevant because *Graham* treated juvenile sentences of life without parole as "analogous to capital punishment."[128] This second line of precedent established "the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses."[129] Included within this line of reasoning was the idea that a

121. *Id.* at 2460.
122. *Id.* at 2463–64.
123. *Id.* at 2464.
124. *Id.* (citing Roper v. Simmons 543 U.S. 551, 569–70 (2005)).
125. *Id.* at 2465.
126. *Id.* (citing Graham v. Florida, 560 U.S. 48, 71–74 (2010)).
127. *Id.* at 2467.
128. *Id.* (quoting *Graham*, 560 U.S. at 89–90 (Roberts, C.J., concurring in the judgment)).
129. *Id.*

sentencer must have an opportunity to consider the "mitigating qualities" associated with youth.[130]

The Court summarized the reasoning behind its ban of mandatory juvenile life without parole quite succinctly:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[131]

Thus, in *Miller*, the Court seems to have granted heightened due process rights (albeit under the guise of the Eighth Amendment) to a criminal defendant outside the context of the death penalty. If this is so, why limit a special *Brady* rule to only capital cases? The answer to this question is that *Miller* and the Court's death penalty jurisprudence were decided based on different rationales. The death-is-different doctrine first established in *Furman* was penalty-focused; it was grounded in the idea that death differs from all other punishments.[132] In contrast, *Miller* is offender-focused. Certainly, a sentence of life without parole is a harsh punishment, but the Court has never suggested that such a punishment, itself, deserves special treatment. Rather, the Court has merely held that, when applied to juveniles, there is a special risk that the punishment will be disproportionate.[133] As such, *Miller* simply mandates that youth, and the special traits that accompany it, be considered as a mitigating factor during sentencing.[134]

This idea that certain traits may make entire classes of individuals categorically less culpable does not conflict with the notion that death is

130. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
131. *Id.* at 2468 (citations omitted).
132. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
133. *Miller*, 132 S. Ct. at 2469. *Accord Graham*, 560 U.S. at 74.
134. *Miller*, 132 S. Ct. at 2469.

different from other punishments. The special significance of death lives on in procedural rights not afforded to non-capital defendants, including juveniles.

3. Limitations on the Rights of Capital Defendants

Even if one accepts that death is different and that the constitutional significance of that difference survived *Miller*, there is still the matter of *Herrera v. Collins*, in which the Court severely limited the special rights afforded to capital defendants. In *Herrera*, a capital defendant filed a habeas petition, raising a claim of actual innocence based on recently discovered evidence.[135] The Court held that a claim of actual innocence is not grounds for federal habeas relief.[136]

The Court acknowledged that a claim of innocence has a role in habeas review: "a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."[137] But actual innocence is not a claim in and of itself; it is merely "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[138] The defendant in *Herrera* argued that, as a capital defendant, he should be treated differently.[139] The Court, however, rejected this argument, noting that although "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed,"[140] "we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.'"[141] Thus, a sentence of death, different as it may be, does not provide defendants with a constitutional right to prove their innocence after being properly convicted of a crime.

Furthermore, the defendant in *Herrera* argued that if the Court was unwilling to grant him a new trial, it could simply commute his death sentence upon a satisfactory showing of actual innocence.[142] This argument was not well received. The Court noted that the defendant's claim was

135. Herrera v. Collins, 506 U.S. 390, 396 (1993).

136. *Id.* at 400 ("This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

137. *Id.* at 404.

138. *Id.*

139. *Id.* at 405.

140. *Id.*

141. *Id.* (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989) (plurality opinion)).

142. *Id.*

based upon his innocence, not upon the idea that some error was made in imposing the specific sentence.[143] It would be "rather strange" for the Constitution to prohibit the execution of someone who has demonstrated actual innocence while still permitting him to spend the rest of his life in prison.[144]

Herrera thus raises two important questions. First, if capital defendants are precluded from proving their own innocence, how much more extensive can their procedural rights really be? Second, if innocence cannot justify reducing a death sentence to a sentence of life imprisonment, then how could the Constitution mandate the same action be taken when a prosecutor withholds exculpatory evidence?

The key to both of these questions lies in the specific reasoning behind the Court's decision in *Herrera*. First, the Court was determined to maintain the division between state trial courts, which perform a fact-finding function, and federal courts performing habeas review, which merely look for constitutional deficiencies.[145] The decision made it abundantly clear that a fair trial is all that is required by the Constitution. Aside from situations in which actual innocence serves as a "gateway" for having constitutional claims decided on their merits,[146] the consideration of evidence on habeas review is limited to examining the record to ensure that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[147] Furthermore, the Court expressed concern that granting a new trial based on evidence found long after the initial trial had concluded would likely impose an "enormous burden" on the states and lead to less accurate determinations of innocence or guilt.[148] All of these concerns are avoided entirely by the proposed special *Brady* rule. Because the rule would not overturn convictions, there would be no need for reviewing courts to take on a fact-finding role or weigh evidence. Likewise, there would be no need for a trial court to retry the case using stale evidence. Thus, in response to the first question posed above, granting capital defendants extensive procedural rights unavailable to non-capital defendants is consistent with *Herrera*. The limitation imposed by *Herrera* was that the Constitution be concerned only with the *process* of determining guilt or innocence at trial, not the ultimate *accuracy* of that

143. *Id.*

144. *Id.*

145. *Id.* at 400–01 ("Federal courts are not forums in which to relitigate state trials." (internal quotation marks omitted)).

146. *See supra* text accompanying note 138.

147. *Herrera*, 506 U.S. at 401–02.

148. *Id.* at 402–04, 417.

determination with respect to an individual defendant.

The Court was also concerned with the consistency between a defendant's claim and the remedy supplied. In *Herrera*, the defendant made a claim of actual innocence. If such a claim were accepted, the only just solution would be to reverse the conviction. By contrast, a defendant making a claim under the proposed special *Brady* rule does not assert innocence. Instead, the claim falls squarely within the ambit of habeas review in that it alleges a deficiency of process. A defendant's claim under the special *Brady* rule would assert a fundamental defect in how the jury—which was denied access to relevant information available at the time of trial—reached its verdict. As discussed above, the Constitution establishes certain procedural requirements for reaching a verdict. The special *Brady* rule would give capital defendants a right to greater information at trial. Although the special *Brady* rule—and the standard *Brady* rule, for that matter—helps to ensure that society reaches the *correct* outcome, its principal purpose is to establish a procedure for reaching a *fair* outcome. Even if a guilty defendant succeeds in getting a death sentence commuted, society still benefits because the process of obtaining fair convictions is protected. The sentence would be commuted rather than having the verdict overturned because the harm caused is theoretically minor. The standard *Brady* rule already reverses convictions when withheld evidence would likely have altered the outcome of a proceeding. By comparison, a violation of the proposed special *Brady* rule would be a less significant violation of a defendant's rights. The Court has already determined that such a violation does not warrant reversing a verdict. However, given the significance of exculpatory evidence and the uniqueness of a death sentence, withholding such evidence appears to be more than harmless error. This answers the second question posed above: from a constitutional standpoint, the special *Brady* rule is entirely different from the rule proposed by the defendant in *Herrera*, which would have reexamined the question of guilt rather than searching for procedural deficiencies at trial.

C. THE LEGISLATIVE ALTERNATIVE

1. The Timing Issue

Although there are reasons to suspect the Constitution already calls for a special *Brady* rule in death penalty cases, and that the courts could plausibly work it into existing constitutional jurisprudence, the rule would be beneficial from a policy standpoint and thus should be implemented through legislation regardless of whether or not it is constitutionally required. One major question for implementing the rule legislatively is

when defendants should be permitted to raise their claim.

The simplest and most efficient time for a defendant to raise an alleged violation of the special *Brady* rule would be on direct appeal, thereby resolving the matter quickly. This would provide prosecutors with an opportunity to retry the case before the evidence becomes stale if they believe the circumstances truly warrant the additional resources. If these cases are not retried, the state would be spared the increased costs associated with prolonged death penalty appeals and housing inmates on death row.[149] However, violations of the special *Brady* rule would almost never be raised on direct appeal because discovering prosecutorial misconduct can take years or even decades.[150]

Assuming special *Brady* violations are not a constitutional basis for relief and, thus, federal habeas review is of no help, the vast majority of defendants would need to rely on state post-conviction relief to assert a special *Brady* claim. However, many jurisdictions impose time constraints on post-conviction relief, often requiring that motions for a new trial be filed within substantially less than a year of the final judgment.[151] Some states extend the time period for such motions when the basis is newly discovered evidence.[152] However, at the time *Herrera* was decided, the Court found that, even with respect to newly discovered evidence, seventeen states required motions for a new trial to be made within sixty days of the final judgment, one state required that the motion be filed during the term in which the judgment was rendered, eighteen jurisdictions had time limits for filing between one and three years, and fifteen states allowed for new trial motions based on newly discovered evidence after three years (and only nine of these had no time limit).[153] The time limit for

149. For a discussion of the high costs associated with carrying out capital trials and housing death row inmates, as well as how those costs have motivated some states to consider restricting or abolishing the death penalty, see Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118–21 (2010).

150. Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1331 nn.14–15 (2009).

151. *See, e.g.*, ALA. CODE § 15–17–5(a) (2012) (requiring filing within thirty days); ARIZ. R. CRIM. P. 24.2 (2012) (requiring filing within sixty days); FLA. R. CRIM. P. 3.590 (2012) (requiring filing within ten days).

152. VT. R. CRIM. P. 33 (2012) (requiring filing within two years of final judgment for claims based on newly discovered evidence but within only ten days of the verdict for all other claims). It is important to note that defendants raising a special *Brady* claim would generally not be able to do so pursuant to newly discovered evidence provisions because such provisions generally require that the evidence could not have been discovered and produced at trial with reasonable diligence and, more importantly, that the evidence be material for the defendant. *E.g.*, ALA. CODE § 15–17–5(a)(5).

153. *Herrera*, 506 U.S. at 410–11.

the federal government and the District of Columbia was two years.[154] However, "many States have their own habeas statutes, court rules, and/or 'interests of justice' case law that permit courts to extend or override time bars on newly discovered evidence motions."[155]

Although it would be preferable for legislatures to statutorily grant a larger window of opportunity for raising special *Brady* claims (or to establish an indefinite filing period), such claims should at least be treated like claims based on newly discovered evidence. After all, the evidence at issue in both scenarios was unavailable to the defense until the filing of the motion. Furthermore, a special *Brady* violation would not, in most cases, lead to a new trial. Thus, there should be less of a concern regarding finality of judgments and wasted resources.

2. Providing Incentives

Although a finding that the special *Brady* rule is not constitutionally required would prevent the federal government from imposing the rule upon the states, there are still methods of incentivizing states to undertake such action. Portions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are already designed to encourage the states to provide capital defendants certain protections.[156] Jurisdictions can choose to "opt-in" to certain provisions of the statute. AEDPA provides states with procedural advantages in federal habeas proceedings if they meet certain conditions. These conditions include providing "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death" and creating "standards of competency for the appointment of counsel in proceedings."[157] In exchange, AEDPA confers benefits: it shortens the statute of limitations period from one year to 180 days; it treats an untimely petition as a second habeas petition; it only permits petitioners to amend petitions after a response is filed "if the prisoner can meet the rigorous standards for a second or successive petition"; it generally prevents federal

154. *Id.* at 410.

155. NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 16 (1999), *available at* https://www.ncjrs.gov/pdffiles1/nij/177626.pdf.

156. 28 U.S.C. §§ 2261–66 (2012). These sections provide capital defendants with procedural protections including right to counsel, a stay of execution during habeas proceedings, and tolling rules for filing habeas claims. They also set limits on federal court jurisdiction and the time period in which habeas claims can be brought and decided.

157. *Id.* § 2265.

courts from reviewing claims already found procedurally defaulted by state courts; and it requires lower federal courts to decide habeas petitions within short timelines (within 180 days of a final judgment for federal district courts and within 120 days of the briefs being filed for courts of appeal).[158] Thus, Congress could incentivize states to adopt special *Brady* provisions by amending AEDPA to include the special *Brady* rule as a requirement for opt-in jurisdictions.[159]

VI. CONCLUSION

The unique nature of the death penalty calls for procedural safeguards beyond those required in other criminal cases. The special *Brady* rule proposed in this Note would alter the traditional *Brady* rule—which requires only that *material* exculpatory or impeachment evidence possessed by the prosecution be disclosed to defendants—by eliminating the materiality requirement in capital cases and instead mandating that *all* potentially exculpatory or impeachment evidence possessed by the prosecution be disclosed. Such a rule in death penalty cases would help to ensure that capital defendants are afforded every reasonable opportunity to present their strongest case, thereby ensuring that those who are executed truly deserve the punishment.

Some would argue that the rule does not go far enough, and that capital defendants should be granted a new trial when any favorable evidence is withheld, or should be given a right to all evidence regardless of whether or not it is favorable. However, the proposed special *Brady* rule is, by necessity, pragmatic in its design. Limiting the effects of the rule to the commuting of death sentences is attractive from a constitutional perspective because it capitalizes on the Court's long line of precedent holding that death is different, and manages to provide capital defendants with heightened due process rights without running afoul of the Court's recent holdings in *Miller* and *Herrera*. It is attractive from a legislative perspective because it provides defendants with limited relief without clogging up an already strained court system[160] or undermining the finality of verdicts. Extending the rule any further would almost certainly

158. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 272 (2006).

159. It is worth noting, however, that despite the existence AEDPA's advantages for opt-in states, "no state has effectively opted in and gained the only AEDPA advantages unique to capital cases." Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 93 n.21 (2012). Thus, there may be reason to doubt the effectiveness of such incentives.

160. Greater discovery may even help to free up judicial resources by encouraging plea agreements. Brennan, *supra* note 48, at 282 (noting that many prosecutors already open their files to defense counsel when it may save the state the expense of a trial).

undermine its constitutional basis, and likely its legislative appeal. Regardless of its imperfections and whether it is implemented constitutionally or legislatively, the special *Brady* rule would help to address some fundamental concerns over the process by which capital defendants are convicted.