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Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence - State v. White, An

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An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence

State v. White[1]

I. INTRODUCTION

Numerous decisions by the United States Supreme Court make clear that a defendant in a criminal trial is constitutionally entitled to disclosure of exculpatory evidence in the possession of the prosecution if there is a reasonable probability that the evidence would affect the outcome of the trial.[2] Nevertheless, prosecutors frequently fail to disclose such evidence.[3] Such failure is attributable to a lack of incentive for prosecutors to disclose potentially exculpatory evidence. This problem could be largely solved by more stringent enforcement of the states' respective rules of professional conduct.

In *State v. White*, the Missouri Court of Appeals for the Western District accepted an innovative theory offered by the defense as to how exculpatory evidence would have affected the result of the trial. This Note argues that the court's holding was correct because acceptance of such innovative theories will provide more incentive for prosecutors to follow the constitutional and ethical rules mandating disclosure of exculpatory evidence.

II. FACTS AND HOLDING

In 1998, Theodore White's twelve-year-old adopted daughter accused him of sexually molesting her.[4] The accusations arose during divorce proceedings between White and his wife, Tina White.[5] Detective Richard McKinley was assigned to investigate the case.[6] Detective McKinley and Tina White soon became romantically involved.[7] The Jackson County Prosecuting Attorney's Office learned about this relationship shortly after it began.[8]

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1. 81 S.W.3d 561 (Mo. Ct. App. 2002).
2. United States v. Bagley, 473 U.S. 667, 682 (1985).
3. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001).
4. *White*, 81 S.W.3d. at 564.
5. *Id.* at 563.
6. *Id.* at 564.
7. *Id.* at 565.
8. *Id.*

The Whites' daughter told investigators of several instances in which she had been molested by her father.[9] During the investigation, Detective McKinley examined the daughter's diary, but returned it to her after concluding that it contained no evidence that would incriminate White.[10] The diary was subsequently lost and was unavailable at trial.[11] Eventually, Detective McKinley executed a probable cause statement and the State of Missouri filed charges against White in April of 1998.[12] During a deposition, Detective McKinley denied any interest in the outcome of the case.[13] At trial, Tina White testified and corroborated the accusations made by her daughter,[14] and Theodore White was convicted of twelve counts relating to the alleged sexual abuse.[15]

After the conviction, but before sentencing, one of White's defense attorneys received a telephone call from a co-worker of Tina White.[16] The co-worker informed the attorney of Tina White's romantic involvement with Detective McKinley.[17] The defense attorney discussed the matter with the Jackson County Prosecuting Attorney's Office and learned that the prosecutor had become aware of the relationship soon after it began, nearly a year earlier.[18] After learning this, White's defense attorneys filed a motion for a new trial, alleging prosecutorial misconduct.[19] In addition, they requested that the Jackson County prosecutor's office be disqualified.[20]

In the motion, White alleged that the prosecutor intentionally misled the jury by deliberately concealing the romantic relationship between Tina White and Detective McKinley.[21] Specifically, he argued that the prosecutor misled the jury by asserting that it would be absurd to believe that Tina White would have

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9. *Id.* at 564.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 567.

14. *Id.* The court noted that although Tina White's testimony was not strongly corroborative, it was consistent with the specific instances described in her daughter's testimony. *Id.* at 564-65.

15. *Id.* at 563 ("White was convicted of two counts of rape, three counts of child molestation in the first degree, two counts of child molestation in the second degree, four counts of statutory sodomy, and one count of furnishing pornographic material to a minor." The court sentenced him to fifty years in prison.).

16. *Id.* at 565.

17. *Id.*

18. *Id.* When it learned of the relationship, the prosecutor's office held a meeting and decided that the information about the relationship was not relevant or material and did not need to be disclosed to White's defense attorneys. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 567.

given false testimony concerning the sexual abuse allegations.[22] White also noted that an assistant prosecuting attorney remained silent during Detective McKinley's deposition when he denied any interest in the outcome of the case, even though she knew that Detective McKinley was romantically involved with Tina White, who stood to benefit financially in the divorce settlement if her husband was found to have engaged in marital misconduct.[23] In sum, White argued that the prosecutor's failure to disclose the information violated his constitutional rights under the standard set forth by the United States Supreme Court in *Brady v. Maryland*.[24]

In response, the state argued that the prosecutor was under no duty to disclose information about the relationship because it was not material to the case.[25] The state pointed out that the relationship between Tina White and Detective McKinley began *after* the allegations of sexual abuse had surfaced.[26] The state further argued that there was other evidence to impeach Tina White relating to her financial motives and desire to gain a favorable outcome in the divorce.[27]

The trial court denied White's motion for a new trial.[28] White appealed to the Missouri Court of Appeals for the Western District,[29] which reversed and remanded, holding that the information about the relationship was exculpatory evidence that should have been disclosed.[30] The court reasoned that the information about the romantic relationship could have been used by the defense to impeach Tina White's testimony.[31] Specifically, the court found that the defense could have argued that Tina White was so concerned with obtaining a conviction against her estranged husband that she was willing to initiate a relationship with the lead detective on the case to gain influence with the prosecution.[32] The court agreed with White that the information could have reasonably affected the result of the trial.[33] Thus, the court held that the

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22. *Id.* At trial the prosecution argued, "So then I guess we have the conspiracy theory here, that Tina manipulated this whole thing. Well, why did Tina manipulate this whole thing?" The prosecution continued, "we still haven't figured out why it would benefit Tina White in any way, shape, or form to do such a thing." *Id.* at 569.

23. *Id.* at 567.

24. 373 U.S. 83 (1963).

25. *White*, 81 S.W.3d at 567.

26. *Id.*

27. *Id.* A defense motion indicated that Tina White had received assets valued at more than $550,000 in the divorce proceeding. *Id.* at 569.

28. *Id.* at 565.

29. *Id.*

30. *Id.* at 571.

31. *Id.* at 570.

32. *Id.* at 569.

33. *Id.* at 570.

prosecution's failure to disclose the information about the romantic relationship between the defendant's estranged wife and the lead detective on the case violated the defendant's due process rights because it denied him the opportunity to impeach their credibility, which might have affected the outcome of the trial.[34]

III. LEGAL BACKGROUND

A. Constitutional Framework

The prosecutor's duty to disclose exculpatory evidence to a defendant has evolved significantly over the years. In 1935, the United States Supreme Court held in *Mooney v. Holohan*[35] that use of evidence known to be false by a prosecutor violates the Due Process Clause of the Fourteenth Amendment.[36] The Court specifically held that knowing use of perjured testimony by the state was unconstitutional.[37] The *Mooney* holding was later expanded in *Napue v. Illinois*[38] to include situations where prosecutors fail to *correct* testimony they know to be false.[39] The Court noted that this rule applies even if "the false testimony goes only to the credibility of the witness."[40]

In 1963, in the landmark case *Brady v. Maryland*,[41] the United States Supreme Court held that the prosecutor's duty to disclose went further than the mere duty to not use false testimony.[42] In *Brady*, the defendant was accused of murder and claimed that his accomplice, Boblit, actually killed the victim.[43] Prior to trial, the defendant had requested that the prosecutor disclose all of Boblit's extra-judicial statements.[44] The prosecutor disclosed several statements, but a statement in which Boblit admitted to the killing was not disclosed to the defendant until after he had been tried and convicted.[45] Presented with these facts, the Court held that nondisclosure of exculpatory evidence violates due process when the evidence is "material either to guilt or to punishment,

34. *Id.*
35. 294 U.S. 103 (1935).
36. *Id.* at 112-13.
37. *Id.* at 112.
38. 360 U.S. 264 (1959).
39. *Id.* at 269-70.
40. *Id.*
41. 373 U.S. 83 (1963).
42. *See id.* at 87.
43. *Id.* at 84.
44. *Id.*
45. *Id.*

irrespective of the good faith or bad faith of the prosecution."[46] The Court, however, provided no definition of "material."

The definition of exculpatory evidence was also later expanded in *Giglio v. United States*[47] to include evidence that the defense could use to impeach the credibility of government witnesses.[48] In this case, the Court declared that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule" and must be disclosed.[49]

Thirteen years after *Brady*, the Court, in *United States v. Agurs*,[50] addressed the issue of whether a prosecutor is required to disclose *favorable* evidence not specifically requested by the defendant.[51] The Court distinguished three situations in which a *Brady* claim may arise: (1) when previously undisclosed evidence reveals the prosecution used testimony that it either knew or should have known was perjured; (2) when the prosecution fails to disclose a specific kind of exculpatory evidence requested by the defense; and (3) when the prosecution fails to disclose exculpatory evidence that the defense either never requested or requested only in a general manner.[52] The Court found that prosecutors have a duty to disclose in all three situations, but noted that if there was not a *specific* request, a higher standard of materiality existed such that the prosecution has a duty to disclose only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial."[53] When a specific request has been made by the defense, on the other hand, the materiality standard is met "if the omitted evidence creates a reasonable doubt that did not otherwise exist."[54]

In 1985, the Court promulgated a uniform standard of materiality in *United States v. Bagley*.[55] In *Bagley*, the Court again[56] denied any distinction between exculpatory and impeachment evidence[57] and abandoned the distinction between

46. *Id.* at 87.

47. 405 U.S. 150 (1972). The Court reversed and remanded because the government failed to disclose that a prosecution witness had been made a promise of leniency for a future case. *Id.* at 154-55.

48. *Id.* at 154.

49. *Id.* (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

50. 427 U.S. 97 (1976).

51. *Id.*

52. *Id.*

53. *Id.* at 108.

54. *Id.* at 112.

55. 473 U.S. 667 (1985).

56. *See* Giglio v. United States, 405 U.S. 150 (1972).

57. *Bagley*, 473 U.S. at 676.

the "specific request," "general request," and "no request" circumstances described in *Agurs*.[58]

According to the new standard, materiality exists if there is a "reasonable probability"[59] that the result of the proceeding would have been different if the exculpatory or impeachment evidence had been disclosed to the defense.[60] A "reasonable probability" was defined by the Court as "a probability sufficient to undermine confidence in the outcome."[61]

The "reasonable probability" standard was reaffirmed by the Court in *Kyles v. Whitley*.[62] The *Kyles* Court emphasized that the question was whether the exculpatory evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[63] Furthermore, materiality is to be determined not by the individual effect of each piece of evidence but by the cumulative effect of all the non-disclosed evidence.[64] The *Kyles* Court also considered whether prosecutors were charged with discovering and disclosing exculpatory evidence known to other law enforcement organizations.[65] The Court concluded that prosecutors have a duty "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[66]

Four years later, in *Strickler v. Greene*,[67] the Court restated that the *Brady* rule applied to require the disclosure of evidence if: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was either willfully or inadvertently suppressed by the state; and (3) the suppression resulted in prejudice to the defendant.[68]

B. Professional Ethics Considerations

The American Bar Association's Model Rules of Professional Conduct have been implemented in many states, including Missouri.[69] Under the Rules, prosecutors have "the responsibility of a minister of justice and not simply that

58. *Id.* at 682.

59. The "reasonable probability" test was taken from the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), in which the Court used the test in the context of an allegation of ineffective counsel. *Id.*

60. *Id.*

61. *Id.*

62. 514 U.S. 419 (1995).

63. *Id.* at 435.

64. *Id.* at 436.

65. *Id.* at 437.

66. *Id.*

67. 527 U.S. 263 (1999).

68. *Id.* at 281-82.

69. *See* MO. RULES OF PROF'L CONDUCT R. 4-3.8 (2002).

of an advocate."[70] Specifically, Rule 3.8(d) of the Model Rules states that a prosecutor in a criminal case shall:

> [M]ake 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.[71]

The ethical obligations imposed by this rule differ in several respects from the constitutional requirements set forth in *Brady* and its progeny.[72] One of the primary differences is that the model rule is not limited to material evidence. In this sense it is broader than the *Brady* requirement.[73] On the other hand, the model rule is also narrower because it does not hold the prosecutor accountable for favorable evidence that is in the sole possession of another law enforcement entity, such as the police, as is constitutionally required under *Kyles v. Whitley*.[74]

In 2000, a commission reviewed the ABA's Model Rules and left Rule 3.8(d) unchanged.[75] The commission did, however, recommend that the Comment to 3.8(d) be revised to state that "[e]vidence tending to negate the guilt of the accused includes evidence that materially tends to impeach a government witness."[76] Although impeachment evidence is already considered to be included in "evidence that tends to negate the guilt of the accused," this revision would have added a materiality requirement for impeachment evidence that does not exist for traditional exculpatory evidence.[77] In the end, the proposed Comment was not included in the 2002 version of the Model Rules.[78]

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70. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2002).

71. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2002). This rule is identical to Missouri Rules of Professional Conduct Rule 4-3.8(d) (2002).

72. *See* Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1206 (2000).

73. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (noting that the constitutional rules require less of the prosecution than the ABA Model Rules of Professional Conduct); Kurcias, *supra* note 72, at 1206.

74. *See* Kurcias, *supra* note 72, at 1216.

75. AM. BAR. ASS'N, REPORT OF THE COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, Proposed Rule 3.8 (Nov. 2000), *available at* http://www.abanet.org/cpr/rule38.html.

76. *Id.* at cmt. 4.

77. *See id.*; Kurcias, *supra* note 72, at 1206.

78. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2002).

IV. THE INSTANT DECISION

In *State v. White*,[79] the Missouri Court of Appeals for the Western District held that the prosecutor's failure to disclose that Tina White, the defendant's estranged wife and mother of the victim, was involved in a romantic relationship with the lead detective on the case violated the defendant's due process rights under the standards promulgated by the United States Supreme Court in *Brady v. Maryland* and its progeny.[80] First, the court held that White's due process rights were violated by the assistant prosecuting attorney's failure to correct Detective McKinley's deposition testimony when he stated that he did not have any interest in the outcome of the case.[81] The court's reasoning, at this point, was based on the principle established in *Napue v. Illinois*[82] that due process is violated not only when a prosecutor fails to correct testimony on a substantive issue that he or she knows to be false, but also when the false testimony relates to the witness's credibility.[83] In *White*, the court accepted White's argument that the assistant prosecutor knew that Detective McKinley was not being truthful when he denied any interest in the case, and, because of this, the assistant prosecuting attorney's failure to correct the testimony violated White's due process rights.

The court then examined the theories put forward by the defense as to how the information about the romantic relationship between Tina White and Detective McKinley could have been used to impeach their credibility.[84] The court accepted White's argument that White lost the opportunity to prepare a more effective defense based on the theory that Tina White was so intent on ensuring that her estranged husband was convicted that she initiated a romantic relationship with the lead detective on the case.[85] The court agreed that, by showing this, White would have been able to impeach Tina White's credibility by suggesting that anyone who would go to such great lengths would be likely to distort the facts in order to corroborate her daughter's allegations.[86] In sum, the court accepted White's argument that evidence of the relationship with Detective McKinley would have strengthened his defense that Tina White used her daughter's allegations as a divorce strategy, which would have significantly

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79. 81 S.W.3d 561 (Mo. Ct. App. 2002). Judge Smart authored the opinion, with which Judges Ellis and Lowenstein concurred. *Id.* at 561, 571.

80. *Id.* at 570.

81. *Id.* at 568 (citing Hutchison v. State, 59 S.W.3d 494, 496 (Mo. 2001)).

82. 360 U.S. 264 (1959).

83. *See White*, 81 S.W.3d at 568. Although the *White* court did not *directly* cite *Napue*, the numerous cases that it did cite directly relied on *Napue*.

84. *Id.*

85. *Id.*

86. *Id.*

diminished the weight given to Tina White's testimony corroborating her daughter's allegations.[87] The court also agreed that, had the romantic relationship between Tina White and Detective McKinley been disclosed, the defense would have been able to impeach Detective McKinley's testimony, and his police work in general, by arguing that he had a motive for failing to keep the daughter's diary,[88] which was lost and unavailable for examination at trial.[89]

Taking all of this into account, the court concluded that the evidence about the relationship could have been helpful to the defense "not because the evidence was *itself* exculpatory, but because it would have tended to support the primary theory of the defense."[90] Specifically, the evidence would have strengthened the theory that even if Tina White did not fabricate the allegations, her corroborating testimony was more likely to be unreliable because she went to such great lengths to have influence with the prosecution.[91] The court also found that Detective McKinley's failure to return the diary would have fit into this theory because he inexplicably returned potentially valuable evidence to the possession of the victim and the defendant's estranged wife.[92]

The court then applied the "reasonable probability" materiality standard promulgated in *United States v. Bagley*[93] to the facts and concluded that, had the information about the relationship been available for the defendant to impeach the police work and the testimony of Tina White, it would have been "reasonably likely to [have] affect[ed] the result of the trial."[94] The court noted that the jury could have reached a different verdict if it believed that there was a reasonable possibility that, even if Tina White did not concoct the allegations, she encouraged them and arguably altered her own testimony in order to corroborate them, and possibly even caused the loss of the diary.[95] The court agreed with White that the information was important enough that the failure to disclose the information deprived him of a fair trial and undermined confidence in the verdict.[96] The court did acknowledge that the prosecution failed to disclose the information in the good faith belief that it was not material,[97] but the court also noted that the intent of the prosecution is irrelevant in a *Brady* violation case.[98]

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87. *Id.* at 569.
88. *Id.* at 568.
89. *Id.* at 564.
90. *Id.* at 569.
91. *Id.*
92. *Id.* at 570.
93. 473 U.S. 667 (1985).
94. *White*, 81 S.W.3d at 570.
95. *Id.*
96. *Id.* (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).
97. *Id.*
98. *Id.* at 571 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); State v. Aaron, 985 S.W.2d. 434, 436 (Mo. Ct. App. 1999)).

In sum, the court concluded that the prosecution's failure to provide the information about the relationship between the defendant's wife and Detective McKinley deprived White of his due process rights in that it prevented him from using the information to impeach their credibility, which might have affected the outcome of his trial.[99]

V. COMMENT

The holding by the Missouri Court of Appeals for the Western District in *State v. White* did not promulgate any novel rule of law. The decision is noteworthy, however, because it is one of a host of cases handed down every year in which prosecutors are held to have violated their constitutional duties under *Brady* and its progeny.[100] The case is also important because it shows how courts may be willing to accept more innovative theories to find that there has been a *Brady* violation.

Violations of the duty to disclose *Brady* materials are among the most frequent instances of prosecutorial misconduct.[101] The high rate at which the *Brady* rule is violated can be attributed to the lack of incentive for the prosecutor to disclose materials to the defense. Critics of the Supreme Court's "reasonable probability" standard for materiality argue that such a high bar discourages prosecutors from disclosing exculpatory evidence.[102] Proponents of this argument suggest that prosecutors may be willing to take the relatively small chance of a conviction being overturned in order to obtain a conviction in the first place.[103]

Moreover, the risk of the conviction being overturned exists only when the defense learns about the exculpatory evidence.[104] Even then, if the defense learns of the evidence and decides to appeal a conviction, it may have failed to properly preserve the error arising from the *Brady* violation.[105] Thus, the critics

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99. *Id.* at 570.

100. *See* Davis, *supra* note 3, at 431.

101. Davis, *supra* note 3, at 431.

102. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 870 (1997).

103. Weeks, *supra* note 102, at 870.

104. Weeks, *supra* note 102, at 870.

105. Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L. J. 965, 977 (1984).

contend, the Supreme Court's "reasonable probability" standard provides little incentive for prosecutorial compliance with the *Brady* disclosure rule.[106]

This view was asserted by Justice Marshall in his dissent in *United States v. Bagley*.[107] In his dissent, Justice Marshall advocated a rule that would require the prosecution to disclose *all* favorable evidence, regardless of whether it would have an effect on the outcome of the trial.[108] He criticized the "reasonable probability" standard as "virtually def[ying] definition" because it looks not at the potential usefulness of the favorable evidence in preparing and presenting the defendant's case, but rather, it looks retrospectively to the impact the evidence would have on the actual outcome of the trial.[109]

Despite the fact that the "reasonable probability" standard has been severely criticized by judges and scholars alike, it is likely to remain in effect. The Supreme Court reaffirmed the high standard of materiality in *Kyles v. Whitley*[110] and, more recently, in *Strickler v. Greene*.[111] Under the present makeup of the Court, it seems highly unlikely that a lower standard of materiality, of the sort proposed by Justice Marshall, will be accepted. Accordingly, other incentives for prosecutors to disclose exculpatory evidence must be examined.

The threat of disciplinary sanctions would appear to be an adequate incentive for prosecutors to disclose information to the defense. Despite the near unanimous adoption of the Model Rules of Professional Conduct by the states, however, prosecutors are rarely sanctioned for *Brady* violations.[112] Professor Richard A. Rosen surveyed lawyer disciplinary bodies in every state in the mid-1980s.[113] His research discovered only nine instances in which disciplinary proceedings had been pursued against a prosecutor for *Brady* violations.[114] Furthermore, in thirty-five of the forty-one states that responded to his survey, no complaints had ever been filed regarding a violation of *Brady* obligations.[115] Ten years after Professor Rosen's findings, another survey revealed that only seven additional proceedings had been commenced based on allegations of *Brady* violations.[116]

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106. *See* Gershman, *supra* note 102, at 438; Rosen, *supra* note 102, at 697; Weeks, *supra* note 102, at 870.

107. 473 U.S. 667 (1985) (Marshall, J., dissenting).

108. *Id.* at 699 (Marshall, J., dissenting).

109. *Id.* at 699-700 (Marshall, J., dissenting).

110. 514 U.S. 419, 434 (1995).

111. 527 U.S. 263, 280 (1999).

112. *See* Rosen, *supra* note 102, at 697; Weeks, *supra* note 102, at 869-70.

113. Rosen, *supra* note 102, at 697.

114. Rosen, *supra* note 102, at 720.

115. Rosen, *supra* note 102, at 730-31.

116. Weeks, *supra* note 102, at 881.

The disciplinary rules set by state boards have been a well-meaning, but obviously ineffectual, attempt to encourage prosecutors to disclose favorable evidence to defendants.[117] The result is that prosecutors have virtually no incentive, other than their own sense of ethics, to disclose favorable evidence to the defense. Still, even the most ethical prosecutor can fail to see that evidence is of the sort that needs to be disclosed.[118] Critics have argued that many prosecutors are institutionally incapable of performing the objective weighing of the materiality of potentially exculpatory evidence.[119] Some critics point to the unique role of prosecutors and the delicate balance in being both "minister[s] of justice"[120] and "zealous advocate[s]."[121] The prosecutor is, in theory, fundamentally different from the defense attorney because she always believes that she is seeking justice for the people at large. While the defense attorney can ethically defend a person he believes to be guilty, the ethical prosecutor only pursues convictions of those she believes are blameworthy.[122] Because the ethical prosecutor always believes the defendant is guilty, it becomes easy for her to view potentially exculpatory evidence as immaterial.[123] The natural tendency is to discount evidence favorable to the defendant as unimportant because it does not support the prosecutor's belief in the ultimate fact—that the defendant is guilty.[124] Hence, prosecutors can, in good faith, downplay or overlook exculpatory evidence because they have difficulty in acting as a "minister of justice" rather than as a "zealous advocate."[125] An alternate view is that some prosecutors consciously choose to be "zealous advocates" in these situations, in the belief that the adversary system itself works in favor of justice. Regardless of the motivations of prosecutors to fail to disclose exculpatory evidence, the fact remains that it is a widespread problem.

The obvious solution to the problem is rigorous enforcement of each of the states' respective rules of professional conduct. If prosecutors were more frequently sanctioned for *Brady* violations, they would have a much greater incentive to disclose exculpatory evidence. The disciplinary rules have been

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117. *See* Rosen, *supra* note 102, at 697.

118. *See generally* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987) (contending that highly ethical prosecutors may violate disclosure requirements because they are systemically incapable of objectively observing their disclosure obligations).

119. *See generally id.*; Weeks, *supra* note 102, at 869-70.

120. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2002).

121. *See* Weeks, *supra* note 102, at 843; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 107 (1991).

122. Jonakait, *supra* note 118, at 550.

123. *See* Jonakait, *supra* note 118, at 559.

124. *See* Jonakait, *supra* note 118, at 559.

125. Weeks, *supra* note 102, at 843.

widely criticized as being ineffective. This could easily change, however, by doing the unthinkable—actually *enforcing* them. Incentives provided by rules of professional conduct would placate many of the critics of the "reasonable probability" standard because most states' ethical rules are broader than the *Brady* rule.[126] Especially in light of the fact that a lower constitutional standard of materiality is unlikely to be implemented, the solution to the high rate of *Brady* violations is stringent enforcement of the rules of professional conduct imposed by every state. Furthermore, this solution is more likely to be effective if rigorous enforcement can be combined with courts accepting innovative theories of materiality.

In *State v. White*, the court did accept a unique and innovative approach to consider how information could have been used to impeach state witnesses. Violations of *Brady* concerning impeachment evidence generally involve a limited variety of circumstances. Impeachment evidence that relates directly to the facts of the case often involves situations where a promise of leniency is made to an accomplice in exchange for testimony.[127] Prior inconsistent statements of eyewitnesses concerning identification of the defendant are also frequently used for impeachment purposes.[128] General impeaching evidence frequently involves past criminal records or promises of leniency in prior criminal cases,[129] but on less frequent occasions, can also include prior allegations of misconduct or incompetence made against police or expert witnesses.[130]

The probative value of impeaching evidence varies according to its relation to the facts at issue in the case.[131] The earlier example of an eyewitness who previously misidentified a defendant would likely be considered "clearly exculpatory."[132] Other exculpatory evidence might not be so clear and may require additional inferences from the court.[133] For example, in *United States v. Agurs*,[134] the defendant claimed self-defense to a charge of murder.[135] The prosecutor did not disclose that the victim had a prior record for assault and

126. *See, e.g.*, Kurcias, *supra* note 72, at 1206.

127. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5.5(c) (1987).

128. *Id.*; *see* Lee v. State, 573 S.W.2d 131 (Mo. Ct. App. 1978).

129. GERSHMAN, *supra* note 127, § 5.5(c).

130. *See, e.g.*, State v. Aaron, 985 S.W.2d 434, 436 (Mo. Ct. App. 1999) (holding that although information about a medical examiner's prior professional misconduct and alleged incompetence should have been disclosed, the information would not have affected the result of the trial).

131. GERSHMAN, *supra* note 127, §5.5(c).

132. GERSHMAN, *supra* note 127, §5.5(c).

133. GERSHMAN, *supra* note 127, §5.5(c).

134. 427 U.S. 97 (1976).

135. *Id.* at 99.

carrying a deadly weapon.[136] The defendant claimed that the information about the victim's criminal record could have been used to support her claim of self-defense.[137] This theory required further inferences that the victim was a violent person and was, therefore, likely the aggressor in the struggle with the defendant.[138] Still, the weight and importance of this inferential link was crucial to the defendant's theory of self-defense. Without it, the jury would have little reason to believe that the victim was the aggressor.

The theory asserted by the defense in *State v. White* also required a number of inferential steps in order to meet the required materiality standards. The information about the romantic relationship between Tina White and Detective McKinley led to the inference that she was willing to go as far as initiating a romantic relationship with the lead detective on the case against her husband to gain favor with the prosecution.[139] This led to the inference that, if she was willing to initiate a relationship to ensure a conviction, she was also likely to "shade the truth" in order to corroborate her daughter's allegations.[140] This could have been used to impeach Tina White's corroborative testimony and lead to the further inference that the daughter's claims were not independent of her mother's influence.[141] This inferential chain was crucial for White to show that there was a reasonable probability that disclosure of the relationship would have affected the outcome of the trial. The court's acceptance of the defense's theory of materiality, therefore, rested on a chain of inferences that linked seemingly unimportant evidence to the defense's theory that Tina White was an unreliable witness who might have fabricated the allegations against the defendant. This, however, was clearly correct, because upon deliberation, a jury might view the information about the relationship as decisive in determining whether the defendant was guilty beyond a reasonable doubt.

The inferential steps permitted to show how exculpatory and impeachment evidence could have fit into a defense theory and affected the result of a trial are a far cry from the original kind of exculpatory evidence anticipated by *Brady v. Maryland*. One might conclude that in response to the high frequency of *Brady* violations, courts may be willing to accept more innovative theories of materiality, involving several inferential steps that link the evidence to the defense's theory, in order to conclude that the result of the trial would have been different had the exculpatory evidence been disclosed. This is a proper approach

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136. *Id.* at 100-01.

137. *Id.* at 100. The Court denied the defendant a new trial based on a standard of materiality that was later replaced by the "reasonable probability" standard set forth in *United States v. Bagley*, 473 U.S. 667, 682 (1985).

138. GERSHMAN, *supra* note 127, § 5.5(c).

139. *See* State v. White, 81 S.W.3d 561, 568 (Mo. Ct. App. 2002).

140. *See id.*

141. *See id.*

that helps provide prosecutors with greater incentive to follow the constitutional and ethical rules regarding disclosure of exculpatory evidence.

VI. CONCLUSION

State v. White is one of a host of cases each year in which courts examine alleged *Brady* violations. The frequency of these violations can be attributed to the lack of an effective incentive for prosecutors to disclose potentially exculpatory evidence. This lack of incentive results, in part, from the high "reasonable probability" materiality standard promulgated by the United States Supreme Court. Also responsible is the failure of most state disciplinary boards to strongly enforce the ethical rules requiring disclosure of *Brady* material. Because the "reasonable probability" standard is unlikely to be modified anytime soon, the solution to the problem of frequent *Brady* violations by prosecutors may lie in the enforcement of rules of professional conduct already in existence. Until this is done, however, courts, such as the court in *State v. White*, should be willing to accept more innovative theories of materiality to find a violation of the duty to disclose exculpatory evidence.

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