

The New Russian Roulette: *Brady* Revisited

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I. Introduction

Delma Banks served over twenty-three years on Texas's death row after being convicted of killing a white teenager in 1981.¹ Banks's reprieve from death came when, just hours before his scheduled execution, the United States Supreme Court granted a stay.² The Court subsequently granted certiorari and ruled that the prosecution violated *Brady v. Maryland*,³ by failing to disclose to the defense that one of two key witnesses was a paid informant.⁴ Additionally, the Court held that the lower court erred in denying a certificate of appealability on whether Banks had adequately raised a second *Brady* claim that another witness was extensively coached prior to his testimony.⁵ At trial, the defense relied upon the State's promise that no formal *Brady* request was necessary because the prosecution would turn over all evidence to which the defendant was entitled.⁶ The State did not turn over this evidence until nineteen years after the trial concluded and Banks had been sentenced to death.⁷ In reaching its decision, the Court implicitly expanded the reach of *Brady* and reinforced the *Kyles v. Whitley*⁸ line of cases that impute to the prosecution knowledge of exculpatory or impeaching evidence in the possession of the police or other branches of law enforcement.⁹

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1. *Banks v. Dretke*, 124 S. Ct. 1256, 1267 (2004).
2. *Banks v. Cockrell*, 538 U.S. 917, 917 (2003).
3. 373 U.S. 83 (1963).
4. *Banks*, 124 S. Ct. at 1279; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
5. *Banks*, 124 S. Ct. at 1263.
6. *Id.* at 1263–64.
7. *Id.* at 1268–69.
8. 514 U.S. 419 (1995).
9. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (finding that the prosecution has a duty to learn of exculpatory evidence known to others acting on behalf of the government); *Banks*, 124

Prosecutorial suppression of exculpatory material in the criminal justice system undermines the fair administration of justice and the reliability of the results produced by criminal trials.¹⁰ The prosecution and defense must honestly and reliably fulfill their duties for the criminal justice system to function in a trustworthy manner.¹¹ The prosecution's nondisclosure of material exculpatory evidence during and after trial challenges the precept that only the guilty will be prosecuted, convicted, and punished.¹² The prosecution represents the public, and the public wins not only when the guilty are convicted but also when criminal trials are fair.¹³ When the prosecution maintains a win-at-all-costs mentality and either suppresses exculpatory evidence or tailors witness statements to suit its needs, it violates the public trust.¹⁴

This article will discuss the current status of *Brady* in capital cases and ways that defense counsel can ensure that their clients reap the full benefit of *Brady* at all phases of trial. Part II of this article surveys problematic aspects of the *Brady* doctrine. Part III focuses on the witness preparation aspect of *Banks* and discusses *Banks*'s implication that material generated in the course of victim and witness interviews may be treated as *Brady* material. Part IV focuses on witness proffers and argues for a standard that would require all proffers to be memorialized for *Brady* purposes. Part V examines the emerging issue of whether victim-witness advocates' files should be subject to potential *Brady* disclosure. Part VI discusses ways defense counsel might take advantage of the current modest expansion of the *Brady* doctrine as evidenced by cases such as *Banks*.

S. Ct. at 1278–79 (stating that witness Farr's relationship as an informant should have been disclosed as impeachment evidence); *United States v. Brooks*, 966 F.2d 1500, 1501 (D.C. Cir. 1992) (remanding for failure by the prosecutor to search the files of other agencies for exculpatory evidence).

10. The ABA Model Rules of Professional Conduct mandate that:

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

ABA MODEL RULES OF PROF'L CONDUCT R. 3.8 (2003).

11. *See Elliott v. Commonwealth*, 1 S.E.2d 273, 275 (Va. 1939) (quoting *Wilson v. Commonwealth*, 162 S.E. 15, 17 (Va. 1932)) ("An accused should not, by wilful act, be placed in such an attitude before the jury by the representative of the commonwealth whose duty to prosecute one accused of crime is coexistent with his duty to see that the accused is accorded a fair and impartial trial.'").

12. *See generally* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 644 (2002) (discussing the *Brady* doctrine in criminal cases).

13. *See id.* at 644 (quoting *Brady*, 373 U.S. at 87) (noting that *Brady* was thought to represent not only that a defendant must have access to exculpatory material, but the prosecution would also pursue justice and not simply victory in the court).

14. *See Brady*, 373 U.S. at 83–84 (noting society's interest in fair criminal trials).

II. Defendant's Right to Exculpatory Material

Brady established a defendant's right to exculpatory material.¹⁵ The Court held that the prosecution must turn over any exculpatory information or evidence to the defense that is material to guilt or punishment.¹⁶ While the United States Supreme Court's central holding in *Brady* was favorable to defendants, subsequent cases demonstrated that the contours of *Brady* were not clear.¹⁷ This is because the prosecution's failure to turn over exculpatory material may not constitute a *Brady* violation.¹⁸ *United States v. Bagley*,¹⁹ followed by *Strickler v. Greene*,²⁰ established that to prove a *Brady* violation, the defense must show both that the evidence at issue is favorable to the accused, either because it is exculpatory or because it weakens some aspect of the prosecution's case, and that the defendant has sustained a relatively high level of prejudice as a result of the suppression.²¹

Cases since *Brady* have expanded the doctrine in some areas but constricted it in others.²² These decisions expanded *Brady* to include exculpatory material without a specific request by the defense²³ and evidence in the control of actors other than the prosecutor but under government control.²⁴ *Brady* has also been expanded to include defense proffers to the prosecution.²⁵ In addition, *Brady* now applies to the suppression of transcripts of prosecution rehearsal meetings

15. *Id.* at 87.

16. *See id.* (finding that a State denies a defendant due process when it fails to disclose to the defendant before trial evidence favorable to the defendant that is material either to guilt or to punishment).

17. *See, e.g.,* *United States v. Powell*, 886 F.2d 81, 84 (4th Cir. 1989) (holding that although the Government has a duty to make a good faith effort to discover and disclose *Brady* material, a failure to fulfill this duty will be harmless error unless the defendant is able to show the information sought was material).

18. *See, e.g.,* *Morrow v. Dretke*, 367 F.3d 309, 322 (5th Cir. 2004) (stating that failure to disclose various FBI reports which would have a cumulative effect did not violate *Brady*).

19. 473 U.S. 667 (1985).

20. 527 U.S. 263 (1999).

21. *See* *United States v. Bagley*, 473 U.S. 667, 678–83 (1985) (clarifying the standard of review when exculpatory material is suppressed); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (stating that no *Brady* violation exists unless there is reasonable probability the verdict would have been different).

22. *Sundby*, *supra* note 12, at 645.

23. *See* *United States v. Agurs*, 427 U.S. 97, 107 (1976) (stating that the prosecution has a duty to disclose exculpatory evidence even in cases when no request has been made by defense).

24. *See* *Kyles*, 514 U.S. at 437 (stating that the knowledge of government agents is imputed to the prosecution).

25. *See* *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555–57 (4th Cir. 1999) (finding that defense proffers of a cooperation witness's proposed testimony are subject to *Brady*).

with witnesses.²⁶ On the other hand, the United States Supreme Court has also constricted the meaning of materiality under *Brady*.²⁷

A problematic aspect of *Brady* is that it is mainly enforced post-trial.²⁸ Defense attorneys are usually unable to discover exculpatory material unless the prosecution follows its ethical duties and legal discovery obligations.²⁹ When the prosecution suppresses material exculpatory evidence, the defense must proceed to trial without such evidence. This puts the prosecution at an unfair advantage during trial. Every trial is a story-telling enterprise in which the prosecution and defense each attempt to convince the audience that its particular version of the story is correct.³⁰ Exculpatory evidence is part of the story-telling lawyers engage in, and how each particular story ends depends upon the extent of the details available to each party.³¹ When facts critical to the narrative are omitted, the triers of fact must insert opinions and suppositions into those missing moments.³²

The *Bagley* Court placed a heavy post-trial burden upon the defense by requiring the defense, on appeal, to demonstrate that it has suffered such prejudice from the prosecution's withholding of exculpatory evidence and that the withheld evidence is reasonably likely to have changed the trial's outcome.³³ Given the difficulty of such a retrospective approach, some reform proponents focus on the pretrial rather than the appellate stage of the proceeding. For example, the Illinois Commission on Capital Punishment recently recommended to the Supreme Court of Illinois that it consider requiring a final case management conference in capital cases to insure compliance with the discovery rules and that each case is fully prepared for trial.³⁴ The Commission noted that

26. See *Banks*, 124 S. Ct. at 1280 n.19 (discussing the rehearsal transcripts suppressed by the prosecution).

27. See *Strickler*, 527 U.S. at 281–82 (noting that the only true *Brady* violations are suppressions of evidence reasonably likely to alter the outcome of a trial); *Bagley*, 473 U.S. at 682 (finding undisclosed evidence “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”).

28. Sundby, *supra* note 12, at 645.

29. *Id.* at 651.

30. See *Old Chief v. United States*, 519 U.S. 172, 189 (1997) (noting that “[a] convincing tale may be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best”).

31. *Id.*

32. *Id.*

33. See *Bagley*, 473 U.S. at 683 (noting that the reviewing court should examine the totality of the circumstances as to how the outcome of the trial would have changed in light of the nondisclosure); *Strickler*, 527 U.S. at 294 (noting that although the prosecution failed to disclose exculpatory materials in police files that cast doubt on portions of an eyewitness testimony, there was no prejudice because of evidence in the record pointing to the defendant's guilt).

34. See THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT 117 (April 2002) *at*

“[t]he trial judge is the person responsible for managing the conduct of both the prosecution and the defense before the jury, and supervising the overall conduct of the trial to insure that a fair and just result is obtained.”³⁵ By conducting case management conferences, both the defense and prosecution will be more adequately prepared, and the flow of information will result in a more efficient process.³⁶ During the conferences, examination of what is considered exculpatory evidence by both the defense and the prosecution will benefit from the impartial scrutiny of the judge.³⁷ The conferences will facilitate the efficient flow of information between the parties and ensure that all discovery requests have been complied with.³⁸ For example, when the prosecution has complied with a *Brady* motion but the defense is aware of additional information in the prosecution’s possession material to its case, the case management conference provides the defense an opportunity to alert the judge to why the information is material and should be disclosed. The defense, of course, will bear the burden of proving that the evidence sought is exculpatory and material.³⁹ However, the case management conference gives the defense the opportunity to inform the judge about the evidence without revealing its entire case strategy.⁴⁰

Such conferences will potentially place more information in the record for examination at the appellate level.⁴¹ The appellate court will conduct a more efficient review of the record when the discovery that was sifted through a case management conference is readily available.⁴² Additionally, the materiality of withheld evidence should be more readily apparent to the appellate court in cases where the defense has had the opportunity to apprise the trial judge of its reasons for seeking disclosure.⁴³ This in turn means that the post-trial burden of the defendant to demonstrate prejudice from suppression of exculpatory evidence will become less onerous.⁴⁴ A uniform adoption of the rule proposed by the Illinois Commission might, therefore, result in more adherence to *Brady*.

While a prosecutor has an ethical duty to disclose any and all exculpatory evidence before and during trial as it is received or revealed, this duty is often

http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf [hereinafter ILLINOIS COMMISSION ON CAPITAL PUNISHMENT] (addressing matters that arise before the guilt and innocence phase begins).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Brady*, 373 U.S. at 87 (requiring the defendant to show that the evidence was material to either guilt or punishment).

40. ILLINOIS COMMISSION ON CAPITAL PUNISHMENT, *supra* note 34, at 117.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

ignored until discovered at the appellate level.⁴⁵ Additionally, even when a defense attorney requests that the trial judge examine the evidence in camera for exculpatory purposes, the judge may frequently defer to the prosecution's assertion that it has no exculpatory material.⁴⁶ Suppression of evidence, false testimony, and undisclosed witness coaching during trial threaten the justice system and lead to untrustworthy and unreliable outcomes.⁴⁷ The adversarial system must be transparent, which means the prosecution should disclose to the defense all information not otherwise exempt.⁴⁸ The adversarial system must at times yield to transparency in the proceedings to ensure that justice is fair and impartial.⁴⁹ "A fair trial under fair procedure is a basic element in our Government. Zealous partisans filled with bias and prejudice have no place among those whom government selects to play important parts in trials designed to lead to fair determinations of guilt or innocence."⁵⁰

Numerous cases of *Brady* violations nationwide suggest that *Bagley* has set too high a standard for the determination of materiality.⁵¹ According to *Bagley*,

45. See *Hudson v. Whitley*, 979 F.2d 1058, 1061 (5th Cir. 1992) (describing how the prosecution had suppressed evidence that the only eyewitness had previously identified someone other than the defendant and that the other person had been arrested); *Walter v. Lockhart*, 763 F.2d 942, 948 (8th Cir. 1985) (finding that the prosecution withheld a transcript for over twenty years that supported defendant's claim that the officer shot him first); *Chaney v. Brown*, 730 F.2d 1334, 1347 (10th Cir. 1984) (finding that the prosecution withheld evidence which contradicted the prosecution's theory of murder and placed the defendant 110 miles from the scene of crime); see also Ken Armstrong & Maurice Possley, *The Verdict: Dishonor Series: Trial & Error. How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, available at 1999 WL 2833492 (discussing the impact of *Brady* violations nationwide).

46. See *Sundby*, *supra* note 12, at 660 (citing *Strickler*, 527 U.S. at 291) (noting that in *Strickler* the district court, while recognizing a *Brady* violation based on "potentially devastating impeachment material," denied relief because the evidence did not establish "reasonable probability in a different result").

47. See *Lux v. Commonwealth*, 484 S.E.2d 145, 149 (Va. Ct. App. 1997) (citing *Commonwealth v. Kilgore*, 426 S.E.2d 837, 842 (Va. Ct. App. 1993)) ("A Commonwealth's attorney's duties include the impartial prosecution of those accused of crime and the duty to see that an accused is accorded a fair trial."); see also *Kilgore*, 426 S.E.2d at 842 (quoting *Compton v. Commonwealth*, 55 S.E.2d 446, 450 (Va. 1949)) ("Both [the] court and counsel should not forget that the object sought is a fair trial . . . in keeping with our high traditions of justice. All that endangers that result should be avoided." (alteration in original)); *Taylor v. Commonwealth*, 23 S.E.2d 139, 142 (Va. 1942) ("The attorney for the Commonwealth is not only under the duty to prosecute one accused of crime, but it is also his duty to see that an accused is accorded a fair trial.").

48. See *Matter of Doe*, 801 F. Supp. 478, 488 (D.N.M. 1992) ("[T]he successful functioning of the adversary system depends upon the coordination of the roles of the prosecutor, the defender and the trier. Without the proper balancing of these roles, the structure fails.>").

49. See *Beck v. Washington*, 369 U.S. 541, 569-70 (1962) (Black, J., dissenting) (stating reasons why the defendant was denied equal protection).

50. *Id.*

51. See, e.g., Maurice Possley & Ken Armstrong, *The Flip Side Of A Fair Trial Series: Trial & Error. How Prosecutors Sacrifice Justice To Win*, CHI. TRIB., Jan. 11, 1999, available at 1999 WL 2873462 (noting a Chicago Tribune nationwide study revealed 381 cases reversed for two main types of misconduct: use of false evidence and concealing evidence suggesting innocence).

“[E]vidence 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.”⁵² Therefore, a prosecutor can suppress evidence which is undeniably favorable to the defense so long as the evidence does not grievously weaken the State’s case. Moreover, because prosecutors presumably do not prosecute those they consider innocent, the *Bagley* standard means that logically *Brady* should almost never apply. If the prosecution truly viewed the suppressed evidence as material—that is, as reasonably likely to create a reasonable doubt—then presumably he or she would not bring the case to trial in the first place.

However, blatant *Brady* violations by the prosecution often come to light at the appellate level.⁵³ A less demanding standard of materiality is required in order to truly resolve the tension the prosecution faces between being an advocate and an adversary.

[A] government prosecutor [stands] in a unique position in the criminal justice system. He [is] an advocate in an adversary system, but unlike the private advocate . . . [a] prosecutor [is] required to insure that the outcome [is] a just one. While the [private advocate] may want to keep information materially supporting his adversary’s case from his opponent, the . . . prosecutor cannot.⁵⁴

A less stringent standard of materiality will ensure that the prosecution cannot determine the outcome of a trial by withholding favorable evidence from the defense by virtue of its position.⁵⁵ While still being required to act as an advocate and gather evidence for his case, the prosecutor will not be faced with the

52. *Bagley*, 473 U.S. at 682.

53. *See In re Sealed Case No. 99-3096*, 185 F.3d 887, 898 (D.C. Cir. 1999) (remanding and instructing the district court to order the U.S. Attorney’s office to review records in possession of its prosecution team for evidence indicating an informant who provided information leading to defendant’s arrest had a deal with the prosecution); *Guerra v. Johnson*, 90 F.3d 1075, 1077–78, 1080 (5th Cir. 1996) (stating that the prosecution suppressed evidence showing that the police and the prosecution intimidated witnesses and failed to disclose evidence regarding who was observed carrying the murder weapon shortly after crime); *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (remanding for evidentiary hearing on defendant’s claim that the Government failed to disclose *Brady* material in light of inconsistencies between officer’s trial testimony and his police report); *United States v. Perdomo*, 929 F.2d 967, 973–74 (3d Cir. 1991) (finding that even though the jury evaluated credibility through other impeaching evidence, *Brady* required disclosure of the criminal record of a key prosecution witness); *Cornell v. Nix*, 921 F.2d 769, 770–71 (8th Cir. 1990) (holding that an evidentiary hearing was required on habeas claim when the State did not disclose that a prosecution witness recanted testimony regarding defendant’s confession); *Bowman v. Commonwealth*, 445 S.E.2d 110, 112–13 (Va. 1994) (noting that the prosecution’s failure to disclose an exculpatory report violated the defendant’s due process rights); *Burrows v. Commonwealth*, 438 S.E.2d 300, 303 (Va. Ct. App. 1993) (noting that the prosecution must provide the criminal record of one of its witnesses and failure to do so violated the defendant’s due process rights).

54. *United States v. Snell*, 899 F. Supp. 17, 19 (D. Mass. 1995).

55. *Id.* at 20.

tension between disclosing favorable evidence that would weaken his case, or withholding such evidence and strengthening the odds of a conviction.⁵⁶

A less demanding materiality standard arguably will require a diversion of prosecution resources if prosecutors are forced to devote more attention and effort to scrutinizing prosecution files on behalf of the defendant.⁵⁷ Additionally, there is no guarantee that such changes will result in a substantial increase in error-correction involving *Brady* violations. The prosecution, however, would have no greater burden in examining its files under a more lenient materiality standard. Essentially, the prosecution would be disclosing information it previously considered as “merely favorable” but not “material” to the defendant. Disclosing all evidence favorable to the defendant will resolve the contradiction between the prosecution’s viewing the evidence through the lens of materiality and the defense search for “merely favorable” material. The disclosure of all evidence favorable to the defense will curb good faith *Brady* violations and most importantly, on a case by case basis, will provide appellate courts with a clearer view of wilful *Brady* violations where sanctions should be imposed.

Pretrial examination of “debatable” evidence by the trial judge is one way of attempting to enforce such a new materiality standard. As Justice Stevens observed in his concurring opinion in *Kyles*, “our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law.”⁵⁸ The Illinois Commission on Capital Punishment recently recommended that the Supreme Court of Illinois adopt a rule redefining exculpatory evidence in order to provide guidance to prosecutors in making appropriate disclosure.⁵⁹ The Commission defined exculpatory evidence as:

[I]nformation that is material and favorable to the defendant because it tends to: (1) Cast doubt on defendant’s guilt as to any essential element in any count in the indictment or information; (2) Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude; (3) Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or (4) Diminish the degree of the defendant’s culpability or mitigate the defendant’s potential sentence.⁶⁰

This definition of exculpatory evidence is broader than *Brady* in that it requires “uncertain” evidence to be disclosed to the defendant.⁶¹ This definition

56. *Id.*

57. *Bagley*, 473 U.S. at 675 (stating that the prosecution is not required to deliver its entire file to the defense but must only disclose favorable evidence that if suppressed would result in an unfair trial).

58. *Kyles*, 514 U.S. at 455 (Stevens, J., concurring).

59. ILLINOIS COMMISSION ON CAPITAL PUNISHMENT, *supra* note 34, at 119.

60. *Id.*

61. *Id.*

will arguably require that evidence, which appears trivial, must be disclosed to the defendant and therefore create an undue burden on the prosecution to scour its entire file for any and all evidence seemingly favorable to the defendant.⁶² However, what may appear a trivial piece of evidence to the prosecution may in fact be material to the defense strategy.⁶³ As Justice Marshall noted in his dissent in *Bagley*, “[E]xistence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty.”⁶⁴ Moreover, any failure by the prosecution to disclose what it considers trivial or cumulative evidence would also fall under the harmless error rule because truly minor or cumulative evidence would not warrant relief in any event.⁶⁵ Defining exculpatory evidence to include all evidence favorable to the defense would be consistent with the idea that disclosure of all favorable evidence would:

[B]egin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would . . . remov[e] a substantial amount of unguided [prosecutorial] discretion.⁶⁶

In effect, the *Bagley* materiality standard requires prosecutors to examine evidence with a flashlight when a spotlight is required.⁶⁷ The *Bagley* standard encourages limiting *Brady*'s reach to evidence which directly indicates whether the defendant is innocent or guilty.⁶⁸ For example, inconsistent statements by a witness as to the initial identity of the perpetrator of a crime can be chalked up to the nervousness of the witness, and such information may be deemed immaterial to the defendant's guilt or innocence.⁶⁹ This results in evidence being

62. *Bagley*, 473 U.S. at 675 (noting that the prosecution does not have to turn over its entire file to the defense).

63. *Id.* at 693 (Marshall, J., dissenting).

64. *Id.*

65. *Id.* at 678 (noting that suppression of favorable evidence only rises to a constitutional violation if it deprives the defendant of the right to a fair trial).

66. *Id.* at 698 (Marshall, J., dissenting).

67. *See Morales v. Portuondo*, 154 F. Supp. 2d 706, 724 (S.D.N.Y. 2001) (citing *People v. Thomas*, 500 N.E.2d 293, 295 (N.Y. 1986)) (“[S]tatements offered by a defendant as exculpatory evidence are held to a more lenient standard of scrutiny than those offered by the prosecution as inculpatory evidence.”).

68. *See Bagley*, 473 U.S. at 682 (“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.” (emphasis added)).

69. *But see Waller v. Commonwealth*, 467 S.E.2d 844, 847 (Va. Ct. App. 1996) (citing *Hall v. Commonwealth*, 355 S.E.2d 591, 594 (Va. 1987)) (“It is fundamental to the right of cross-examination that a witness who is not a party to the case on trial may be impeached by prior statements made by the witness which are inconsistent with his present testimony . . .”).

overlooked because it does not directly negate guilt.⁷⁰ Furthermore, *Brady* and *Bagley* impinge upon the fairness of the trial because they allow prosecutors to examine the evidence as if their decision were being reviewed post-trial at the appellate level.⁷¹ This circular process means the prosecution gets to determine from a post-trial vantage point what should be considered material to the defense's case at the pretrial stage. Thus, the prosecution may retain evidence favorable to the defense if the evidence is simply favorable but not material and thereby undermine the operation of the adversarial system.⁷² However, as Justice Marshall noted in his *Bagley* dissent, "[I]t is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence."⁷³

One way to ensure a measure of transparency is to require prosecutors to provide open-file discovery to defendants in cases where death is a possible punishment.⁷⁴ As the United States Supreme Court has stressed, the death penalty is a different type of punishment both in terms of severity and finality.⁷⁵ "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."⁷⁶ The Constitution Project's Death Penalty Initiative submitted eighteen recommended reforms to the death penalty system.⁷⁷ Section

70. See *Burrows*, 438 S.E.2d at 302 (noting that the evidence sought was of impeachment value in stating the witness's motivation for testifying).

71. See *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004) (stating that "the prosecutor's absolute duty to disclose under *Brady* is limited to evidence a reasonable prosecutor would perceive at the time as being material and favorable to the defense").

72. See *United States v. King*, 928 F. Supp. 1059, 1062 (D. Kan. 1996) (citing *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988)) ("If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense."). In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Supreme Court emphasized the importance of full disclosure in criminal trials:

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Taylor, 484 U.S. at 408–09 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

73. *Bagley*, 473 U.S. at 698 (Marshall, J., dissenting).

74. THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY at 47–50 (2001).

75. See *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (holding that the defendant was denied due process of law when his death conviction was imposed).

76. *Id.* at 358.

77. THE CONSTITUTION PROJECT, *supra* note 74, at ix. The commission was organized by the Constitution Project and its members comprised of supporters and opponents of the death penalty. *Id.* These members included former judges, prosecutors, victim advocates, defense lawyers, journalists, and scholars and others concerned with the death penalty. *Id.*

Eight, which governs the role of prosecutors, recommends that “because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.”⁷⁸ The committee expanded on its recommendation by stating that “full open-file” discovery should be required in capital cases.⁷⁹ On the other hand, open-file discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files.⁸⁰ For example, relevant information has languished in the files of law enforcement departments for years until ultimately discovered.⁸¹ In order to curtail suppression of this type, especially in capital cases, the prosecution must ensure that all information has been requested from all its agencies, and the defense must remind the prosecution to do so.⁸² In fact, recommendation 48 by the Illinois Commission on Capital Punishment noted that:

[W]hile the prior [Illinois] Supreme Court rules required the prosecution to ensure that flow of information was maintained between the various investigatory personnel and the prosecution so that information could be evaluated for disclosure to the defense, [a] new rule . . . goes one step further and will likely encourage increased vigilance by the prosecution to insure that all investigatory materials have been obtained.⁸³

The Commission went on to recommend that a certificate be filed by the State and indicate that conferences had been held with all those connected to the case and all material required to be disclosed had been disclosed.⁸⁴

Undoubtedly, suppression of evidence will continue to plague the justice system if prosecutors remain the sole judges of what constitutes exculpatory material evidence.⁸⁵ Advances in science have exonerated many defendants and brought to light instances of illegally suppressed evidence.⁸⁶ The practice of

78. *Id.* at 47.

79. *Id.*

80. *Id.*

81. *See* Taus v. Senkowski, 293 F. Supp. 2d 238, 246 (E.D.N.Y. 2003) (noting that an exculpatory FBI report was not turned over to the prosecution until almost ten years after trial).

82. ILLINOIS COMMISSION ON CAPITAL PUNISHMENT, *supra* note 34, at 119.

83. *Id.*

84. *Id.* at 118.

85. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (stating that although the perspective of an advocate is helpful to the defendant in ferreting out information, settled practice has been that the prosecution determines what is material information and its decision on what to disclose is often final).

86. *See generally* BENJAMIN N. CARDOZO SCHOOL OF LAW, INNOCENCE PROJECT at http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration (last visited September 21, 2004).

allowing prosecutors to be the sole judges of exculpatory evidence, therefore, warrants closer examination.⁸⁷ If prosecutors remain the sole judges of what evidence is exculpatory, they will be the judges, effectively, of defendants' guilt or innocence.⁸⁸

Prosecutors may argue that *Brady* violations are rare, and while the system is imperfect, *Brady* is actually working quite efficiently.⁸⁹ However, even rare violations of *Brady*, especially in capital cases, are unacceptable. A series of articles by the Chicago Tribune examined over 380 cases nationwide, including capital cases, where *Brady* violations occurred.⁹⁰ The articles presented instances of wilful *Brady* violations in which prosecutors concealed evidence that discredited key prosecution witnesses, pointed to other suspects, or supported defendants' claims of self-defense.⁹¹ Such violations of *Brady*, while perhaps "rare," adversely impact the lives of defendants and cumulatively impair the functioning of the judicial system. The rarity of *Brady* violations does not take away the adverse impact they have on the system as a whole because "[p]rosecutors, who are the criminal justice system's gatekeepers, hold powers and responsibilities unique in American society."⁹²

The Professional Rules of Conduct of each state may impose sanctions upon a prosecutor for a *Brady* violation, but, in and of itself, a violation of *Brady* imposes no other liability.⁹³ In fact, in many cases, the only sanction a prosecutor receives is in the form of a critical judicial opinion concerning prosecutorial misconduct.⁹⁴ The remedy a defendant usually obtains is a new trial and admission of the suppressed evidence.⁹⁵ When a prosecutor fails to disclose exculpatory evidence, the result is a trial that is skewed in favor of the prosecution.⁹⁶ Additionally, the fact that the United States Supreme Court has

87. See *State v. Peseti*, 65 P.3d 119, 133 (Hi. 2003) (stating that the trial judge is in the best position, in the exercise of his or her sound discretion, to determine the optimal time for evaluating the relative significance of proffered exculpatory but otherwise privileged material).

88. See generally *Bursey*, 429 U.S. at 545.

89. See, e.g., Steve Weinberg, *A Question of Integrity, Prosecutors Dispute the Significance of 'Prosecutorial Misconduct'*, ¶ 7 at <http://www.publicintegrity.org/pm/printer-friendly.aspx?aid=34> (June 26, 2003) (noting that in many cases allegations of misconduct are rarely substantiated and are confused with prosecutorial error).

90. Possley & Armstrong, *supra* note 51, at ¶ 7.

91. *Id.*

92. *Id.* at ¶ 12.

93. See *Imbler v. Pachtman*, 424 U.S. 409, 409 (1976) (holding that prosecutors acting within the scope of their duties have absolute immunity from civil liability).

94. See *Banks*, 124 S. Ct. at 1273 (criticizing the State's failure to turn over exculpatory evidence to the defense).

95. See *Miller v. Pate*, 386 U.S. 1, 7 (1967) (granting habeas relief when prosecution misrepresented paint stained shorts as blood stained and failed to disclose true nature of stains); *Ex parte Richardson*, 70 S.W.3d 865, 873 (Tex. Crim. App. 2002) (reversing a capital murder conviction).

96. See *Agurs*, 427 U.S. at 104 (noting that failure to disclose exculpatory evidence "involves a corruption of the truth-seeking function of the trial process").

granted prosecutors absolute immunity from civil liability for *Brady* violations demonstrates one possible reason why wilful abuse of the doctrine continues today.⁹⁷

To ensure compliance with *Brady*, meaningful sanctions should be imposed on the prosecution for wilful violations.⁹⁸ The rationale for such sanctions was extensively discussed by Justice White in his concurrence in *Imbler v. Pachtman*.⁹⁹ Justice White disagreed with the implication that “*absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the juridical process and to interfere with Congress’ purpose.”¹⁰⁰ The *Imbler* majority concluded that granting prosecutors absolute immunity to civil liability was proper because the “ultimate fairness of the operation of the system . . . could be weakened by subjecting prosecutors to [civil] liability.”¹⁰¹ However, the concurrence noted that the adverse consequences of imposing civil liability for *Brady* violations mentioned by the *Imbler* majority were already “present with respect to suit against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct.”¹⁰² In fact, a prosecutor who wants to protect against liability for wrongful failure to disclose evidence may choose to disclose more than is necessary.¹⁰³ This type of disclosure will only help, not harm, the judicial process.¹⁰⁴

Imposing such liability will arguably discourage dedicated prosecutors from remaining in public service.¹⁰⁵ But even under a more aggressive use of sanctions for *Brady* violations, good-faith violations of *Brady* would continue to enjoy immunity.¹⁰⁶ Prosecutors who have dedicated their careers to public service should benefit from stricter sanctions imposed for wilful violations of *Brady* because such changes will weed out those willing to win at all costs while preserving the integrity of the judicial system.

97. See *Imbler*, 424 U.S. at 420 (stating that prosecutors enjoy absolute immunity from §1983 suits relating to acts performed within the scope of their duties).

98. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (noting that “it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation”).

99. *Imbler*, 424 U.S. at 441–45 (White, J., concurring).

100. *Id.* at 433.

101. *Id.* at 427.

102. *Id.* at 436 (White, J., concurring).

103. *Id.* at 443.

104. *Id.*

105. See *Imbler*, 424 U.S. at 424–25 (noting that to allow civil liability would open a path for unlimited harassment and embarrassment to prosecutors by those who would profit).

106. *Id.* at 437–38 (White, J., concurring) (noting that there should not be a rule granting absolute immunity from suits for committing *wilful* violations of pre-existing constitutional disclosure requirements if done in bad faith).

III. Witness Preparation Must be Memorialized for Brady Purposes

Delma Banks was arrested, charged, and convicted of killing sixteen-year-old Richard Whitehead.¹⁰⁷ During the guilt phase of the trial, Charles Cook testified for the prosecution that Banks had confessed to killing the victim.¹⁰⁸ The prosecution suppressed a seventy-three page transcript of a pretrial meeting between the prosecutor, law enforcement officers, and Cook.¹⁰⁹ On cross-examination, Cook represented three times that he had not discussed his testimony with anyone.¹¹⁰ The prosecution allowed Cook's statement to stand uncorrected and in fact told the jury that Cook had given them "[t]he absolute truth."¹¹¹ Subsequently, it was discovered that Cook had at least three practice sessions with the prosecution and was "intensively coached" for his appearance at trial.¹¹² The pretrial transcript showed that Cook had been unable to keep his account of the story straight.¹¹³ The transcript also revealed that the prosecutor repeatedly coached Cook.¹¹⁴ But when Cook stated in open court before the jury that his testimony had not been coached, the prosecution failed to correct that assertion.¹¹⁵ Thus, the prosecution clearly presented false testimony concerning the circumstances surrounding Cook's pretrial preparation.¹¹⁶ *Banks* may prove to have a significant impact by implicitly expanding *Brady* to requiring disclosure of pretrial preparation sessions between prosecutors and their witnesses.¹¹⁷ It further raises the question of whether these sessions should now be memorialized for *Brady* purposes.¹¹⁸

Generally, attorneys prepare their witnesses for trial to relay a particular story to the jury in the most sympathetic and clear manner.¹¹⁹ But while

107. *Banks*, 124 S. Ct. at 1263.

108. *Id.* at 1264.

109. *Id.* at 1269.

110. *Id.* at 1264.

111. *Id.*

112. *Id.*

113. George Kendall, *Prosecutorial Misconduct and Ineffective Counsel: The Case Of Delma Banks, jr.*, ¶ 5, at <http://www.deathpenaltyinfo.org/article.php?scid=38&did=588> (August 5, 2004).

114. *Banks*, 124 S. Ct. at 1264.

115. *Id.*

116. *Id.* at 1280 n.19. The Supreme Court noted that Banks's defense attorney demonstrated Cook had been coached by calling "attention to discrepancies between portions of the September 1980 transcripts and Cook's trial testimony." *Id.* The defense attorney also "emphasized the prosecution's duty to disclose the September 1980 transcript once Cook, while on the stand, stated that he had not been coached." *Id.*

117. *Id.* at 1264.

118. *Id.* at 1263.

119. See MODEL RULES OF PROFESSIONAL CONDUCT 3.4(b) (stating that a lawyer shall not "counsel or assist a witness to testify falsely"). While a lawyer has the right to prepare his client for trial, he must not cross the ethical barrier by knowingly allowing his client to commit perjury. *Id.* The adversary system requires that the attorney present his cases as clearly and concisely as possible,

preparing a witness is good lawyering, the fact that a prosecutor has prodded a witness to revise the substance of his testimony arguably falls in the category of *Brady* material because the witness's original, uncoached version qualifies as a prior inconsistent statement.¹²⁰ In both civil and criminal cases, pretrial preparation of witnesses is an essential part of ensuring that a witness conveys his testimony to the jury or trier of fact in a clear and concise manner.¹²¹ "Similarly, the ethical lawyer defending a client . . . tries to make proper objections, assert privilege and protect the witness from abuse, all without manipulating the testimony."¹²² But, if a prosecutor coaches a witness and fails to reveal exculpatory evidence to the defense which may impeach that witness, that attorney has committed a breach of his ethical and legal duties to the court.¹²³

Under the facts of *Banks*, moreover, if a witness professes he was not coached in his testimony, the prosecution must clearly acknowledge the truth of the matter and turn over any transcripts or notes of rehearsal sessions showing that the witness was in fact coached.¹²⁴ But *Banks* arguably applies equally if the witness states that he has been prepped by the prosecution. For example, to the extent a witness testifies and his trial testimony is inconsistent with his pretrial statements, the prosecutor has an obligation to disclose the substance of such statements whether or not any record of them exists. Since the prosecutor is responsible for knowing the content of his witness's statements, if there exists no record of the prior statement, the prosecution should be required to submit the content of the prior inconsistent statement in memo form to the court and the defense.¹²⁵

however, he may not use false and tailored testimony. *Id.*

120. See *infra* Part III and accompanying notes (discussing disclosure of prior inconsistent statements and memorialization of prosecution-witness rehearsal sessions).

121. See Alec Rothrock, *Trial Talk: Coaching the Witness* ¶ 3, at <http://www.burnsfigawill.com/articles/Rothrock/trialtalk/trialtalkcoachingthewitness.htm#TopofPageCoachingthewitness> (February/March 2000) ("[W]itness preparation is permitted, expected, required, important, and beneficial. The ethical lawyer tries to prepare a witness without influencing the substance of the witness's testimony.").

122. *Id.*; see *Banks*, 124 S. Ct. at 1268 (noting that the transcripts revealed that Cook's testimony was rehearsed after Banks's September 1980 arrest, that the testimony was "closely rehearsed" by State representatives, and that this presented compelling evidence that Cook's testimony was tutored by the prosecution).

123. See MODEL RULES OF PROFESSIONAL CONDUCT 3.4(b) (providing that a lawyer may not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law").

124. See *Banks*, 124 S. Ct. at 1263 (noting that the witness had been coached); *United States v. Beasley*, 576 F.2d 626, 632-33 (5th Cir. 1978) (criticizing the failure of the Government to produce in a timely manner the statement of a prosecution witness when the statement's content was different from the witness's at trial testimony).

125. See generally Rothrock, *supra* note 121.

This aspect of *Banks* strengthens the argument that if contact between the prosecution or its agents and witnesses or victims results in material exculpatory evidence, such evidence must be memorialized.¹²⁶ Without memorialization of witness preparation sessions, the defense will be unable to impeach witnesses with exculpatory evidence solely within the prosecution's knowledge and possession.¹²⁷ This argument finds support in *Kyles*, in which the prosecution's case rested heavily on eyewitness testimony.¹²⁸ One such witness, Isaac Smallwood, was deemed questionable by the Court.¹²⁹ The prosecutor's notes showed that "important elements" of Smallwood's story had changed over time.¹³⁰ However, despite the various inconsistencies and variations in the witness's story, neither the prosecutor's notes nor any of the other notes and transcripts were given to the defense.¹³¹ The Court noted that the inconsistencies in Smallwood's testimony between the first and second trial "would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the prosecutor had coached him to give it."¹³² The Court observed that "[t]he implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first."¹³³

Together, *Kyles* and *Banks* present a compelling argument for the memorialization of witness rehearsal sessions. Both cases show that during witness preparation sessions, a line must be drawn between attorney work-product and information subject to *Brady*.¹³⁴ When the prosecutor interviews the witness and records his own mental impressions, that is undoubtedly work-product.¹³⁵ However, the witness's storytelling in response to the interview is information subject to *Brady*. The focus on witness preparation in *Banks* and the discussion of the key witnesses's inconsistent statements in *Kyles* lead to the

126. *Banks*, 124 S. Ct. at 1275. The Court, while discussing *Strickler*, mentioned that in light of the State's open file policy it was "especially unlikely that defense counsel would have suspected that additional impeaching evidence was being withheld." *Id.* at 1274–75 (quoting *Strickler*, 527 U.S. at 285). The defense does not have to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such evidence has been disclosed." *Id.* at 1275. The Court noted that a rule declaring that a "'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant's due process." *Id.*

127. *Id.*

128. *Kyles*, 514 U.S. at 429.

129. *Id.* at 443.

130. *Id.* at 429.

131. *Id.*

132. *Id.* at 443.

133. *Id.* at 443 n.14.

134. *See Banks*, 124 S. Ct. at 1264 (recounting the fact that witness Cook had been coached by the prosecution); *Kyles*, 514 U.S. at 443–44 (noting the impeachment potential of discrepancies between witness's statements at various phases of trial preparation).

135. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (stating that an attorney's mental impressions are protected from discovery).

conclusion that prosecutors should memorialize their interviews with witnesses.¹³⁶ The risk that exculpatory material will be left on the cutting room floor is especially great during witness preparation.¹³⁷ In *Banks*, the Court noted that the long-suppressed transcripts revealed that Cook's testimony had been extensively rehearsed and shaped by the prosecution.¹³⁸

While prosecutors may argue that requiring memorialization of witness interviews will create an undue burden and will conflict with their roles as adversaries, in fact, the criminal justice system as a whole will benefit from memorialization of witness meetings.¹³⁹ As the Court stated in *Bagley*, the prosecutors's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" ¹⁴⁰ Therefore, while the prosecution will initially bear some additional burden, the most important aspect of any criminal case should be to see justice is done.¹⁴¹ At the very least, *Banks* and *Kyles*, when read together, establish that transcripts, notes, and unrecorded recollections of witness-preparation sessions will be deemed *Brady* material if the sessions include information that is material to guilt or mitigation.¹⁴²

When jurors observe a witness in court, they are frequently witnessing the final product of numerous meetings between prosecutors and witnesses, and the jury has no way of knowing that the testimony of the witness has been fine-tuned.¹⁴³ In *Kyles*, the Court observed that the "jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the second trial."¹⁴⁴ Furthermore, if as in *Banks*, the defense attorney questions a coached witness as to whether or not his testimony has been coached and the witness answers in the negative, both the defense and the jury will have to accept the response of the witness unless the prosecution corrects the assertion.¹⁴⁵ A

136. See *Orndorff v. Lockhart*, 707 F. Supp. 1062, 1068 (E.D. Ark. 1988) (finding that the prosecutor failed to disclose that the witness's memory was hypnotically refreshed during pretrial investigation).

137. *Banks*, 124 S. Ct. at 1263.

138. *Id.* at 1268.

139. See *Bagley*, 473 U.S. at 675 (stating that the purpose of the *Brady* rule was "to ensure that a miscarriage of justice did not occur").

140. *Id.* at 675 n.6 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

141. *Id.*

142. *Banks*, 124 S. Ct. at 1264; *Kyles*, 514 U.S. at 429–30.

143. See *Rothrock*, *supra* note 121, at ¶ 2 (emphasizing the difficulty of detecting influenced witness testimony).

144. *Kyles*, 514 U.S. at 443.

145. See FED. R. EVID. 611(b) ("Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."). Without the impeaching evidence showing inconsistent statements or coaching, the defense attorney will have to accept the witness's false and prejudicial response. *Id.*

memorialized copy of rehearsal sessions between the prosecution and the witness provides the defense with the tools for an effective cross-examination and informs the jury of potentially impeaching evidence concerning how coaching may have changed the witness's testimony.¹⁴⁶

Banks also raises the question of the relationship between the attorney work-product doctrine and *Brady*. The work-product doctrine was firmly established in *Hickman v. Taylor*.¹⁴⁷ In *Hickman*, the Court decided whether and to what extent a party to an action could inquire into the oral and written statements of witnesses or other information that counsel had gathered in preparation for possible litigation.¹⁴⁸ The Court noted that in performing his duties, a lawyer must be able to perform his work with a degree of privacy and freedom from intrusion by opposing counsel into his statements, interviews, mental impressions, and person beliefs.¹⁴⁹ To protect this right, the Court held that:

[W]ithout purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.¹⁵⁰

The Supreme Court has not yet decided whether *Brady* requires the prosecution to turn over work-product.¹⁵¹ It is arguable that transcripts and notes of a prosecutor constitute work-product and thus are not discoverable under *Brady*.¹⁵² However, while opinion work-product is privileged absent extraordinary circumstances, the underlying facts and non-privileged information obtained or prepared by the prosecution during preparation of its case for trial are not necessarily immune from discovery.¹⁵³ The facts of *Banks* serve as an example of when *Brady* must reach the work-product of prosecutors.¹⁵⁴ Unlike

146. See U.S. CONST. amend. VI (requiring that the defendant be afforded a reasonable opportunity for effective cross-examination of the witnesses against him); *Murdoch*, 365 F.3d at 704 (“Effective cross-examination is of paramount importance when . . . the government’s case depends heavily (or entirely) upon the testimony of informants or accomplices.”).

147. *Hickman*, 329 U.S. at 511.

148. *Id.* at 497.

149. *Id.* at 511.

150. *Id.* at 510.

151. See *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000) (quoting *Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000)) (“Neither the Supreme Court nor this court has decided whether *Brady* requires a prosecutor to turn over his work product.”).

152. *Id.*

153. *Id.*; *Hickman*, 329 U.S. at 511.

154. *Banks*, 124 S. Ct. at 1263–64.

cases in which the prosecution would be turning over non-verbatim and non-adopted witness statements, the prosecution in *Banks* had in its possession a verbatim transcript of the rehearsal session with Cook.¹⁵⁵ The Eleventh Circuit has noted that “for prejudice to exist, we must find that the evidence—although itself inadmissible—would have led the defense to some admissible evidence.”¹⁵⁶ It is unquestionable that the record of the prosecutorial rehearsal session with Cook in *Banks* could foreseeably have led to the discovery of admissible impeachment evidence.¹⁵⁷ As noted earlier in this section, the information flowing from a witness to the prosecutor during a rehearsal session is properly subject to *Brady*.¹⁵⁸ The witness relays unprivileged facts about what he knows or observed concerning a crime, and his statements are not work-product of the prosecutor.¹⁵⁹ If a witness testifies consistently throughout all sessions with the prosecutor and at trial as to the content of his statements, then there is no *Brady* obligation. However, if as in *Kyles* and *Banks*, the witness testifies inconsistently between the pretrial preparations and trial, or his testimony becomes more precise and incriminating as the proceedings progress, such information is undoubtedly subject to *Brady*.

IV. Plea-Bargaining Proffers Should Be Memorialized For Purposes of *Brady*

In *Spicer v. Roxbury Correctional Institute*,¹⁶⁰ Larry Brown had been arrested on three counts of distribution of cocaine and stated to his counsel that he had information about an unrelated assault at a restaurant named Armadillos for which defendant Spicer stood accused.¹⁶¹ Brown specifically communicated to his own counsel that he had not seen the defendant on the date of the crime.¹⁶² His counsel contacted the prosecutor and informed him that Brown could testify to knowing a man named “Spicy” who had asked questions about Armadillo’s, that he suspected “Spicy” may have been planning a robbery, but he had not observed Spicer on the date of the crime.¹⁶³ When the prosecutor interviewed Brown without his own counsel present, however, Brown stated for the first time stated that he had actually observed Spicer running from the scene of the

155. *Id.* at 1263; see also *Williamson*, 221 F.3d at 1183 (noting that non-verbatim, non-adopted witness statements were not admissible at trial due to the risk of inaccuracy and untrustworthiness).

156. *Williamson*, 221 F.3d at 1183 (citing *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000)).

157. See *Banks*, 124 S. Ct. at 1263–64 (describing the State’s intensive coaching of witness Cook and indicating that it may have discredited Cook if disclosed).

158. *Hickman*, 329 U.S. at 511.

159. *Id.*

160. 194 F.3d 547 (4th Cir.1999).

161. *Spicer*, 194 F.3d at 551.

162. *Id.*

163. *Id.*

crime.¹⁶⁴ While recognizing the inconsistency between what Brown's counsel originally told him and Brown's subsequent testimony, the prosecutor relied on what Brown told him directly rather than the original proffered information.¹⁶⁵

Brown testified at trial that he had seen the defendant "run past" from the scene of the crime.¹⁶⁶ He also testified that this was the same account of the events he had told his own counsel prior to the plea bargain agreement.¹⁶⁷ After the defendant was found guilty, Brown's defense counsel learned of the discrepancies between Brown's original proffer and his eventual testimony and contacted Spicer's attorney.¹⁶⁸ On federal habeas review, the United States Court of Appeals for the Fourth Circuit held that Brown's statements to his counsel that he had not seen the defendant on the day of the crime qualified as *Brady* material.¹⁶⁹ The court noted that the fact that Brown told two different versions of his story demonstrated that the information, "if disclosed to the defense, could have been used to impeach Brown."¹⁷⁰ The court noted that "the impeaching nature of [a] statement does not depend on whether the state was a direct or indirect audience. For purposes of determining whether evidence is 'favorable' to the defendant, it is the content of the statements, not their mode of communication to the state, that is important."¹⁷¹ Therefore, regardless of the manner in which the proffers were initiated or obtained, they must be disclosed by the prosecution when they contain exculpatory evidence.¹⁷²

The *Spicer* court clarified that although it was applying *Brady* to a defense proffer, it did not hold the prosecution liable for exculpatory material that flowed only between a witness and his attorney.¹⁷³ Nor are prosecutors required to disclose potentially exculpatory material from the hypothesizing that typically occurs during plea negotiations.¹⁷⁴ However, a prosecutor is responsible for information he or she receives, which an objectively reasonable prosecutor should recognize as exculpatory or of impeachment value, and has a duty to disclose such information to the defendant if it is material.¹⁷⁵ Consequently, when a prosecutor possesses specific factual information obtained during a plea bargain discussion with an attorney and additional information from the witness is directly inconsistent with his prior statements, a reasonable and prudent

164. *Id.*

165. *Id.*

166. *Id.* at 552.

167. *Spicer*, 194 F.3d at 552.

168. *Id.* at 553.

169. *Id.* at 556.

170. *Id.* at 557.

171. *Id.* at 556.

172. *Id.* at 557–58.

173. *Spicer*, 194 F.3d at 557–58.

174. *Id.*

175. *Id.*

prosecutor should be alert for possible exculpatory *Brady* material and immediately disclose such information to the defense.¹⁷⁶

While plea negotiations are usually informal during the preliminary phases, both prosecutors and defense attorneys should be alert to potential *Brady* material.¹⁷⁷ As noted by the dissent in *Spicer*, “[P]roffers by counsel attempting to negotiate a plea . . . are, by their very nature, unreliable for ascertaining specific facts.”¹⁷⁸ Nevertheless, *Spicer* indicates that defense proffers are not wholly immune from *Brady* disclosure.¹⁷⁹ The process of negotiating deals between a defendant and the prosecution may be a lengthy process.¹⁸⁰ What the witness ultimately testifies to and what was proffered initially will likely differ.¹⁸¹ Moreover, as in *Spicer*, a witness or informant may state that he has information about the crime when in fact he has little or no knowledge.¹⁸² Plea bargains can actually exacerbate this problem because deals are often contingent on the witness’s favorable testimony in court.¹⁸³ Any previous deals between a prosecutorial agent and an informant must be discoverable and admissible to show potential bias in their testimony.¹⁸⁴

The defense will not be able to discern the motives a witness has in agreeing to testify in a case unless the prosecution reveals the information about the negotiation leading up to the agreement.¹⁸⁵ The importance of the inconsistent statements in *Spicer* is a compelling example of why proffers must be

176. *Id.* at 558–60.

177. *Id.* *Spicer* indicates the importance of ensuring that reliable information is transmitted between the defense and the prosecutor during plea negotiations. *Id.*

178. *Id.* at 565 (King, J., dissenting).

179. *Spicer*, 194 F.3d at 556.

180. *Id.* at 547.

181. *See* United States v. Sudikoff, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999) (citing United States v. Van Brandy, 726 F.2d 548, 552 (9th Cir. 1984)) (stating that if the differences between the testimony of a witness and his proffers were reasonably “innocuous,” but the usefulness of the evidence was doubtful, the doubt should be resolved in favor of disclosure).

182. *Spicer*, 194 F.3d at 551.

183. *See Bagley*, 473 U.S. at 683 (stating that the fact that the deal “was expressly contingent on the Government’s satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction”); *Quimette v. Moran*, 942 F.2d 1, 9–10 (1st Cir. 1991) (noting the State’s failure to disclose information about the long criminal record of the State’s witness and the existence of a deal the State struck with the witness); *Jones v. Jago*, 575 F.2d 1164, 1167 (6th Cir. 1978) (noting that the prosecutor failed to disclose a statement from the co-indictee, who prior to trial had been declared a material witness for the prosecution and against whom all charges were dropped).

184. *See Reutter v. Solem*, 888 F.2d 578, 581–82 (8th Cir. 1989) (holding that the State withheld impeachment evidence that its primary witness had applied for commutation and had been scheduled to appear before the parole board a few days after his testimony).

185. *See Sudikoff*, 36 F. Supp. 2d at 1203 (“[I]nformation that reveals the process by which a . . . witness and the government reach a leniency agreement is relevant to the witness’s credibility because it reveals the witness’s motive to testify against the defendant. Therefore, such information is discoverable under *Brady* and *Giglio*.”).

memorialized.¹⁸⁶ Without memorialization, the results may be similar to *Banks* and *Kyles*, and material impeachment evidence will remain undisclosed.¹⁸⁷

V. *Victim-Witness Advocate Files and Brady*

Prosecutors' offices and police departments around the country increasingly utilize victim-witness advocates.¹⁸⁸ A victim-witness advocate primarily acts as liaison between the victim or witness and the prosecution and law enforcement.¹⁸⁹ The victim-witness advocate facilitates her clients' involvement with the criminal justice system and may frequently become a counselor to a victim or witness, and thus, is privy to information that defense counsel is unable to obtain.¹⁹⁰ Because advocates are usually employees of the prosecution, their work should be subject to the same rules of the discovery process as the work from the rest of the prosecution's team.¹⁹¹

When an advocate interviews a witness or victim, such meetings, as with prosecutorial witness preparation sessions, should be memorialized for *Brady* purposes.¹⁹² The defense will not be afforded the opportunity to cross-examine, as guaranteed by the Sixth Amendment, if victim or witness statements are not memorialized.¹⁹³ In many cases, the prosecution's case hinges on the testimony of the victim or witness.¹⁹⁴ The credibility of such witnesses often makes the difference between a guilty or not guilty verdict.¹⁹⁵ In fact, in *Murphy v. Superior*

186. *Spicer*, 194 F.3d at 551.

187. *See Banks*, 124 S. Ct. at 1263 (noting that the prosecution continued to hold secret the key witness's link to the police and false statements); *Kyles*, 514 U.S. at 429 (noting that the prosecutor failed to turn over notes or other transcripts with various witness inconsistencies).

188. *See* VA. CODE ANN. § 19.2-11.01 (Michie 2004) (setting out crime victim and witness rights and stating that "[u]nless otherwise stated . . . it shall be the responsibility of a locality's crime victim and witness assistance program to provide information and assistance required").

189. VIRGINIA COMMONWEALTH UNIVERSITY, VICTIM-WITNESS PROGRAM, at <http://www.vcu.edu/police/victwitn.html> (last updated August 15, 2003) (setting forth the victim or witness rights and entitlements, which include protection, financial assistance, social services, confidentiality information, and the right to remain in the courtroom during criminal proceedings).

190. *See Jaffe v. Redmond*, 518 U.S. 1, 18 (1996) (establishing that the relationship between a therapist and her client is confidential). If a victim-witness advocate is also a certified social worker, clinical social worker or psychologist, then the privileges allowed in *Jaffe* will attach to communications between the victim or witness and the advocate. *Id.* These privileges are in addition to the work-product privilege imputed by virtue of being an agent of the prosecution. *Id.*

191. *See Murphy v. Superior Court*, 689 P.2d 532, 537 (Ariz. 1984) (stating that victim assistance caseworkers may be potential impeachment witnesses). *But see State v. Wilcox*, 758 A.2d 824, 832-36 (Conn. 2000) (stating that no violation of *Brady* existed for failure to turn over impeaching but non-material victim-witness advocate notes).

192. *See supra* Part III (discussing the need for memorialization of prosecution-witness rehearsal sessions).

193. *Id.*

194. *See Dubose v. Lefevre*, 619 F.2d 973, 977 (2d Cir. 1980) (noting that the prosecution had discussed with the witness the consideration she would receive for her proposed testimony).

195. *Id.*

Court,¹⁹⁶ the court noted that it was “entirely possible that a victim assistance caseworker, who is frequently in close contact with a distraught victim only moments after an incident, will learn details of the incident which would make the caseworker a proper subject for discovery as a potential impeachment witness.”¹⁹⁷ The defendant in *Murphy* attempted to compel the depositions of the victim and her victim-witness assistant after his indictment for attempted sexual assault.¹⁹⁸ In such cases, in which the advocate has exculpatory evidence, if the advocate’s notes are not subject to the same rules of discovery as the prosecutor’s notes, the prosecution may be able to circumvent its discovery obligations.¹⁹⁹ Therefore, for victim-witness advocate programs that are controlled by the prosecution, the courts should require disclosure of advocates notes when they contain material information.

In *Commonwealth v. Liang*,²⁰⁰ the defendant sought discovery of the notes of a victim-witness advocate who had spoken with the complaining witness.²⁰¹ The Supreme Judicial Court of Massachusetts held that the notes of a victim-witness advocate are protected by the same rules that are applicable to a prosecutor’s notes.²⁰² The court also found that “advocates themselves have a duty to relay to the prosecutor any information they believe is exculpatory.”²⁰³ The *Liang* decision reinforced *United States v. Agurs*,²⁰⁴ which held that the prosecution has a duty to disclose exculpatory material within its possession or control, even without a request from the defendant.²⁰⁵ “Prosecutors are subject to a duty to disclose exculpatory evidence that advocates obtain from conversations with victims or witnesses, as advocates are agents of the prosecution.”²⁰⁶ *Liang* comports with the holding in *Kyles* that the prosecution is charged with

196. 689 P.2d 532 (Ariz. 1984).

197. *Murphy*, 689 P.2d at 537.

198. *Id.* at 532.

199. *See* *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (stating that with respect to disclosure, the problem is “one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense”).

200. 747 N.E.2d 112 (Mass. 2001).

201. *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001).

202. *Id.* The *Liang* court noted that:

The result here secures the defendant’s right to obtain essential material for his defense (e.g., exculpatory evidence and witness statements) while protecting the work product of attorneys and their legal staff. We conclude that, unless advocates’ notes contain exculpatory evidence or “statements” of witnesses, their notes are protected as work product.

Id. at 119.

203. *Id.* at 117.

204. 427 U.S. 96 (1976).

205. *Id.* at 116; *United States v. Agurs*, 427 U.S. 96, 106–08 (1976).

206. *Liang*, 747 N.E.2d at 117.

knowledge of information contained in the files of those under its control.²⁰⁷ The Massachusetts decision forces the prosecution to closely examine its advocates' files in order to determine whether they contain exculpatory evidence.²⁰⁸ It also means that the prosecution must diligently ensure that all material, exculpatory evidence is turned over to it from third parties within its control.²⁰⁹

To be sure, there is a conflict between the victim-witness advocate's role as an employee of the prosecution and its role as a counselor to victims and witnesses. Due to this conflict, prosecutors should choose between maintaining the advocate as a subordinate program within their control or allowing it to become a separate and independent entity.²¹⁰ In most instances, the advocate acts as a liaison between the victim or witness and the prosecutors.²¹¹ However, a special problem arises when licensed social workers, clinical psychologists, or therapists work as victim-witness advocates and the advocates are also agents of the prosecution.²¹² Their conversations with victims or witnesses may fall under the category of privileged communications protected from forced disclosure.²¹³ These privileged communications include: psychologist-patient privilege, psychiatrist-patient privilege, social worker-client privilege, licensed professional counselor-client privilege, and domestic violence and sexual assault counselor-client privilege.²¹⁴ If the victim-witness advocate program is a separate entity from the prosecution, a statutory privilege may apply; but there will be no colorable claim from the prosecution that the work-product privilege applies.²¹⁵

The idea that communications between victim-witness advocates and

207. *Id.* at 116; *Kyles*, 514 U.S. at 438.

208. *Liang*, 747 N.E.2d at 116–17.

209. *Id.*

210. *See* VA. CODE ANN. § 19.2-11.01 (Michie 2004) (establishing victim-witness rights and authorizing victim-witness programs); *see also* DEPARTMENT OF CRIMINAL JUSTICE SERVICES, VICTIMS OF CRIME IN VIRGINIA at <http://www.dcs.virginia.gov/research/documents/crimeincommonwealth/Section-5.pdf> (last visited October 2004) (depicting the substantial increase in victim-witness programs in Virginia over a ten-year period).

211. *See* *Genesee Co. Soc. Servs. Workers Union v. Genesee Co.*, 502 N.W.2d 701, 702–03 (Mich. Ct. App. 1993) (discussing the assignment of social workers as victim-witness assistants to the prosecution).

212. *Liang*, 747 N.E.2d at 114.

213. *See* *People v. Stanaway*, 521 N.W.2d 557, 573 (Mich. 1994) (holding that the trial judge must conduct an in-camera inspection of privileged records “on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense,” and balancing the need to preserve confidentiality in therapeutic settings with a defendant’s right to discover exculpatory evidence).

214. *See* VA. CODE ANN § 8.01-399 (Michie Supp. 2004) (protecting communications between physicians and patients); VA. CODE ANN. 8.01-400.2 (Michie 2000) (shielding communications between counselors, social workers, and psychologists and their clients).

215. *See* *Liang*, 747 N.E.2d at 119 (holding that an advocate’s notes are subject to the work-product privilege but exculpatory evidence must be disclosed).

victims or witnesses can fairly be kept confidential draws support from the United States Supreme Court's decision in *Jaffee v. Redmond*.²¹⁶ In *Jaffee*, the survivors of a victim shot and killed by a police officer sought discovery of the notes of a licensed clinical social worker who was counseling the officer.²¹⁷ The Seventh Circuit, reversing the lower court's decision, concluded that Rule 501 of the Federal Rules of Evidence "compelled recognition of a psychotherapist-patient privilege."²¹⁸ Ultimately, the Court agreed with the Seventh Circuit that the confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure.²¹⁹ This presents a strong policy reason why the victim-witness advocate program should be independent from the prosecution. Privileges preventing disclosure of relevant information are not favored and may often give way to a strong public interest.²²⁰ In jurisdictions that consider the victim-witness advocate programs an arm of the prosecution or law enforcement agency, the advocate's notes should be subject to the work-product privilege and not a confidential communication privilege.²²¹ However, if the prosecution asserts either privilege "when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights."²²²

Trained victim advocates may be social workers and have extensive legal knowledge, due in part to their close relationship with the prosecution.²²³ However, they are not formally legally trained and may be unaware of the extent to which *Brady* covers their conversations with their clients.²²⁴ If the advocate program is within the jurisdiction of the prosecution, the prosecution must question its advocates about conversations with victims and other witnesses.²²⁵ The prosecution must also routinely examine the advocate's files to ensure that what the victim or witness is telling the prosecutor is consistent with his or her statements to the advocate.²²⁶

216. See *Jaffee*, 518 U.S. at 18 (recognizing a psychotherapist privilege of confidentiality).

217. *Id.* at 5.

218. *Id.* at 6.

219. *Id.* at 18.

220. See *State v. L.J.P.*, 37 A.2d 532, 537 (N.J. Super. Ct. App. Div. 1994) (holding that the trial court committed reversible error in precluding psychotherapist's testimony).

221. See *Liang*, 747 N.E.2d at 114 (holding that the notes of a victim-witness advocate are protected by the same rules that are applicable to a prosecutor's notes).

222. *Peseti*, 65 P.3d at 128.

223. *Liang*, 747 N.E.2d at 119.

224. *Id.*

225. *Id.* at 117-18.

226. See *id.* (discussing that the prosecution must determine from advocates' notes whether witness or victim statements are in advocates' files and subject to a discovery order).

Subjecting victim-witness advocates' notes to *Brady* will arguably constrain victim advocates in the performance of their duties. Victims or witnesses may be unwilling to fully disclose information if they have reason to believe their conversations will be turned over to the defendant and their privacy invaded. The answer to such a concern, however, is that the victim-witness advocate program should be independent of the prosecution.²²⁷ If it is, advocates can perform a truly therapeutic function for victims and witnesses while being able to assure them that their privacy will be protected. Additionally, the prosecution will not normally be aware of the information contained in the advocates' files, and, therefore, information will not be imputed to them.²²⁸ In fact, the defense would bear the heavy burden of proving to the court that the rights of the defendant to discover the information contained in the victim advocate's files overrides the statutory privilege afforded by *Jaffee* and by equivalent state statutory protections.

VI. Taking Advantage of the Expansion of *Brady*

Defense attorneys should utilize *Brady* to the fullest extent the criminal justice system allows. The courts have constricted the materiality element of *Brady* but expanded *Brady* in other ways beneficial to the defense.²²⁹ While the basic rules concerning *Brady* material have not changed, courts have expanded the content of *Brady* in cases such as *Banks*, *Spicer*, and *Liang*.²³⁰ The prosecution must disclose exculpatory information to the defense whether the information is in the hands of the prosecution or not.²³¹ This includes information known to the police or other prosecutorial agents, whatever their actual knowledge.²³² Defense counsel should always make motions to examine police officers and investigators working with the prosecution under oath.²³³ The defense should not only focus on the immediate investigators working on the case, but also

227. See *supra* Part V (arguing that prosecution entities should choose between the victim-witness program being a subordinate or a separate entity for *Brady* purposes).

228. See *Kyles*, 514 U.S. at 438–40 (imputing the knowledge of agents of the prosecution to the prosecution).

229. See *Sundby*, *supra* note 12, at 645 (noting that in the decades since *Brady*, the doctrine has been both expanded and contracted by subsequent Supreme Court decisions).

230. See generally *Banks*, 124 S.Ct. at 1263 (noting that transcripts of rehearsal meetings are impeachment evidence); *Spicer*, 194 F.3d at 556–57 (finding that defense proffers are subject to *Brady*); *Liang*, 747 N.E.2d at 119 (holding that victim-witness advocates' notes are subject to *Brady*).

231. *Kyles*, 514 U.S. at 421.

232. See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (citing *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964)) (stating that failure to disclose information in the hands of the police is equally harmful to the defendant as failure to disclose information in the hands of the prosecution); *Fitzgerald v. Bass*, 358 S.E.2d 576, 582 (Va. Ct. App. 1987) (concluding that a prosecutor's lack of knowledge of false testimony does not excuse her failure to disclose the truth).

233. Please contact the Virginia Capital Case Clearing House at 540-458-8557 for a motion to examine investigators under oath.

officers who had close contact with victims and witnesses.²³⁴ These officers may be far removed from the inner workings of the case as time goes on, but very often these officers have made reports or notes relating to their conversations with other officers, witnesses, or victims.²³⁵

Often, *Brady* violations originate not with the prosecution's intentional suppression of material, but rather with the investigators' failure to turn over information to the prosecuting attorneys.²³⁶ In light of *Bagley*, *Kyles*, and *Strickler*, it would be considered a willful omission on the part of the prosecution if it did not regularly peruse the investigators' files during the course of the proceedings.²³⁷ The defense, for its part, should urge the prosecution to remind all its agents of their duty to disclose exculpatory material within their possession. For example, a *Brady* letter to the prosecution requesting disclosure of information favorable to the defendant can specifically request that the prosecutor disseminate a memorandum to each law enforcement agency involved in a case and include such language as, "I am asking each person connected with this investigation to advise me of any evidence or information not already furnished that could be viewed as in some way 'favorable' to the defense." The request should be specific as to all notes, documents, and physical evidence the defense believes to be in the possession of law enforcement.

Motions must be specific and inclusive.²³⁸ Often the defense makes general *Brady* motions that are summarily denied by the court.²³⁹ To combat this problem, defense counsel must ensure that their motions include very specific information as to potentially exculpatory evidence, and the motions must inform both the judge and the prosecution about all categories of potential exculpatory

234. *Ex parte Richardson*, 70 S.W.3d at 873 (reversing murder conviction because the prosecution failed to disclose the existence of diary kept by a police officer containing information that could impeach the State's key witness).

235. *Id.* at 871. Police officer Tonya Goldston testified that she kept the diary to protect herself and other officers from false accusations by the witness. *Id.* In addition, five other officers testified at the writ hearing that the witness was not a truthful person. *Id.*

236. *See Kyles*, 514 U.S. at 437 (noting that the prosecution failed to turn over notes and transcripts of inconsistent witness statements); *Washington v. Buraker*, 322 F. Supp. 2d 692, 699–700 (W.D. Va. 2004) (noting that the defendant alleged police failed to disclose the identity of an eyewitness who had failed to identify him earlier to the prosecution); *Moreno v. Commonwealth*, 392 S.E.2d 836, 840 (Va. Ct. App. 1990) (stating that the police failed to turn over a written informant agreement for remuneration based on the number of drug busts successfully prosecuted).

237. *See Strickler*, 527 U.S. at 294 (following *Bagley* in establishing the prejudice standard of review for suppressed exculpatory material); *Kyles*, 514 U.S. at 437 (discussing that the prosecution has a duty to learn of exculpatory evidence known to others within its control); *Bagley*, 473 U.S. at 679 (clarifying the standard of review for when exculpatory material is suppressed).

238. *See Brown v. Chaney*, 469 U.S. 1090, 1090 (1984) (Burger, C. J., dissenting from denial of certiorari) (stating that Chief Justice Burger would grant the order to distinguish between specific and general requests for exculpatory information).

239. *Id.* at 1093 (noting that the district court refused to issue a writ because defense counsel only made a general request for exculpatory evidence).

evidence.²⁴⁰ When defense counsel knows or suspects that the prosecution has exculpatory information in its possession, he must specifically identify the evidence in his motion and explain its materiality to guilt or punishment.²⁴¹

“The defense must give the prosecution notice of what is desired, but notice alone—such as notice that the defense desires every document in the prosecution’s files—is not enough to overcome the prosecutor’s interest in avoiding premature or excessive discovery.”²⁴² The defense should never forget that the materiality element also relates to the ability to prepare for trial.²⁴³ The *Bagley* Court expressed its concern with the suppression of evidence by stating that the reviewing court may consider directly “any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.”²⁴⁴ Therefore, each motion must serve the dual purpose of preservation of issues and discovery.

As most victim-witness advocates are likely to continue as agents and employees of the prosecution for the foreseeable future, it is important for defense counsel to seek disclosure of impeachment and exculpatory evidence uncovered by such advocates through their contact with witnesses. The defense can begin by requesting disclosure of all impeachment evidence within a witness’s formal statement. Second, the defense attorney should request all written statements, including prior versions of the final formal statement. Third, the defense should request any notes of oral conversations that occurred prior to memorialization of formal statements and that contain exculpatory material.

VII. Conclusion

Kyles, *Strickler*, *Banks*, and at the circuit court level, *Spicer*, demonstrate how the *Brady* doctrine has evolved to include witness preparation sessions and defense proffers on behalf of co-operating witnesses or informant-witnesses.²⁴⁵ Victim-witness advocates present a special problem and as such, the defense must ensure that the prosecution has requested, received, and disclosed all information contained in the advocates’ notes that contain material impeachment or exculpatory information.²⁴⁶

240. *Id.* at 1094–95 (discussing the various distinctions between general and specific requests for exculpatory material held by various lower courts since *Agurs* was decided).

241. *Id.* at 1095 (describing the type of notice the defense must give the prosecution).

242. *Id.*

243. *Bagley*, 473 U.S. at 683.

244. *Id.*

245. *See Banks*, 124 S. Ct. at 1263 (discussing the suppression of rehearsal transcripts); *Kyles*, 514 U.S. at 438 (imputing knowledge to the prosecution for information within the possession of its agents); *Bagley*, 473 U.S. at 676 (expanding *Brady* to impeachment evidence); *Agurs*, 427 U.S. at 107 (expanding the prosecution’s duty to disclose exculpatory evidence absent a request); *Spicer*, 194 F.3d at 556–57 (expanding *Brady* to include defense proffers).

246. *See supra* Part V (discussing the victim-witness advocate program and disclosure of exculpatory material).