UCLA LAW REVIEW

Prosecutors Hide, Defendants Seek: The Erosion of *Brady* Through the Defendant Due Diligence Rule

Kate Weisburd

ABSTRACT

This Article is the first to examine the routine—but problematic—practice of courts forgiving prosecutors for failing to disclose *Brady* evidence if the defendant or his lawyer knew or with due diligence could have known about the evidence. This Article begins by explaining the insidious emergence of the "due diligence" rule and catalogs how courts have defined, justified, and applied the rule since *Brady v. Maryland*. It argues that while the rule is not without intuitive appeal, its burden-shifting framework is troubling and suspect. The defendant due diligence rule is directly contrary to the due process and truth-seeking principles fundamental to *Brady*, and it ignores basic realities of adversarial criminal practice. This Article exposes and refutes several misperceptions upon which the rule rests: (1) that prosecutors can always accurately evaluate what evidence is sufficiently available through due diligence so as to justify nondisclosure; (2) that the exculpatory facts contained in a record, and in theory available to the defense, are always equal in evidentiary value to the record itself; (3) that defendants can always accurately identify legally relevant facts in their cases and can communicate effectively with their lawyers; (4) that defense lawyers have the same resources as prosecutors and, therefore, have the same ability to conduct diligent investigations; and (5) that any problems with the defendant due diligence rule can be addressed in postconviction proceedings through claims of ineffective assistance of counsel. This Article concludes by calling for elimination of the rule and the restoration of *Brady*'s intended framework.

AUTHOR

Kate Weisburd is Supervising Staff Attorney & Lecturer at the Youth Defender Clinic, East Bay Community Law Center, UC Berkeley School of Law.

Sincere thanks to Ty Alper, Jeffery S. Brand, David I. Bruck, Emily Bruce, Andrew G. Ferguson, Keith A. Findley, Miriam Gohara, Eliza Hersh, Randy Hertz, Kristen Holmquist, Jesse Hsieh, John D. King, Joy Milligan, Saira Mohamed, Ann O'Leary, Mae C. Quinn, Kenneth Rose, Andrea Roth, Elisabeth Semel, Steven F. Shatz, Edward Smock, Tirien Steinbach, Kim Thomas, Katherine Tinto, Sarah Weiss, Charles D. Weisselberg, the participants in the Stanford-Berkeley Clinicians' Writing Workshop, and the participants in the NYU Clinical Law Review Workshop. Special thanks to the editors of the *UCLA Law Review*.

TABLE OF CONTENTS

INTRODUCTION

Michael Fullwood was convicted and sentenced to death in 2002 by a North Carolina jury for stabbing his estranged girlfriend, Deidre Waters. The jury heard that on March 29, 1985, Mr. Fullwood broke into Ms. Waters's house and stabbed her, before stabbing himself in the stomach.[1] The jury did not hear, however, additional details about Mr. Fullwood's behavior—details known only to the prosecution. What the prosecution knew—and the jury did not—was that after the police arrested Mr. Fullwood and took him to the emergency room for his self-inflicted injuries, Mr. Fullwood started crying uncontrollably and made several statements to the police. Mr. Fullwood told one of the police officers that he had been using cocaine at the time of the crime and that he had lost control. When he realized what he had done, he stabbed himself and wanted to die. The prosecutors knew all of this, but they failed to disclose it to the defense. Had Mr. Fullwood's lawyers known about these statements and behavior before trial, they could have used it to show that he was "remorseful, distraught, and crying, and . . . that he was under the influence of drugs at the time of the commission of the crime."[2] Although Mr. Fullwood's acts were horrific, had the jury heard the full account, Mr. Fullwood might not have been sentenced to death.[3]

On postconviction review, the Fourth Circuit held that the state's failure to disclose Mr. Fullwood's emergency room statements did not violate Mr. Fullwood's due process rights under *Brady v. Maryland*.[4] In brief, *Brady* requires prosecutors to disclose to defendants all favorable evidence in the government's possession that is material to guilt or punishment.[5] The court reasoned that there was no suppression because Mr. Fullwood, "better than anyone, knew about his cocaine use on the night prior to the stabbing and knew that he had recounted this fact to [the police]. The *Brady* rule 'does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense.'"[6]

Twenty years earlier and several hundred miles away in Puerto Rico, a jury found Ramon Lugo guilty of murder based on the testimony of a sole eyewitness

1. Fullwood v. Lee, 290 F.3d 663, 671–73 (4th Cir. 2002).
2. *Id.* at 685 (quoting Brief of Appellant at 36, *Fullwood*, 290 F.3d 663 (No. 01-13)).
3. Mr. Fullwood's death sentence has since been vacated but on grounds unrelated to his *Brady* claim. *Id.* at 674.
4. 373 U.S. 83 (1963).
5. *Id.* at 87.
6. *Fullwood*, 290 F.3d at 686 (quoting Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994)).

named "Yaco."[7] The jury did not hear, again because the prosecution knew but failed to disclose it, that Yaco had been charged with a felony in an unrelated case and that the prior court had ordered a psychiatric evaluation of him. On postconviction review, the First Circuit rejected Mr. Lugo's *Brady* claim on the grounds that these facts about Mr. Lugo, which were contained in a file in the court clerk's office, "were a matter of public record" and thus were "available to the defense attorney through diligent discovery."[8]

In both *Fullwood v. Lee*[9] and *Lugo v. Munoz*,[10] the court excused the prosecutors' failure to disclose exculpatory evidence on the theory that the defendant either knew or could have known of that evidence through due diligence. These cases are not anomalies. They reflect the common modern tendency of courts to excuse prosecutors from disclosing exculpatory evidence that would otherwise be subject to disclosure under *Brady*. Every federal court of appeals, except for the Tenth and D.C. Circuits, applies some form of what this Article refers to as the "defendant due diligence rule."[11] How exactly courts define and apply the rule varies greatly by circuit and state.[12] For example, some courts, like the Fourth Circuit, focus on what the defendant himself knew and could have told his lawyer.[13] Other courts, like the First Circuit, focus more broadly on the actions of the defense lawyers and on whether the evidence was, in theory, equally accessible to the defense.[14]

The proffered justifications for the defendant due diligence rule are straightforward and have intuitive appeal. First, prosecutors should not be punished for failing to provide the defense with facts or evidence that defendants or defense counsel could have obtained themselves.[15] Second, the defendant can always raise an ineffective assistance of counsel claim on appeal or in postconviction proceedings, if the defense counsel is not diligent.[16]

7. Lugo v. Munoz, 682 F.2d 7, 8 (1st Cir. 1982).
8. *Id.* at 9–10 (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)) (internal quotation marks omitted).
9. 290 F.3d 663.
10. 682 F.2d 7.
11. *See infra* note 80.
12. *See infra* notes 80–82.
13. *See, e.g.*, *Fullwood*, 290 F.3d at 686.
14. *See, e.g.*, *Lugo*, 682 F.2d at 10.
15. *E.g.*, United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980) ("Truth, justice, and the American way do not . . . require the Government to discover and develop the defendant's entire defense.").
16. *See* Tice v. Wilson, 425 F. Supp. 2d 676, 696 (W.D. Pa. 2006) (finding no *Brady* violation because defense counsel exemplified a lack of diligence by failing to review the defendant's own records and, furthermore, that the defendant's "ineffective assistance claim [was] premised upon the assertion that trial counsel could easily have obtained those records had he attempted to do so"); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and*

Notwithstanding the initial appeal of these justifications, they are contrary to the Due Process Clause, as interpreted in *Brady* and its progeny. The common theme throughout the Court's *Brady* jurisprudence is a strict adherence to the principle that a fair trial requires that "evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury."[17] The defendant due diligence rule, however, shifts the burden of disclosure from the government to the defendant, and as a result, less exculpatory evidence is "fully aired." In this way, the truth-seeking purpose of criminal trials is undermined. The defendant due diligence rule also undermines due process goals of procedural justice because it is based on fundamental misperceptions about criminal trials, defendants, their lawyers, and prosecutors.

This Article explores the disjuncture between this intuitively appealing rule, *Brady* jurisprudence, and the reality of criminal practice. Although much has been written on *Brady*, most of the literature focuses on prosecutors' failure to identify exculpatory evidence and lack of consequences for purposeful noncompliance.[18] In contrast, this Article places the defendant and his lawyer at the center of the inquiry to better understand why the defendant due diligence rule is indefensible in both theory and practice.

Part I sets out the current state of the defendant due diligence rule. It begins by tracing the history of the rule and how it insidiously emerged from two general sources. The first source of the defendant due diligence rule is an out-of-context phrase lifted from two U.S. Supreme Court cases. In *Kyles v. Whitley*[19] and *United*

Retrospective Review, 53 FORDHAM L. REV. 391, 429 n.215 (1984) (discussing how counsel's failure to be diligent may be grounds for an ineffective assistance of counsel claim).

17. United States v. Agurs, 427 U.S. 97, 116 (1976) (Marshall, J., dissenting).

18. *E.g.*, Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129 (Carol S. Steiker ed., 2006) (explaining structural difficulties that confront prosecutors trying to comply with *Brady*); Alafair Burke, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2007) (explaining the challenges of prosecutorial compliance with *Brady*); Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007) (discussing the various ways prosecutors manipulate *Brady* and avoid compliance); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010) (discussing the challenges to monitoring and discovering *Brady* material); Fred Klein, *A View From Inside the Ropes: A Prosecutor's Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 876 (2010) (discussing instructional pressure on prosecutors to seek convictions and the need for ethics training and education); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780 (2007) (exploring why prosecutors are ill equipped to evaluate materiality).

19. 514 U.S. 419 (1995).

States v. Agurs,[20] two early post-*Brady* cases, the Court referred to the prosecutor's duty to disclose evidence that was "unknown to the defense."[21] Although this phrase was not part of the Court's definition of *Brady* evidence, lower courts isolated these four words and interpreted them to mean that there is no *Brady* violation if the defense knew or should have known about the evidence in question at the time of trial.

The second source of the defendant due diligence rule is other due diligence requirements within the criminal law. For example, courts often discuss a defendant's diligence in the context of procedural default in federal habeas proceedings.[22] Although questions about procedural default are distinct from questions about the merits of a *Brady* claim, lower courts borrowed the due diligence language from federal habeas and applied it to the definition of *Brady* violations. Given the circuitous history of the rule, it is no surprise that courts have defined and applied the rule in an internally inconsistent way.

Part II explains how the defendant due diligence rule is contrary to the due process concerns articulated in *Brady*. Since *Brady*, the Supreme Court has reiterated the same three factors to establish a *Brady* violation: (1) The evidence is favorable to the defendant; (2) it is suppressed by the state (either willfully or inadvertently); and (3) it is material either to guilt or to sentencing.[23] The Court has never added a requirement that defense counsel exercise due diligence. The Court's concern with the defendant's due process rights to exculpatory evidence is precisely why the duty to disclose exculpatory evidence is absolute and does not depend on the request of a defendant.[24] It is also the rationale for a prosecutor to err on the side of disclosure if he is unsure about the favorable nature of the evidence in his possession.[25] Indeed, in *Banks v. Dretke*,[26] the Court appeared to reject any notion of a diligence requirement: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material. . . . A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[27] Although the language in *Banks* was limited to a question about procedural default in federal

20. 427 U.S. 97.
21. *Kyles*, 514 U.S. at 437; *Agurs*, 427 U.S. at 103.
22. For a discussion of the due diligence rule in the context of federal habeas, see Part II.
23. For a discussion of the general *Brady* framework, see Part I.A.
24. United States v. Bagley, 473 U.S. 667, 668 (1985).
25. *Kyles*, 514 U.S. at 439.
26. 540 U.S. 668 (2004).
27. *Id.* at 695–96.

habeas review, it reflects the Court's overriding concern with prosecutors avoiding disclosure of exculpatory evidence.

Part III examines and debunks five common misperceptions about criminal practice on which the defendant due diligence rule is based. First, that prosecutors have the ability to always accurately evaluate what evidence is sufficiently available through due diligence to justify not disclosing the evidence. At best, the prosecutor will withhold evidence because of an honest belief that the evidence is available to the defense through due diligence. At worst, this belief will serve as a post hoc explanation to excuse prosecutorial misconduct. Second, that exculpatory facts in a record or document are always equal in evidentiary value to the record or the document itself. Third, that defendants can always accurately identify legally relevant facts in their cases and can communicate effectively with their lawyers. Fourth, that defense lawyers have the same resources as prosecutors and, therefore, have the same ability to conduct diligent investigations. And finally, that any problem with the defendant due diligence rule can be addressed in postconviction proceedings through a claim of ineffective assistance of counsel.[28]

Part IV argues that in addition to contradicting *Brady* and its progeny, the defendant due diligence rule is unworkable in both theory and practice. If left unchecked, the rule will completely eviscerate the principles on which *Brady* is based. Given the values at stake, the only solution is to eliminate the defendant due diligence rule altogether.

By diluting prosecutors' disclosure duties and basing its framework on unrealistic assumptions about institutional actors, the defendant due diligence rule unquestionably increases the number of trials in which prosecutors withhold material exculpatory evidence. When prosecutors withhold such evidence, defendants are convicted, sentenced, and sometimes put to death, based on incomplete, unreliable evidence.[29] For example, in a study of all 5,760 capital convictions in the

28. *See* Strickland v. Washington, 466 U.S. 668 (1984) (establishing a two-pronged test for evaluating an ineffective assistance of counsel claim: whether counsel's performance was deficient and whether there was a substantial probability that it affected the outcome).

29. Over the past decade, multiple reports and articles have discussed the increasing number of wrongful convictions based on prosecutorial misconduct, including the failure to disclose *Brady* evidence. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (exploring the reasons for wrongful convictions, including corrupt practices by prosecutors); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 108–11 (2008) (discussing *Brady* and other "innocence-related" claims); Gershman, *supra* note 18, at 533 ("Not surprisingly, violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences: innocent people are wrongfully convicted, imprisoned, and even executed . . . ."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399,

United States from 1973 to 1995, researchers found that prosecutors' suppression of evidence was responsible for 16 percent of reversals at the state postconviction stage.[30] These numbers do not accurately reflect the extent of the problem, however, since they only capture instances when the exculpatory evidence was in fact discovered. What remains unknown is the number of cases in which a judge or jury convicted a defendant without knowing all the evidence because the government knew of exculpatory evidence and did not disclose it. In short, when a prosecutor makes good on his duty to disclose favorable evidence, trials are more fair, efficient, and reliable. This Article concludes by addressing potential policy concerns with eliminating the rule.

I. THE STATE OF THE LAW

The *Brady* decision reflects the Court's commitment to the truth-seeking purpose of criminal trials and to ensuring that defendants have equal access to exculpatory evidence before and during trial.[31] Given the Court's concern with equal access and fair trials, the emergence of the defendant due diligence rule—which shifts the burden from the prosecutor to the defendant—is surprising. This Part traces the development of the defendant due diligence rule and the common features of the rule. It begins by reviewing some of the central features of *Brady* that are relevant to understanding the defendant due diligence rule.

A. *Brady* Basics: Fairness and Burdens

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good or bad faith of the prosecution."[32] Since *Brady* was decided, these words have been redefined and reinter-

403 ("[P]rosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions."); Ken Armstrong & Maurice Possley, *Trial & Error: Part I: The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story (reporting the results of a national study of approximately 11,000 court rulings over thirty-six years in which 381 defendants had their homicide convictions reversed because of prosecutorial misconduct).

30. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000).

31. *See* Capra, *supra* note 16, at 394.

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

preted.[33] What has not changed is the Supreme Court's steadfast commitment to the principle on which *Brady* rests: "Society wins not only when the guilty are convicted, but when criminal trials are fair."[34] A fair trial is contingent on "evidence tending to show innocence, as well as that tending to show guilt, be[ing] fully aired before the jury."[35] In this respect, *Brady* reflects the Court's overriding focus on fairness in criminal trials, even where it is in tension with the traditional adversarial system.[36] The Court's commitment to these principles explains several key features of *Brady*.

The first core feature of *Brady* is that the prosecutor's duty to disclose *Brady* evidence is absolute. It does not depend on, nor is it triggered by, a request by the defendant.[37] Although the Court in *Brady* initially placed a burden on the defendant to request exculpatory evidence from the state, the Court removed this requirement by the time it decided *Bagley* in 1985 and *Kyles* in 1995.[38] This change was motivated by the Court's own observation that only a prosecutor knows what evidence he possesses.[39]

Second, under *Brady* and its progeny, a prosecutor must always err on the side of disclosure. The Court has consistently explained that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[40] The *Kyles* Court explained the rationale: "Such disclosure will serve to justify trust in the prosecutor as the 'representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[41] The Court's focus on the prosecutor's disclosure obligations is well founded. In practice, prosecutors often have little incentive to comply with *Brady*, and

33. Many of the post-*Brady* cases further defined key aspects of the *Brady* doctrine. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 434–38 (1995) (further refining the definition of materiality and what constitutes favorable evidence); United States v. Bagley, 473 U.S. 667, 682 (1985) (defining "materiality"); United States v. Agurs, 427 U.S. 97, 112–13 (1976) (defining when a prosecutor's duty to disclose is triggered); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (clarifying that evidence pertaining to witness credibility falls within *Brady*).

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

35. *Agurs*, 427 U.S. at 116 (Marshall, J., dissenting).

36. As Stephanos Bibas has noted, *Brady* was a shift "from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system." Bibas, *supra* note 18, at 129.

37. *See Bagley*, 473 U.S. at 682–83; *Agurs*, 427 U.S. at 107.

38. *See Kyles*, 514 U.S. at 433–34.

39. *Id.* at 437.

40. *Id.* at 439; *accord Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

41. *Kyles*, 514 U.S. at 439 (alterations in original) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

there are no external policing mechanisms to determine whether a prosecutor has not complied with *Brady*.[42]

Third, the burden of obtaining and disclosing evidence lies with the prosecution.[43] This affirmative burden applies with equal force to evidence "known only to police investigators and not to the prosecutor."[44] Over the years, courts have further defined what government agencies *Brady* covers.[45] The rationale for this rule is also straightforward: A prosecutor has a duty to "assist the defense in making its case."[46] The duty to disclose exculpatory evidence is ongoing; it extends beyond conviction and never expires.[47]

All of these features reflect that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[48] Withholding exculpatory evidence does not further this goal; instead, it undermines it.

B. The Emergence of the Defendant Due Diligence Rule

The Supreme Court has never adopted a defendant due diligence rule. The story of how the rule emerged in the lower courts illuminates the problematic aspects of the rule and helps explain why the rule is defined in so many different ways. There are two general explanations for the defendant due diligence rule: It emerged from the Court's *Brady* jurisprudence and from cases addressing defendant due diligence in other contexts.

42. Part III.A, *infra*, discusses the issue of prosecutorial compliance with *Brady* in the context of the defendant due diligence rule.

43. *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) ("To the extent [*Brady*'s disclosure duty] places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

44. *Kyles*, 514 U.S. at 438.

45. *See* United States v. Safavian, 233 F.R.D. 205, 207 n.1 (D.D.C. 2006) (explaining that the prosecutor has a duty to search and disclose *Brady* evidence, within reason, in the possession of all Executive Branch agencies and departments, rather than solely the agencies "closely aligned" with the prosecution); United States v. Brooks, 966 F.2d 1500, 1502–03 (D.C. Cir. 1992) (stating that the government's duty to search other agencies' files includes the duty to search police department and internal affairs files); United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991) (establishing that the prosecution team charged with the duty to disclose favorable evidence included both investigative and prosecution personnel).

46. United States v. Bagley, 473 U.S. 667, 675 n.6 (1985).

47. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (holding that the obligation to disclose *Brady* material exists regardless of the particular procedural posture of the case).

48. Neder v. United States, 527 U.S. 1, 18 (1999) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

1. *Brady* Jurisprudence

Although the Court has never referenced the defendant due diligence rule, in two seminal *Brady* cases, *United States v. Agurs*[49] and *Kyles v. Whitley*,[50] the Court referred to evidence that was "unknown to the defense."[51] These four short words were part of the Court's larger discussion about the definition of materiality. Nonetheless, lower courts took the phrase "unknown to the defense" out of context and expanded the definition of *Brady* evidence to include evidence that is material to the defense *and* that is undiscoverable by the defendant. It is useful to examine both *Kyles* and *Agurs* to better understand the context in which the Court used this phrase and how lower courts proceeded to misapply it.

As Professor Barbara Babcock has noted, "In spite of its short length and simple facts, *Agurs* is a difficult opinion."[52] At its core, *Agurs* is about which materiality standard to apply to *Brady* claims in postconviction, and whether the standard is different when the defendant makes a specific request, a general request, or no request at all. The facts are simple: The defendant was convicted of killing James Sewell. The theory of the defense at trial was self-defense—that Mr. Sewell attacked the defendant first with a knife. The defendant made no *Brady* requests and the government failed to disclose the fact that Mr. Sewell had twice been convicted of crimes involving knives.[53] Evidence of the victim's prior knife attacks would have bolstered the self-defense theory.

The Supreme Court held that there were different materiality standards depending on the type of request the defendant made at trial. When the defendant made no request or simply a general request at trial, on appellate review the defendant must show that the suppressed evidence "creates a reasonable doubt that did not otherwise exist."[54] On the other hand, when the defendant made a specific request at trial, "the failure [by the state] to make any response is seldom, if ever, excusable."[55] In discussing the different types of requests, the Court noted that each type of case "involves the discovery, after trial, of information which had

49. 427 U.S. 97 (1976).
50. 514 U.S. 419 (1995).
51. *Id.* at 437; *Agurs*, 427 U.S. at 103.
52. Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1145 (1982).
53. *Agurs*, 427 U.S. at 100.
54. *Id.* at 112.
55. *Id.* at 106.

been known to the prosecution but *unknown to the defense*."[56] This is the only instance when the Court refers to the phrase "unknown to the defense."

The *Agurs* holding was problematic for defendants because it placed the burden on the defendant to put the prosecutor on notice that certain evidence could be exculpatory. As Professor Daniel Capra explained, "[I]n many if not most cases, defense counsel is given the virtually impossible task of specifically identifying evidence that by definition he does not know exists. Defense counsel must in effect rummage through the prosecutor's file without having access to the file."[57] In his dissent in *Agurs*, Justice Marshall pointed out that under the rule announced by the majority, defendants who made no request or just a general request would be at a severe disadvantage because "[t]he rule creates little, if any incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense."[58]

In many respects, Justice Marshall's dissent foreshadowed the Court's decision nine years later in *United States v. Bagley*. In *Bagley*, the Court explicitly eliminated the distinction between the three types of requests in favor of a "reasonable probability" standard that would apply regardless of whether the defendant made a request.[59] By removing the distinction between requests, the *Bagley* Court also removed the corresponding burden that it had placed on defense lawyers to make specific requests for *Brady* evidence and shifted the burden back to the government.

The only other Supreme Court case to use the phrase "unknown to the defense" is *Kyles v. Whitley*, which was decided almost twenty years after *Agurs*. The defendant in *Kyles* made a specific request for *Brady* evidence before trial. The prosecutor assured the defense that she had "no exculpatory evidence of any nature,"[60] despite the existence of multiple pieces of exculpatory evidence that were in fact known to the prosecutor. In concluding that the government violated *Brady*, the Court addressed the very concerns Justice Marshall identified in his *Agurs* dissent:

> While the definition of . . . materiality . . . must . . . be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence *unknown*

56. *Id.* at 103 (emphasis added).
57. Capra, *supra* note 16, at 397 (footnote omitted).
58. *Agurs*, 427 U.S. at 117 (Marshall, J., dissenting).
59. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* Kyles v. Whitley, 514 U.S. 419, 434 (1995).
60. *Kyles*, 514 U.S. at 428.

> *to the defense* does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.[61]

This is the only portion of the *Kyles* opinion that uses the phrase "unknown to the defense." It is worth noting that the Court used the phrase in the context of discussing the prosecutor's duty to evaluate materiality. In this way, *Kyles* reflected the Court's exclusive concern with the prosecutor's duty. There was no mention, much less discussion, of the defendant's burden.

It is therefore paradoxical that lower courts isolated the phrase "unknown to the defense" from both *Agurs* and *Kyles* and used it as justification to impose a burden on the defendant to discover *Brady* material. Nonetheless, in the years after *Kyles* and *Agurs* were decided, lower courts began to narrow the definition of *Brady* evidence to cover only evidence that is "unknown" to the defense.[62] Beyond citing either case, none of the decisions from the lower courts offers much in the way of a doctrinal justification for the rule.

Lower courts also have expanded the scope of the term "unknown to the defense" to include any evidence that is unknowable to the defense with due diligence. In short, lower courts took the term to mean something that the Supreme Court never said—namely, that defendants have a burden to discover or obtain *Brady* evidence. At most, the Court intended "unknown to the defense" as a limited exception to the prosecutor's *Brady* obligation, but lower courts have interpreted it to mean much more.

At least one state court has recognized that the phrase was taken out of context. In *State v. Williams*,[63] the Maryland Court of Appeals addressed the exact phenomenon described above. In *Williams*, the court rejected the state's argument that *Kyles* stood for the position that *Brady* evidence be unknown

61. *Id.* at 437 (emphasis added).

62. *See, e.g.*, United States v. Johnson, 264 F. App'x 388, 389 (5th Cir. 2008); Mark v. Ault, 498 F.3d 775, 787 (8th Cir. 2007) (describing *Kyles* as addressing only evidence "unknown to the defense" as a basis for a potential Brady violation (quoting *Kyles*, 514 U.S. at 434)); Apanovitch v. Houk, 466 F.3d 460, 474 (6th Cir. 2006) (holding that *Brady* "only applies to evidence that was known to the prosecution, but unknown to the defense" (citing *Agurs*, 427 U.S. at 10)); Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 557 (4th Cir. 1999) ("Suppressed evidence is 'information which had been known to the prosecution but unknown to the defense.'" (quoting *Agurs*, 427 U.S. at 10)).

63. 896 A.2d 973 (Md. 2006).

to the defendant: "This proposition [unknown to the defense] is taken out of context . . . and in any event, does not fully convey the *Kyles* Court's analysis or holding."[64]

2. Defendant Due Diligence, *Brady*, and Federal Habeas

There is a second explanation for how the defendant due diligence rule developed. Defendant due diligence, as a general legal concept, emerges in other doctrines within criminal law. Instead of recognizing the differences between the different doctrines, lower courts borrow due diligence language and haphazardly apply it to the *Brady* doctrine. For example, the doctrine of newly discovered evidence in state and federal habeas corpus proceedings refers to the defendant's diligence in raising claims based on new evidence.[65] Similarly, a defendant seeking a new trial based on new evidence under Rule 33 of the Federal Rules of Criminal Procedure must also demonstrate due diligence.[66]

Most significantly for *Brady* purposes, defendant due diligence is discussed extensively in the context of procedural default in habeas corpus proceedings. Since defendants often raise *Brady* claims for the first time in federal habeas, courts frequently analyze whether the *Brady* claim is procedurally barred from review because the claim could have been raised earlier. A defendant raising a *Brady* claim for the first time in federal habeas must show cause and prejudice for why the claim should not be barred.[67] This inquiry, commonly referred to as cause and prejudice analysis, is distinct from evaluating the underlying merits of a *Brady* claim.[68] Nonetheless, lower courts borrowed the definition of due diligence from the procedural default context and applied it to the merits of the *Brady* claim.

64. *Id.* at 994.

65. *See, e.g.*, 28 U.S.C. § 2255(f)(4) (2006) (providing that the one-year statute of limitations for habeas petitions begins to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"); Johnson v. United States, 544 U.S. 295, 311 (2005) (indicating that, where the factual predicate for a habeas claim was in existence for some time, petitioner was obligated to explain why he did not take action to discover predicate earlier).

66. *See, e.g.*, United States v. Kenny, 505 F.3d 458, 462 (6th Cir. 2007) (explaining that a defendant seeking a new trial based on newly discovered evidence "has the burden of demonstrating that '(1) the evidence was discovered after trial, (2) it could not have been discovered earlier with due diligence, (3) it is material and not merely cumulative or impeaching, and (4) it would likely produce an acquittal if the case was retried'" (quoting United States v. Turns, 198 F.3d 584, 586–87 (6th Cir. 2000))).

67. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

68. McCleskey v. Zant, 499 U.S. 467, 498 (1991).

Stated somewhat differently, lower courts are taking the due diligence rule from federal habeas and applying it to the very definition of *Brady* evidence.

Some history of *Brady* claims in federal habeas helps explain the confusion. In *McCleskey v. Zant*,[69] the Court explained that "[t]he requirement of cause in the abuse-of-the-writ context is based on the principle that [a] petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition."[70] That is, a petitioner is barred from raising a claim for the first time in federal habeas if the grounds for the claim could have been discovered earlier through diligence.[71]

Then, in evaluating the underlying merits of *Brady* claims, lower courts applied this diligence standard from federal habeas. For example, in addressing the underlying merits of a *Brady* claim raised in federal habeas, the Fourth Circuit adopted the diligence language from *McCleskey*. Although *McCleskey* only addressed due diligence in the context of cause and prejudice analysis, the Fourth Circuit cited the exact same language in defining what constitutes *Brady* evidence.[72]

The problem with borrowing the diligence language is that the inquiry into cause is not analogous to the inquiry about the underlying merits of a *Brady* claim. The cause inquiry focuses on the defendant's conduct and whether the defendant can show "some objective factor external to the defense" to excuse the procedural default.[73] *Brady*, on the other hand, focuses on exculpatory evidence possessed by the government.

Not only are lower courts applying the wrong doctrine, they are applying an outdated version of the wrong doctrine. In 1999, in *Strickler v. Greene*,[74] and again in 2005, in *Banks v. Dretke*,[75] the Supreme Court specifically addressed defendant

69. 499 U.S. 467.

70. *Id.* at 498. The Court went on to explain that "[t]he question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition." *Id.*

71. *See, e.g.*, Zeitvogel v. Delo, 84 F.3d 276, 279–80 (8th Cir. 1996) ("[T]he State's failure to produce the records does not excuse Zeitvogel's procedural default. Lack of production by state officials is not cause excusing procedural default if the information the officials failed to produce is reasonably available through other means.").

72. Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir. 1995) ("Assuming *arguendo* that the location of the gun was material, the governing question for the state court was whether Barnes could have obtained the information through 'reasonable and diligent investigation.'" (quoting *McCleskey*, 499 U.S. at 498)).

73. Murray v. Carrier, 477 U.S. 478, 488 (1986); *see also McCleskey*, 499 U.S. at 498 ("[The a]buse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." (citation omitted)).

74. 527 U.S. 263 (1999).

75. 540 U.S. 668 (2004).

due diligence in the context of cause and prejudice analysis in federal habeas proceedings.[76] Taken together, these cases generally reject the use of a defendant due diligence rule to bar review of *Brady* claims in federal habeas.[77] Despite this significant shift, lower courts continued to borrow the now-outdated language about diligence and apply it to the merits of *Brady* claims.[78] To the extent lower courts continue erroneously to export due diligence definitions from federal habeas, they should borrow the current law as articulated in *Banks*: Just as there is no place for defendant due diligence in cause and prejudice analysis, there is no place for the defendant due diligence rule in the merits analysis of *Brady* claims.[79]

In sum, the defendant due diligence rule developed in a somewhat haphazard way: Some lower courts took one phrase out of context, and other lower courts borrowed language from outdated cause and prejudice analysis. As a result, courts now frequently apply a rule that has no legitimate doctrinal support.

C. Common Features of, and Proffered Justifications for, the Defendant Due Diligence Rule

The circuitous history of the defendant due diligence rule helps explain why there is such divergence among courts in the definition and application of the rule. All federal courts of appeal, except the Tenth and D.C. Circuits, apply some form of the defendant due diligence rule.[80] With no explanation or citation to other diligence cases, however, the Third, Seventh, and Ninth Circuits vacillate between applying and not applying some form of the defendant due diligence rule.[81] State

76. *Banks*, 540 U.S. at 697; *Strickler*, 527 U.S. at 287–88. *Banks* and *Strickler* are also discussed *infra* Part II.

77. *See infra* Part II.

78. *See infra* notes 80–81.

79. At least one circuit court has noted the shift in the law as articulated in *Banks*. In *Walker v. Kelly*, 195 F. App'x 169 (4th Cir. 2006), the Fourth Circuit, citing *Banks*, held that "the cause analysis focuses on prosecutorial misconduct, not on the defendant's diligence." *Id.* at 175; *see also id.* ("It is also violative of due process, as it condones the prosecutor's ability to conceal documents and requires a defendant to search for *Brady* material.").

80. *See* United States v. Coplen, 565 F.3d 1094, 1097 (8th Cir. 2009); United States v. Skilling, 554 F.3d 529, 574 (5th Cir. 2009); Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006); LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir. 2005); United States v. Pelullo, 399 F.3d 197, 202 (3d Cir. 2005); Spirko v. Mitchell, 368 F.3d 603, 611 (6th Cir. 2004); Boss v. Pierce, 263 F.3d 734, 740 (7th Cir. 2001); United States v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998); United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995); United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990). *But see In re* Sealed Case, 185 F.3d 887, 897 (D.C. Cir. 1999); Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995).

81. *Compare* Gov't of the Virgin Islands v. Gumbs, 426 F. App'x 90, 92–93 (3d Cir. 2011), United States v. Fuller, 421 F. App'x 642 (7th Cir. 2011), Holland v. City of Chicago, 643 F.3d 248 (7th

courts and federal district courts are similarly split.[82] The application of the rule has also prompted a handful of strongly worded dissents.[83]

Looking at the various definitions, a few common themes can be identified. As an initial matter, most lower courts define the rule as the First Circuit does: "The government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defendant."[84] In this way, courts extend the language of "unknown to the defendant" not just to situations where the defendant had actual knowledge, but also to situations where the defendant could have obtained the knowledge through due diligence.

In total, there are three general variations on the defendant due diligence rule. First, many courts excuse a prosecutor from disclosing *Brady* evidence if the evidence in question is, in theory, equally available to a diligent defendant. The most common example of this version of the rule is exculpatory evidence that is public record.[85] The case of *Lugo v. Munoz*,[86] discussed in the Introduction of this Article, and the Fifth Circuit's decision in *United States v. Infante*[87] exemplify this permutation of the rule. In *Infante*, defense counsel discovered after trial that Mr. Infante's co-conspirator and chief government witness had filed a motion for a psychiatric evaluation of himself (the co-conspirator) in connection with his own separate criminal case. The trial court in the co-conspirator's case granted the motion and ordered an evaluation. The motion and the judge's order were contained

Cir. 2011), United States v. Are, 590 F.3d 499, 510 (7th Cir. 2009), Rhoades v. Henry, 596 F.3d 1170, 1181 (9th Cir. 2010), *Raley*, 470 F.3d at 804, *and Pelullo*, 399 F.3d at 218–19 (applying the defendant due diligence rule), *with* Wilson v. Beard, 589 F.3d 651, 664 (3d Cir. 2009), *Boss*, 263 F.3d at 740, Gantt v. Roe, 389 F.3d 908, 913 (9th Cir. 2004), *and* United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000) (rejecting the defendant due diligence rule).

82. *Compare* State v. Skakel, 888 A.2d 985, 1035 (Conn. 2006), Alford v. State, 667 S.E.2d 680, 683 (Ga. Ct. App. 2008), Davis v. State, 43 So. 3d 1116, 1123 (Miss. 2010), State v. Parrish, 241 P.3d 1041, 1044 (Mont. 2010), Jones v. State, No. 52476, 2010 WL 3295708 (Nev. Apr. 16, 2010), *and* Commonwealth v. Ligons, 971 A.2d 1125, 1146 (Pa. 2009) (applying the defendant due diligence rule), *with* Parker v. Herbert, No. 02-CV-0373, 2009 WL 2971575, at *47 (W.D.N.Y. May 28, 2009), Garnett v. Morgan, No. C05-1438 MJP, 2010 WL 5058524 (W.D. Wash. Dec. 3, 2010), Hallford v. Culliver, 379 F. Supp. 2d 1232, 1250 (M.D. Ala. 2004), Prewitt v. State, 819 N.E.2d 393, 407 (Ind. Ct. App. 2004), Commonwealth v. Tucceri, 589 N.E.2d 1216, 1221–22 (Mass. 1992), State v. Williams, 896 A.2d 973, 992 (Md. 2006), *and* State v. Parker, 198 S.W.3d 178, 193 (Mo. Ct. App. 2006) (rejecting the defendant due diligence rule).

83. *E.g.*, Bell v. Bell, 512 F.3d 223, 250–51 (6th Cir. 2008) (Moore, J., dissenting); *Spirko*, 368 F.3d at 614–18 (Gilman, J., dissenting).

84. *Rodriguez*, 162 F.3d at 147.

85. *Payne*, 63 F.3d at 1208 ("Documents that are part of public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.").

86. 682 F.2d 7 (1st Cir. 1982).

87. 404 F.3d 376 (5th Cir. 2005).

in a publically accessible case file. The Fifth Circuit concluded that there was no *Brady* violation because Mr. Infante's counsel should have known to look in the case file, given that the witness was a co-conspirator and his case was related to Infante's case.[88] The justification is easy to appreciate: If the record is equally accessible, then the defendant or his lawyer should have to exercise some diligence and not simply depend on the government to get the records.

The Sixth Circuit relied on the "equally accessible" justification to distinguish *Banks* and *Strickler*. In *Bell v. Bell*,[89] the government assured the defense that it had turned over all discoverable information. The government did not disclose the sentencing records of a key state witness that the defense could have used to impeach his credibility. The Sixth Circuit concluded that there was no *Brady* violation because the defendant knew the witness was incarcerated, which "strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence."[90] Unlike the evidence at issue in *Banks* and *Strickler*, which was only in the possession of the state, the sentencing records were equally accessible to the defense.[91] The dissent in *Bell*, however, took the position that under *Banks* and *Strickle*r a defendant should "not be penalized for failing to discover" the exculpatory evidence.[92]

The second variation of the defendant due diligence rule is that there is no *Brady* violation if the evidence was known by the defendant himself and he could have or should have told his lawyers about it. *Fullwood v. Lee*,[93] also discussed in the Introduction of this Article, is a good example of a court concluding that there is no *Brady* violation if the defendant or his lawyer know or should know of exculpatory information.[94] Another example of this version of the rule is from the Ninth Circuit. In *Raley v. Ylst*,[95] a capital case, the court found that there was no *Brady* violation when the government failed to disclose the defendant's jail medical records. The jail records reflected the defendant's mental health problems, which the defense could have offered as mitigating evidence at his sentencing trial. In denying the *Brady* claim, the Ninth Circuit reasoned that the defendant knew about his own medical condition and that "[t]hose facts were sufficient to alert defense counsel to the probability that the jail had created medical

88. *Id.* at 387.
89. 512 F.3d 223.
90. *Id.* at 236.
91. *Id.* at 235.
92. *Id.* at 242 (Clay, J., dissenting).
93. 290 F.3d 663 (4th Cir. 2002).
94. *Id.*
95. 470 F.3d 792 (9th Cir. 2006).

records . . . . Because petitioner knew of the existence of the evidence, his counsel could have sought the documents through discovery."[96]

The third and final version of the rule is related to the last: There is no *Brady* violation, even if the physical evidence in question is in the exclusive control of the government, so long as the relevant facts are accessible to a diligent defendant. A Florida case, *Occhicone v. Moore*,[97] exemplifies this version of the rule. In that case, the government failed to disclose statements and police interview notes from eyewitnesses who reported that the defendant appeared intoxicated at the time of the crime. The defendant argued that the statements were exculpatory because it was relevant to his defense of voluntary intoxication. The court found no *Brady* violation because the defendant was with the witnesses in question prior to the crime and "no one better than [the defendant] could have known about these witnesses."[98] The court reasoned that "[a]lthough the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld."[99] The justification is straightforward: So long as the defendant should be aware of the facts, there is no *Brady* violation. Exculpatory records—such as police notes or statements—that serve as independent corroboration or verification do not, without more, constitute *Brady* material under this line of cases.

Under each of the three versions of the rule, the burden of disclosing exculpatory evidence shifts from the state to the defendant. Rather than disclose exculpatory evidence, the state can—under the defendant due diligence rule—sit on otherwise exculpatory evidence, assuming that the defendant could obtain the same information on his own. Stated differently, a defendant must establish that he was diligent to perfect any *Brady* claim. In this way, the defendant due diligence rule has evolved from, at best, a narrow exception to the prosecutions' *Brady* obligation into an exception that—in practice—completely swallows the rule.[100] Part III.A discusses the ways in which the defendant due diligence rule changes how prosecutors operate.

Only two circuits—the D.C. and Tenth Circuits—consistently recognize the conflict between *Brady* and the defendant due diligence rule.[101] In *Banks v.*

96. *Id.* at 804.
97. No. 8:01-CV-2136T27, 2005 WL 1073936 (M.D. Fla. Mar. 31, 2005).
98. *Id.* at *6.
99. *Id.*
100. *See* Gershman, *supra* note 18, at 557.
101. *E.g.*, *In re* Sealed Case, 185 F.3d 887, 897 (D.C. Cir. 1999); Douglas v. Workman, 560 F.3d 1156, 1181 (10th Cir. 2009); Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995).

Reynolds,[102] the defendant, Mr. Banks, learned after trial that two other individuals had been arrested for the crime for which he was convicted. The charges against those two individuals were ultimately reduced or dropped. As it happened, the public defender representing Mr. Banks had also represented one of the two men who had been arrested for the same crime. The state never informed Mr. Banks's counsel that two other men had been charged with the crime. The state reasoned that since Mr. Banks's lawyer represented one of the men, he should have known about the prior arrests. The Tenth Circuit rejected the state's argument:

> [T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge . . . the fact that defense counsel "knew or should have known" about the Dean/Hicks information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was exculpatory.[103]

The D.C. Circuit similarly rejected the defendant due diligence rule on the grounds that since the government is responsible for "any favorable evidence known to others acting on the government's behalf," it follows that it is the government's burden to disclose exculpatory evidence in its possession, not the defendant's burden to find it.[104]

II. THE RULE IS CONTRARY TO *BRADY*

Since *Brady* was first decided, the Supreme Court has relied on the same three factors to establish a *Brady* violation: (1) The evidence is favorable to the defendant; (2) it is suppressed by the state (either willfully or inadvertently); and (3) it is material either to guilt or to sentencing.[105] The Court has never added a fourth prong requiring that the evidence be unknown to the diligent defendant, nor has the Court ever stated that the government is relieved of its disclosure duties if the defendant or his lawyer knows of the evidence or could learn of it. The defendant due diligence rule is contrary to *Brady* because it inserts a new element into the definition of *Brady* evidence and, more fundamentally, because it is contrary to the very principles on which *Brady* is based.

102. 54 F.3d 1508 (10th Cir. 1995).
103. *Id.* at 1517.
104. *In re Sealed Case*, 185 F.3d at 896.
105. *E.g.*, Strickler v. Greene, 527 U.S. 263, 280 (1999); Kyles v. Whitley, 514 U.S. 419, 434 (1995); United States v. Bagley, 473 U.S. 667, 675 (1985).

The *Brady* doctrine is premised on the dual goals of truth seeking and fair trials.[106] It furthers these goals by requiring that prosecutors provide broad, timely, and absolute disclosure of all material exculpatory evidence. In contrast, the defendant due diligence rule suppresses exculpatory evidence by shifting the burden of discovery to the defendant and suggesting that the government's disclosure duty is not absolute. This diminution in the prosecutor's absolute burden, in turn, perversely incentivizes the prosecutor to err on the side of delayed disclosure at best, and complete suppression at worst.

Under *Brady* and its progeny, the burden has always been on the prosecutor to "learn of any favorable evidence" and disclose it to the defendant.[107] Relatedly, a core aspect of *Brady* law is that a prosecutor's duty to disclose is absolute, irrespective of any request by the defendant. Indeed, in *Bagley* and *Kyles*, the Court explicitly rejected the request requirement set out in *Agurs* because it placed a burden on defendants to ask about evidence they had no reason to know existed.[108] The defendant due diligence rule, however, places the burden on the defendant to identify and communicate all exculpatory facts, or on defense counsel to investigate and obtain all exculpatory evidence on his own, or on both. In doing so, the rule directly contradicts *Brady*: It is internally inconsistent to demand that the prosecution learn of and disclose exculpatory evidence regardless of any request by a defendant and simultaneously to place a burden on defendants to exercise due diligence in learning of and obtaining the evidence on their own.

Through its burden-shifting framework, the due diligence rule incentivizes prosecutors to delay disclosure of, or even purposely withhold, exculpatory evidence. In contrast, the Court in *Kyles* made clear that *Brady* requires a prosecutor to err on the side of disclosure.[109] Relatedly, numerous courts have recognized that *Brady* implicitly requires the prosecution to "disclose [*Brady*] material at such a time as to allow the defense to use the favorable material effectively in the prepa-

106. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."); United States v. Agurs, 427 U.S. 97, 116, 120 (1976) (noting that a fair trial requires that "evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury," and that knowing use of perjured testimony results in the "corruption of the truth-seeking function of the trial process").

107. *Kyles*, 514 U.S. at 437. As discussed in Part I.A, *infra*, the government is only responsible for disclosing evidence that is within its reach. *See* United States v. Iverson, 648 F.2d 737, 739 (D.C. Cir. 1981) ("[T]he primary obligation for the disclosure of matters which are essentially in the prosecutorial domain lies with the government . . . .").

108. *Kyles*, 514 U.S. at 439.

109. *Id.*

ration and presentation of its case."[110] Under the defendant due diligence rule, however, a prosecutor independently evaluates not only whether the evidence is material but also whether it is sufficiently available to a diligent defendant. A prosecutor's incentive to disclose evidence before trial is diminished if he need only disclose evidence that is not equally accessible to the defendant. For example, under the defendant due diligence rule, a prosecutor could opt to withhold exculpatory evidence if, in his opinion, the evidence was available to the diligent defendant through pretrial discovery or investigation.[111] In this respect, the rule gives even more discretion to individual prosecutors and provides additional justifications for a prosecutor to withhold exculpatory evidence. A prosecutor is forced to speculate not only about whether evidence is material but also about whether the evidence is sufficiently available to a diligent defendant.

By diluting the prosecution's duties and incentives to disclose exculpatory evidence timely, the due diligence rule directly undermines *Brady*'s truth-seeking goal. Courts have recognized that anything less than a "strict compliance" regime inevitably leads to less discovery and disclosure of material exculpatory evidence.[112] When favorable evidence is withheld, the factfinder is handicapped in his ability to discern what actually happened. Thus, the defendant due diligence rule undermines "preserv[ing] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."[113]

Conversely, if the purpose of trials is truth seeking then there is no cost to the government in disclosing favorable evidence. With the exception of evidence that

110. Edelen v. United States, 627 A.2d 968, 970 (D.C. 1993) ("[I]t is now well settled that the prosecution must disclose [*Brady*] material 'at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.'" (quoting United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976))); *see also* Monroe v. Angelone, 323 F.3d 286, 301 (4th Cir. 2003) (although the apparent redundancy of *Brady* information that comes to light after trial may avert a finding of a constitutional violation, it "does not excuse disclosure obligations" before trial); United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) ("[I]n the pre-trial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999); Boyd v. United States, 908 A.2d 39, 62 (D.C. 2006).

111. *E.g.*, Puertas v. Overton, 168 F. App'x 689, 695 (6th Cir. 2006) (finding no *Brady* violation where defendant could have obtained the same facts through pretrial discovery).

112. *See Boyd*, 908 A.2d at 62 ("[T]he most effective mechanism for enforcing the due process rights of criminal defendants and avoiding the needless expenditure of judicial resources is to require strict compliance with the demands of *Brady* . . . in the first instance . . . .").

113. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1417 (1996) (quoting Kyles v. Whitley, 514 U.S. 419, 440 (1995)).

might pose a safety issue (for example, evidence about a confidential informant), there is no risk in disclosing more, rather than less, evidence.[114] Of course, the principle that there is no cost to disclosing exculpatory evidence is often at odds with the prevailing culture in prosecutors' offices, where obtaining convictions—sometimes at any cost—is often the measure of success.[115]

A small number of lower courts have noted the way that the defendant due diligence rule is contrary to *Brady*. In *Wilson v. Beard*,[116] for example, the Third Circuit addressed exculpatory evidence that was, in theory, equally available to the defense and concluded that "the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel."[117]

Although the Supreme Court has never addressed due diligence in the context of the merits of a *Brady* claim, it has done so in the context of federal habeas. Even though the two contexts are distinct, the Court's discussion of defendant due diligence illustrates the Court's grave concerns with placing the burden to discover exculpatory evidence on the defendant. In both *Strickler v. Greene*[118] and *Banks v. Dretke*,[119] the Court discussed at length the scope of the defendant's burden. In *Strickler*, the defendant made a general pretrial request for all exculpatory evidence. In response, the prosecutor claimed that the request was unnecessary because the government had an open-file policy. Despite the open-file policy, the government failed to disclose several documents that cast doubt on the credibility of the state's key witness. The documents consisted of notes from trial preparation and police witness interviews, all of which raised questions about the witness's credibility. Upon discovering the exculpatory evidence, the defendant raised a *Brady* claim in federal habeas. The Fourth Circuit denied relief because the defendant did not establish cause for failing to raise the *Brady* claim in state court.[120] The

114. *See* Neder v. United States, 527 U.S. 1, 18 (1999) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . ." (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)) (internal quotation marks omitted)); *see also* United States v. Bagley, 473 U.S. 667, 692 (1985) ("[T]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." (quoting *In re* Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962)) (internal quotation marks omitted)).

115. For a more detailed discussion of the difficulty in enforcing *Brady*, see Part III.A *infra*.

116. 589 F.3d 651 (3d Cir. 2009).

117. *Id.* at 664 (quoting Wilson v. Beard, No. 05-2667, 2006 WL 2346277, at *14 (E.D. Pa. Aug. 9, 2006)) (internal quotation marks omitted); s*ee also* Boss v. Pierce, 263 F.3d 734, 740 (7th Cir. 2001) (rejecting "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes").

118. 527 U.S. 263 (1999).

119. 540 U.S. 668 (2004).

120. Strickler v. Pruett, No. 97-29, 1998 WL 340420, at *8 (4th Cir. 1998).

Fourth Circuit reasoned that the defendant knew that the police had interviewed the state's star witness and could have filed appropriate discovery motions in state court. In the court's view, a party "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence."[121]

The Supreme Court rejected the Fourth Circuit's analysis because the defendant and his lawyers reasonably relied on the prosecutor's open-file policy.[122] The Court explained that especially in light of the open-file policy, it would be unreasonable to expect defense counsel to know that these records existed and make a discovery request: "In the context of a *Brady* claim, a defendant cannot conduct the 'reasonable and diligent investigation' . . . to preclude a finding of procedural default when the evidence is in the hands of the State."[123] As a caveat and in a footnote, the Court acknowledged that its decision did "not reach, because it was not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."[124] This footnote suggests that the Court was aware of the complications arising from imposing a burden on a defendant to discover *Brady* evidence.

While the Court in *Strickler* took pains to limit its ruling to the facts presented, the Court later strongly suggested in *Banks v. Dretke* that any due diligence requirement in the context of showing cause on habeas review would be contrary to *Brady*. As in *Strickler*, the prosecution in *Banks* had an open-file policy at trial but failed to disclose evidence that undermined the credibility of the state's star witness. In postconviction, the government argued that Mr. Banks failed to establish cause because he could have discovered the *Brady* evidence on his own and, therefore, could have raised his *Brady* claim in state postconviction. Rejecting this argument, the Court noted that "defendants [need not] scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[125] The Court went on to explain that "[a] rule . . . declaring that a 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."[126]

121. *Strickler*, 527 U.S. at 279 (citing Stockton v. Murray, 41 F.3d 920, 925 (4th Cir. 1994)) (internal quotation marks omitted).
122. *Id.* at 289.
123. *Id.* at 287–88.
124. *Id.* at 288 n.33.
125. Banks v. Dretke, 540 U.S. 668, 695 (2004).
126. *Id.* at 696.

Taken together, *Banks* and *Strickler* reflect the Court's concern with a rule by which the "prosecutor may hide, defendant must seek."[127] As the dissent in the Fourth Circuit case, *Bell v. Bell*,[128] observed, "The rule emerging from *Strickler* and *Banks* is clear: where the prosecution makes an affirmative representation that no *Brady* material exists, but it in fact has *Brady* material in its possession, the petitioner will not be penalized for failing to discover that material."[129] Even though the holding was limited to cause analysis in the context of federal habeas, the logic should apply with equal force to the merits of *Brady* claims. Placing a burden on the defendant to investigate has no place in the *Brady* analysis. The holdings in both cases are also arguably limited to circumstances in which the exculpatory evidence is in the exclusive control of the government and the government has assured the defendant that it has disclosed all *Brady* material. Neither of these facts is determinative, however, in evaluating the merits of a *Brady* claim. Just as a defendant's right to material exculpatory evidence does not turn on the making of a *Brady* request, it follows that it also cannot turn on whether the prosecutor has claimed that all *Brady* disclosures have been made.

Although *Banks* is arguably limited in its application, at least one lower court has cited it in rejecting the defendant due diligence rule in evaluating the underlying merits of *Brady* claims. The Maryland Court of Appeals cited *Banks* in concluding that a "defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady*."[130]

III. UNWORKABLE: THE RULE AND COMMON MISPERCEPTIONS

The defendant due diligence rule is not only contrary to the principles on which *Brady* is based, but it is unsupportable as a matter of practice. All versions of the defendant due diligence rule—whether defendant focused or counsel focused—are based on fundamental misconceptions about defendants, defense lawyers, and prosecutors. The justifications for the rule, discussed in Part I, begin to unravel when examined in the context of these false assumptions. While the rule might appear straightforward and easily applied—if the defendant or defense counsel knew, or could have known, of the evidence in question, then there is no violation—there are multiple variables that render its application across cases almost impossible in any objective or uniform way.

127. *Id.*
128. 512 F.3d 223 (6th Cir. 2008).
129. *Id.* at 242 (Clay, J., dissenting).
130. State v. Williams, 896 A.2d 973, 992 (Md. 2006).

This Part examines five key myths on which the defendant due diligence rule rests: (1) prosecutors always have the ability to accurately evaluate what evidence is sufficiently available through due diligence so as to justify not disclosing it; (2) the exculpatory facts in a record are equal in evidentiary value and weight to the record itself; (3) defendants always accurately identify legally relevant facts in their case and communicate effectively with their lawyers; (4) defense lawyers are equal to the prosecutor in resources and in their ability to conduct diligent investigations; and (5) defense counsel's failure to be diligent can be cured by raising ineffective assistance of counsel claims in postconviction.

A. Myth #1: Prosecutors Are Always Effective Predictors of the Scope of a Defendant's Due Diligence

The defendant due diligence rule is premised on the assumption that prosecutors—when they are in the midst of trial preparation—will accurately and honestly assess what exculpatory evidence is sufficiently available to the defendant through due diligence so as to justify not disclosing it. Put differently, to the extent that a court limits the definition of *Brady* evidence to that which is not known to the defense and cannot be known with due diligence, the court places prosecutors in the position of determining what a defendant or defense counsel knows or could know. For this reason, the defendant due diligence rule is not workable, assuming even the most ethical and well-intended prosecutor.

A prosecutor's *Brady* obligation is self-enforced and is self-executing: Prosecutors decide what to disclose.[131] Unless the *Brady* material is disclosed or discovered after trial, *Brady* violations will go undetected.[132] The prevalence of prosecutorial noncompliance with *Brady* and the inherent difficulty in policing prosecutorial misconduct is well documented.[133] These enforcement dilemmas are

131. Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987).

132. *See* Gurwitch, *supra* note 18, at 306–07 (explaining how proving a *Brady* violation is difficult because the evidence is withheld from both the defense and the court).

133. *E.g.*, Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 960 (1998) ("Given the fact that . . . most of what prosecutors do is hidden from public view, it is likely that the recent line of misconduct cases which have reached the appellate courts are but the tip of an iceberg, and that the depth of that iceberg is substantial."); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966 (1984) ("Flagrant misconduct by prosecutors appears to be increasing. Unfortunately, this trend is not of recent origin."). In a recent study of four thousand cases in California from 1997 to 2009 in which there were claims of prosecutorial misconduct, courts explicitly found misconduct in 707 cases, and the offending prosecutors were "almost never discipline[d]." KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, SANTA CLARA UNIV. SCH. OF LAW, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–

magnified when a prosecutor is allowed to—and, indeed, obligated to—decide what evidence is sufficiently accessible or known to the defendant to justify nondisclosure. Under the defendant due diligence rule, prosecutors must guess about what a defendant or defense counsel does not know, could know, or should know.[134] This guessing game is directly at odds with one of the core features of *Brady*: When in doubt, prosecutors must err on the side of disclosure.[135]

In any event, as a practical matter, there is no way for a prosecutor to accurately evaluate what a defendant or defense counsel either knows or could know with diligence. Just as prosecutors have empirically been shown to speculate inaccurately about what evidence is material to the defense,[136] prosecutors also cannot accurately speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigative resources of any given defendant or defense lawyer. There are significant variables, such as the time and financial resources for investigation, that affect a defense lawyer's capacity to uncover evidence. Without violating attorney–client privilege and rules of confidentiality, a defense lawyer cannot tell a prosecutor about the limits on his time and resources; this is precisely why defendants file motions for expert and investigator funding ex parte.[137] While it may seem intuitive that some records, such as the criminal case file at issue in *Lugo*, are readily available to both sides, it is impossible for a prosecutor to know if defense counsel has actually obtained such a record.[138] Yet under the defendant due diligence rule, so long as the prosecutor guesses that the defense lawyer could—in theory—get the case file through investigation, the prosecutor has no disclosure obligation.

Prosecutors are given the authority to play this unchecked role of gatekeeper despite being the defendant's adversary. Although we expect prosecutors to "seek justice before victory,"[139] this theoretical objective is often at odds with the more

2009, at 3 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf.

134. *See* Gershman, *supra* note 18, at 557–58.

135. *See* Kyles v. Whitley, 514 U.S. 419, 439 (1995).

136. *See* Deal, *supra* note 18, at 1800–05.

137. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 86–87 (1985).

138. *See* Lugo v. Munoz, 682 F.2d 7, 9 (1st Cir. 1982) (explaining that the prosecution has a duty to disclose evidence "within its exclusive control," but that it has "no such burden" when the evidence suppressed was "a matter of public record" and "readily available to a diligent defender").

139. Boss v. Pierce, 263 F.3d 734, 743 (7th Cir. 2001).

tangible goal of winning cases.[140] The culture within most prosecutors' offices rewards convictions—often at any cost.[141] "All too often winning—or at least not losing—can become the preeminent value" for the prosecutor.[142] Many prosecutors' offices measure success and assess performance through their conviction rates.[143] As Professor Stephanos Bibas explains, "*Brady* requires prosecutors to look out for defendants' interests, and adversarial-minded prosecutors are poorly suited to do that job."[144] The institutional pressure to convict would surely influence prosecutors in their assessment of defendant due diligence.[145]

Eliminating the defendant due diligence rule would have a negligible impact on prosecutors[146] and, in some ways, would make the task of evaluating *Brady* evidence easier. Rather than trying to determine what facts or records are sufficiently known or available to the defendant, a prosecutor would simply disclose any favorable evidence material to guilt or punishment. In this way, eliminating the rule altogether would promote judicial efficiency and curtail disputes about whether a defendant or defense counsel was diligent.

140. *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 483 (2006) ("The duty to act as a zealous advocate and the duty to act as a minister of justice are not contiguous; some tension between them seems inevitable.").

141. Klein, *supra* note 18, at 876 (explaining that prosecutors work within an "office culture that rewards convictions and breeds an attitude that the prosecution is engaged in a battle against the guilty, so the ends justify the means"); *see also* Burke, *supra* note 18 (discussing generally how psychological factors such as confirmatory bias, selective information processing, and resistance to cognitive dissonance inherently lead to *Brady* violations even by ethical prosecutors).

142. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 357 (5th ed. 2009); *see* Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 537 (2012) (discussing the ways in which "expansive criminal codes and intense pressure to appear tough on crime" result in prosecutors seeking convictions at the expense of their "duty to serve justice").

143. *See* Bandes, *supra* note 140, at 484 ("Generally, the conviction rate will constitute the basic yardstick of an office's efficacy, and those who contribute to that rate will advance."); Bibas, *supra* note 18, at 132 ("Fundamentally, though, the prosecutor remains an adversary, a boxer rather than a referee."); *see also* Klein, *supra* note 18, at 876 ("[T]he failure [by prosecutors] to disclose exculpatory information results from an office culture that rewards convictions . . . .").

144. Bibas, *supra* note 18, at 129–30.

145. For more on prosecutorial discretion and the role of the prosecutor, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

146. *See* Taylor v. Illinois, 484 U.S. 400, 416 (1988) (reasoning that the "burden of . . . [disclosure] in advance of trial adds little to [the] routine demands of trial preparation").

B. Myth #2: Exculpatory Facts Are Always Equal in Value to Exculpatory Records

The second false assumption underlying the rule is that knowledge of a fact and substantive evidence of that fact are of equal value to the accused. A defendant telling his lawyer about an exculpatory fact, however, is different from the lawyer having independently verifiable evidence of that fact. For example, unlike fact witnesses or defendants themselves, records do not have a stake in the outcome of the case and their credibility cannot be questioned in the same way.[147]

This assumption is especially troubling in cases where the analysis is focused on what a defendant knows and could have told his lawyer. In *Spirko v. Mitchell*,[148] the prosecution failed to disclose exculpatory photographs. The photographs depicted the defendant's alleged accomplice in another state at the time of the alleged offense. The Sixth Circuit held that there was no *Brady* violation "because the evidence was available to [the defendant] from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence."[149] Implicit in the court's holding was that knowledge of the mere fact that the accomplice may have been in another state is equal in value to the photographs themselves. Yet, for purposes of trial, the photographs would have held far greater evidentiary value than other forms of evidence, such as witness testimony (even if such testimony could be secured by the defense through subpoena, itself dubious assumption).

The problem extends not only to the question of what a defendant knows but what counsel could find out through independent investigation. In another Sixth Circuit case, *Puertas v. Overton*,[150] the prosecution failed to disclose a state police report on public corruption, which included allegations against some of the officers who investigated the defendant's case. The Sixth Circuit reasoned that there was no *Brady* violation because counsel could have obtained the same information from newspaper accounts of the corruption investigation. In a lengthy dissent, Judge Moore explained that counsel's mere knowledge of an exculpatory fact is not equivalent to learning of compelling corroborating evidence of that fact:

> Independent knowledge of some of the information that happened to be contained in the Report is not the equivalent, for *Brady* purposes, of

147. The exclusionary rule of the Federal Rules of Evidence reflects the concern that defense statements have the potential to be self-serving. *See* FED. R. EVID. 809.

148. 368 F.3d 603 (6th Cir. 2004).

149. *Id.* at 611.

150. 168 F. App'x 689 (6th Cir. 2006).

> knowledge that a Report was issued and that certain claims could be substantiated by the Report. The fact that the Michigan State Police conducted an official investigation from which a Report resulted indicates that the allegations had some amount of credibility and gravity. Although [the defendant] knew about some of the information included in the Report, that an official investigation was conducted and a Report was issued lends credence to the possibility that [the defendant] was set up and that the charges against him were entirely fabricated.[151]

As Judge Moore recognized, to gloss over the differences between types of evidence is to ignore key distinctions in evidentiary weight and even admissibility. For example, newspaper articles, which often contain multiple layers of hearsay, would be less likely to be admitted than a police report, which could be introduced into evidence through the officer who wrote the report and who, presumably, has personal knowledge of the contents of the report. Similarly, in *Fullwood v. Lee*,[152] calling a police officer to testify about Mr. Fullwood's condition at the emergency room the night of the stabbing would hold much more evidentiary weight than calling the defendant himself. The defendant's testimony would be viewed as self-serving, as compared to the police officers' testimony, which would be viewed as more credible. Calling the police officer as a witness would also avoid forcing the defendant to choose between testifying and invoking his Fifth Amendment privilege.

C. Myth #3: Defendants Always Accurately Identify and Communicate Legally Relevant Facts to Their Attorneys

The defendant due diligence rule also naïvely assumes that defendants can always adequately identify legally significant facts and communicate those facts to their lawyers. In *Fullwood*, the court assumed that the defendant would repeat what he told the police—namely that he had used cocaine and lost control at the time of the crime—to his lawyer.[153] In *Occhicone v. Moore*,[154] discussed in Part I.C, the court similarly determined that there was no *Brady* violation when the state failed to disclose interview notes from state witnesses who said they saw Mr. Occhicone intoxicated shortly before the alleged offense. The court reasoned that

151. *Id.* at 705 (Moore, J., dissenting).
152. 290 F.3d 663 (4th Cir. 2002).
153. *Id.* at 686 ("Fullwood, better than anyone, knew about his cocaine use . . . and knew that he had recounted this fact to [the police]. . . . The "purported *Brady* material, therefore, was known to Fullwood and available for his use.").
154. No. 8:01-CV-2136T27, 2005 WL 1073936 (M.D. Fla. Mar. 31, 2005).

since the witnesses were with Mr. Occhicone before the offense, "no one better than Occhicone himself could have known about these witnesses."[155]

Although it might seem reasonable to expect that a defendant would tell his lawyer any fact helpful to his case, multiple factors—such as a defendant's mental illness, his lack of knowledge about what facts are relevant, his feelings of shame or embarrassment, or his condition on the night of the offense—can impair a defendant's ability to identify legally significant facts and communicate those facts to his lawyers.

Indeed, many defendants are diagnosed as developmentally disabled[156] or suffer from intellectual disabilities, low cognitive functioning, organic brain damage, or traumatic brain injuries.[157] Intellectual disabilities in particular often limit defendants' abilities to perceive themselves and communicate effectively with their attorneys.[158] Other factors, such as age, education, a history of substance abuse, and surviving physical or sexual abuse, also explain why a defendant might not identify and communicate helpful facts.[159] To assume that a defendant always acts rationally—that is, just like someone not involved in the system—is to

155. *Id.* at *6.

156. *See generally* Robert L. Schalock et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007).

157. *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf (reporting that more than half of all prison and jail inmates were found to have a mental health problem).

158. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430 (1985) ("Certain dimensions of self-concept and self-perception are . . . often affected by mental retardation. It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities or out of defensiveness about their handicap." (footnote omitted)).

159. *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 918–42 (1999) (discussing children's ability to understand and participate in legal proceedings); Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406–13 (1999) (concluding that psychosocial factors and cognitive factors differentiate adolescents and adults in terms of understanding competence); Ellis & Luckasson, *supra* note 158, at 427–32 (discussing the challenges of representing mentally disabled clients); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 787–88 (2010) (discussing the effects of age, cognitive limitations, and immaturity in the context of the need for effective counsel); Rebecca J. Covarrubias, Comment, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 440–53 (2009) (explaining the difficulties in identifying defendants' mental illness).

ignore the significant factors that contributed to the defendant's involvement in the criminal justice system in the first place.[160]

It is hardly a novel proposition that defendants often cannot or do not accurately report facts relevant to their case. For example, in the ineffective-assistance-of-counsel context, the Supreme Court has explicitly held that defendants cannot be expected to identify legally relevant facts and communicate them to their lawyers. In *Rompilla v. Beard*,[161] a capital case, trial counsel tried to interview their client, Mr. Rompilla, about his life history in preparation for the penalty phase of the trial.[162] Mr. Rompilla told his lawyer that he was "bored being here listening" and returned to his cell. After that, counsel did little else to investigate the case.[163] The Court held that counsel were ineffective for failing to conduct a reasonable investigation into Mr. Rompilla's mitigation case, which included a troubled childhood and the fact that Mr. Rompilla suffered from mental illness and alcoholism.[164] The Court recognized that criminal defendants are not the best sources of information because the evidence is "surrounded by . . . emotional . . . barriers,"[165] and that Mr. Rompilla's attorneys "relied unjustifiably on Rompilla's own description of an unexceptional background."[166] The Court admonished counsel explicitly not to rely solely on client self-reporting and instead to pursue other avenues of inquiry as part of a competent mitigation investigation.[167]

Rompilla is no anomaly. The Court has repeatedly recognized that young defendants, as well as defendants with mental retardation, are limited in their capacity to understand the proceedings against them and to assist their counsel.[168]

160. *See* Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After* Schriro v. Landrigan, 62 FLA. L. REV. 721, 745 (2010) ("It is difficult to see how highly-functioning individuals, let alone most capital defendants—who are frequently indigent, suffer from cognitive deficits, have histories of substance abuse, or are survivors of physical or sexual abuse—could make life-altering decisions in a rational manner so soon after [being convicted of a capital offense].").

161. 545 U.S. 374 (2005).

162. *Id.* at 381.

163. *Id.* at 381–82.

164. *Id.* at 381–90.

165. Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 734 (2008).

166. *Rompilla*, 545 U.S. at 379.

167. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 925–26 (2008).

168. *See* Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012) ("Mandatory life without [the possibility of] parole for a juvenile . . . ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."); Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) ("[T]he features that distinguish juveniles from adults also

The ABA Guidelines governing the representation of capital defendants similarly provide that counsel cannot rely solely on their clients to discover mitigating evidence, reflecting the recognition that clients may not be able to accurately explain and describe their history.[169]

This logic applies with equal force in the context of *Brady* analysis and the defendant due diligence rule. The Court's holding in *Rompilla* cannot be reconciled with the defendant due diligence rule. If a defendant cannot be relied on to report the facts of his life under *Rompilla*, then how can he be expected to report facts about his case under the defendant due diligence rule? Although favorable facts about a defendant's life are arguably different in nature to favorable facts about the pending case, both are subject to disclosure under *Brady*.[170] Moreover, the baseline problem is the same: A defendant is often unable to recognize and relate facts that are legally favorable to his case.

Even if a defendant had the cognitive ability to understand the exculpatory facts, he might not—as the law has repeatedly recognized—have the ability or knowledge to act in his own best interest. For example, the limited capacity of a young person to protect his own interests is the stated justification for affording youth special protections in juvenile court.[171] Similarly, the limitations on a defendant's right to represent himself in a criminal case exist because of the

put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense."); Atkins v. Virginia, 536 U.S. 304, 318 (2002) ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").

169. *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1005 (2003) (Guideline 10.5: Relationship With the Client), *available at* http://ambar.org/2003Guidelines; *see also* O'Brien, *supra* note 165, at 722–26.

170. *See* Cone v. Bell, 129 S. Ct. 1769, 1783–86 (2009) (finding evidence that defendant "was impaired by his use of drugs around the time his crimes were committed" to constitute *Brady* information and remanding for assessment of materiality).

171. *See Miller*, 132 S. Ct. at 2468 ("[I]n imposing a State's harshest penalties, [that is, life without the possibility of parole,] a sentencer misses too much if he treats every child as an adult."); Schall v. Martin, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves. . . . [I]f parental control falters, the State must play its part as *parens patriae*."); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) ("[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . [He] is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.").

Court's concern with a defendant's ability to act as his own lawyer.[172] The Court's jurisprudence on competency to stand trial also recognizes that a defendant does not always have the ability to understand the proceedings against him.[173] These concerns about the capacity of defendants to act in their best interests similarly apply in the context of the defendant due diligence rule.

It is also unrealistic to assume that defendants are able to isolate and identify facts that have legal significance.[174] Lawyers, not defendants, are trained to recognize legally relevant facts. Courts have therefore acknowledged limitations on a defendant's ability to weigh in on legal decisions such as what witnesses to call, what motions to file, and what arguments to raise. A defendant might inadvertently overlook important favorable facts, and may also believe it is in his best interest to withhold the information from his attorney. This is precisely why defendants need, in Justice Sutherland's words in *Powell v. Alabama*,[175] the "guiding hand" of counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[176]

In turn, even if defendants had the ability to identify legally significant facts, the assumption that defendants will convey those facts to their lawyers is unrealistic. It is certainly true that defense lawyers are obligated to create and maintain a relationship with their clients,[177] and that building a trusting relationship with

172. *See* Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 133 (2004) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (quoting Martinez v. Court of Appeal, 528 U.S. 152, 162 (2000)) (internal quotation marks omitted)).

173. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (defining competency to stand trial).

174. *See* Ho, *supra* note 160.

175. 287 U.S. 45 (1932).

176. *Id.* at 69.

177. STANDARDS FOR DEF. FUNCTION Standard 4-3.1 ("Defense counsel should seek to establish a relationship of trust and confidence with the accused . . . .").

clients is part of providing effective representation in criminal cases.[178] In practice, however, there are multiple barriers to building a trusting relationship, and defendants may not tell their lawyers everything they could or should.

First, just as mental illness or age may inhibit a defendant's ability to identify facts, these limitations also pose a challenge to communication. In *Atkins v. Virginia*,[179] the Court explicitly recognized that "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[180]

Second, the vast majority of defendants are indigent and are represented by appointed lawyers they did not choose.[181] It is often the case that court-appointed lawyers and public defenders have such high case loads that there is little time to build trusting relationships with clients.[182] Appointed lawyers enter the lives of their clients at points of crises. Defense attorneys often counsel clients about the advantages and disadvantages of going to trial or taking a plea—a conversation that is difficult even under the best of circumstances.[183] To compound the problem, public defender offices are themselves in a state of crisis: Most are facing

178. *See* Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006) (citing ABA Standards for Criminal Justice and holding that defendant's appellate counsel was ineffective for a number of reasons including his failure to form a relationship with the client); Commonwealth v. Williams, 863 A.2d 505, 528–29 (Pa. 2004) (holding that defense counsel's deficient performance in connection with the penalty phase investigation included his failure to develop a meaningful relationship with his client); Eaton v. State, 192 P.3d 36, 63–64 (Wyo. 2008) (citing with approval the commentary to the ABA Guidelines that discusses the attorney's duty to develop a relationship with the "difficult client").

179. 536 U.S. 304 (2002).

180. *Id.* at 320–21.

181. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 41–45 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (discussing the crisis in indigent defense); NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) ("Poor people account for more than 80% of individuals prosecuted."); Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 (2010).

182. *See, e.g.*, Bright, *supra* note 181, at 691, Marie-Pierre Py, *Public Defender System Fails Georgians and Their Lawyers*, ATLANTA J.-CONST., Mar. 30, 2009, at A6, *available at* 2009 WLNR 5935629.

183. *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 185 (2000) ("Much more often than not, counsel must bring bad news—the weight of the evidence or the possible sentence, for example—that clients and their families are loathe to hear. Court-appointed counsel, in particular, must perform these functions not having been chosen by the client and, therefore, facing a trust barrier often compounded by socio-economic and racial factors.").

severe budget cuts, high caseloads, few resources, and low pay.[184] Even the most well-intended court-appointed lawyer may have little time to establish a relationship of trust and openness with every client.[185] For many defendants, they see no difference between a public defender and a prosecutor: Both are lawyers employed by the government and both are part of the system that imprisons people.[186] As a result, defendants may not trust their lawyers and may be unwilling to share all the information about their case.[187]

Perceived and real differences in race and socioeconomic status also affect communication between clients and their lawyers. The criminal justice system disproportionately impacts poor people of color,[188] whereas lawyers are disproportionately white and less likely to be poor.[189] These differences can create barriers to communication[190] and can undermine the attorney–client

184. *See* discussion *infra* Part III.D.

185. *See* Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009) (discussing the impact of high case loads on indigent defense representation).

186. For more discussion on the everyday challenges of indigent defense representation, see generally AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009); STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE (2006); DAVID FEIGE, INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE (2006).

187. *See* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 86 (1993) ("The lack of trust is a major obstacle to establishing an effective attorney–client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: 'Did you have a lawyer when you went to court?' 'No. I had a public defender.'").

188. *See* SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (describing the extreme racial disparities in the criminal justice system).

189. In 2000, only 15.9 percent of judges were people of color, and only 9.7 percent of lawyers were people of color. *See* ABA, THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 3 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/goal_2010.authcheckdam.pdf; *see also* Charles J. Ogletree, Jr., *Beyond Justification: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1283–84 (1993) (discussing how race and class means that "not all public defenders will see themselves mirrored in their clients").

190. *See* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1 (2008) (discussing the role of race in building attorney–client relationships); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 231 (2002) (discussing race and cross-cultural lawyering); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 388–403 (2002) (examining the effects of cultural differences on traditional interviewing and counseling models).

relationship.[191] A defendant's relationship with his lawyer is shaped by the experiences and biases of both the client and attorney.[192] Perceived and real differences in language and culture create additional challenges to communication.[193] The extensive literature on the importance of culturally aware and competent lawyering is evidence that establishing a meaningful attorney–client relationship takes, at a minimum, time and effort.[194]

Finally, the nature of the exculpatory facts might create a barrier to communication. Many of the most legally helpful facts to a defendant in a case, especially in a capital case, involve painful or embarrassing events, or expose other sensitive aspects of a defendant's case or life. The mere act of having to relive and tell these facts is itself a barrier.

Most cases that employ the defendant due diligence rule ignore the critical disconnect between the rule and defendants' limited ability to recognize and report legally significant facts. For example, as previously noted, the court in *Occhicone* ruled that there was no *Brady* violation when the state failed to disclose evidence about witnesses who could have testified that the defendant appeared drunk at the time of the crime. Since the defendant knew whom he was with that night, there was no *Brady* violation.[195] The court's analysis, however, assumes that the defendant willfully withheld the favorable information. It ignores other explanations for why the defendant may not have told his lawyer: He may have been embarrassed, he may have mistrusted his attorney, he may have been too intoxicated to remember whom he was with, or he may have suffered other mental impairments. It also ignores that the defendant may not have realized that being

191. *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001) (discussing the need for lawyering across cultures); Kenneth P. Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns With Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 52 (2002) (discussing the ways in which race affects the attorney–client relationship); Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42.

192. *See* Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 374 (1997) (discussing how attorney–client relationships are impacted by race, gender, and culture); Antoinette Sedillo Lopez, *Beyond Best Practices for Legal Education: Reflections on Cultural Awareness—Exploring the Issues in Creating a Law School and Classroom Culture*, 38 WM. MITCHELL L. REV. 1176 (2012) (discussing how cultural values of lawyers affect attorney–client relationships).

193. *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1007–31 (2007) (discussing the challenges of lawyering across language barriers); Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219, 230–43 (2007) (discussing the impact of culture on building trust in the attorney–client relationship and the resulting ethical choices attorneys may face in representing immigrant clients).

194. *See* sources cited *supra* notes 188–193.

195. Occhicone v. Moore, No. 8:01-CV-2136T27, 2005 WL 1073936, at *6 (M.D. Fla. Mar. 31, 2005).

intoxicated could negate intent or otherwise be the basis of a defense. The Ninth Circuit expressed such concerns in *United States v. Howell*,[196] rejecting the government's argument that it did not violate *Brady* in failing to disclose police reports because the defendant knew the exculpatory facts contained therein:

> Defendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences. Consequently, "[d]efense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government, regardless of the defendant's knowledge or memory of the disclosed statements."[197]

D. Myth # 4: The Defense Is Equal to the Prosecution in Power and Resources

An additional misperception on which the defendant due diligence rule is based is that defense attorneys are adversarial equals—in both power and resources—to the prosecution. There is ample evidence that prosecutors and defense lawyers (especially court-appointed lawyers) are not equals. While defense lawyers are expected to investigate and the failure to do so constitutes ineffective assistance of counsel,[198] this constitutional rule does not—nor could it legitimately—reflect any assumption that defense lawyers have equal capacity to conduct an investigation as compared to the average prosecutor.

To begin with, prosecutors and defense lawyers are not equals under the law.[199] As the representative of the state, each individual prosecutor has discretion to decide which cases to bring, whom to charge, whether to offer a plea, the content of the plea, what sentence to recommend, and whether to seek the death penalty.[200]

Along with that power comes access to resources. Prosecutors at all levels of government have at their disposal law enforcement personnel who handle most, if

196. 231 F.3d 615 (9th Cir. 2000).

197. *Id.* at 625 (alteration in original) (citation omitted) (quoting United States v. McElroy, 697 F.2d 459, 465 (2d Cir. 1982)).

198. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003).

199. *Cf.* Erwin Chemerinsky, Lecture, *Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process*, 60 HASTINGS L.J. 1129, 1131 (2009) (discussing how the Federal Sentencing Guidelines, mandatory minimums, and California's three strikes law "have transferred a tremendous amount of power from judges to prosecutors").

200. *See* Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2146 (2010); Gershman, *supra* note 18, at 532 ("[T]he criminal justice system typically features an imbalance in power and resources that increasingly favors the prosecutor . . . .").

not all, of the investigation. Unlike appointed counsel, a prosecutor does not need to ask the court for funding for investigative assistance. Unlike appointed counsel, prosecutors have access to local, state, and federal law enforcement officers who scour the crime scene for evidence, track down every witness, and locate every relevant record. Prosecutors also have broader subpoena power.[201]

Most defendants, on the other hand, are represented by public defenders or appointed lawyers who have fewer resources.[202] In this way, indigent criminal defendants are at a severe disadvantage. As previously mentioned, the provision of indigent defense in this country is in crisis.[203] State and local public defender offices are underfunded. Individual public defenders often handle over one hundred cases at a time, often with little or no investigative support. Because of the funding crisis, court-appointed lawyers often provide representation that violates their professional duties.[204] As a result, most court-appointed defense lawyers lack the investigative resources to discover *Brady* material after trial, much less before trial even begins.[205] The investigative resources at the disposal of an average prosecutor always outmatch those available to an average public defender or appointed lawyer.

Not only does the defendant due diligence rule fail to account for the differences in investigative resources, but it also assumes that witnesses are just as likely to talk to a defense attorney or investigator as they are to a prosecutor or police officer. For example, as previously mentioned, some courts have found that the failure to disclose exculpatory statements of state witnesses does not violate *Brady*.[206] The reasoning focuses on the fact that if either the defendant or his lawyer knew the name of the state witness and if counsel could have interviewed the witness on her own, then there is no *Brady* violation.[207] This reasoning is problematic because it assumes the defendant will convey this information to his

201. *See* Bibas, *supra* note 18, at 132.
202. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 181, at 61 (discussing resource inequalities between court-appointed defense attorneys and the prosecution).
203. *See* sources cited *supra* note 181.
204. *See* sources cited *supra* notes 181–182.
205. *See* Bibas, *supra* note 18, at 132.
206. *See* Occhicone v. Moore, No. 8:01-CV-2136T27, 2005 WL 1073936, at *6 (M.D. Fla. Mar. 31, 2005) (finding no *Brady* violation for failure to turn over evidence about witnesses who said the defendant appeared intoxicated at the time of the crime because the defendant knew whom he was with).
207. *See* United States v. Roane, 378 F.3d 382, 402 (4th Cir. 2004) (finding no *Brady* violation for failure to disclose police interview notes from state witnesses who provided defendant with an alibi, noting that "obviously, [the defendant] knew who he was with on the evening of the . . . murder—he had no need for the Government to provide him with such information").

lawyer and it assumes the witness will talk to the defense lawyer or investigator. Witnesses may be unlikely, however, to talk to lawyers who represent someone they dislike or distrust.[208] On the other hand, witnesses may be more willing to speak with police.

In *Boss v. Pierce*,[209] the Seventh Circuit examined defendant diligence in the context of exculpatory information that was known to a defense witness but not to defense counsel. In concluding that the prosecution violated *Brady*, the court explicitly rejected "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes. . . . [I]t is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses. Sometimes, a defense witness may be uncooperative or reluctant."[210]

It is also impossible to assess objectively what information is accessible to a defense attorney through due diligence. The vast differences in funding and resources among public defender offices and court-appointed lawyers makes it impossible to have a one-size-fits-all definition of defendant due diligence. Some public defender offices have no staff investigators and must ask the court for investigators. Other public defenders have staff investigators, but the investigators may have enormous caseloads. In short, for some defense attorneys, the task of copying a case file from a clerk's office is easily completed, while for other defense attorneys who have no investigative support, pulling a case file is not as easy as it sounds.[211] This reality is why, as the Fifth Circuit noted in passing in a procedural default case, "if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial."[212]

This is not to suggest that state and federal prosecutors must singlehandedly ameliorate the indigent defense crisis by conducting the investigation for the defense. Obviously, prosecutors must disclose only what *Brady* mandates—namely, evidence that is material and favorable to the defense. What is clear is that the defendant due diligence rule does not account for the differences in resources between prosecutors and defense lawyers and among court-appointed lawyers. Because of the crisis in indigent defense, many defendants already receive ineffec-

208. *See* Bibas, *supra* note 18, at 132.
209. 263 F.3d 734 (7th Cir. 2001).
210. *Id.* at 740.
211. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 181, at 53, 65, 93.
212. Johnson v. Dretke, 394 F.3d 332, 337 (5th Cir. 2004), *aff'd*, 442 F.3d 901 (5th Cir. 2006).

tive assistance of counsel.[213] Defendants should not be further penalized by having the government withhold evidence under the defendant due diligence rule.

E. Myth #5: Ineffective Assistance of Counsel Claims Can Cure Any Prejudice to Innocent Defendants

The final misperception on which the defendant due diligence rule rests is that defense counsel's failure to be diligent can be remedied through ineffective assistance of counsel (IAC) claims on appeal or in postconviction proceedings.[214] A defendant's ability to raise an IAC claim, however, does not mitigate the ways in which the defendant due diligence rule undermines a defendant's due process right to exculpatory evidence.

Even though defense counsel's failure to be diligent could be grounds for an independent IAC claim,[215] as a legal remedy IAC does not cure the underlying *Brady* violation for several reasons. First, the ability to raise an IAC claim for failure to be diligent assumes that, at some point, the defendant discovered the *Brady* evidence in question. As discussed in Parts III.A–D, however, there are many reasons—among them the perverse incentives created by the defendant due diligence rule itself—that *Brady* evidence is never disclosed or discovered. If the defendant never discovers the *Brady* evidence, then there is no factual basis for an IAC claim.

Second, IAC is not a substitute for obtaining *Brady* evidence before trial when the evidence could be used to prevent a conviction in the first place.[216] Assuming for the moment that a defendant prevails on an IAC claim, the relief is cold comfort if he has been in prison for years or, worse, awaiting execution. Moreover, the defendant may have an impaired ability to gather compelling evidence of innocence in a retrial years later, a reality underlying the imposition of statutes of limitation in criminal cases.

Third, and perhaps most significant, the vast majority of defendants are unrepresented in both state and federal postconviction proceedings.[217] Thus, nu-

213. *See* sources cited *supra* note 181.

214. *See* sources cited *supra* note 16.

215. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

216. Boyd v. United States, 908 A.2d 39, 62 (D.C. 2006) (holding that "the most effective mechanism for enforcing the due process rights of criminal defendants and avoiding the needless expenditure of judicial resources is to require strict compliance with the demands of *Brady* . . . in the first instance").

217. The Supreme Court has never held that defendants are entitled to counsel in postconviction proceedings. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today." (citation omitted)); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989)

merous defendants must navigate the complicated procedural hurdles of postconviction proceedings and raise any *Brady* claim on their own. For these reasons, in addition to the exacting standard of review in postconviction, the chances of prevailing on an IAC claim are slim.[218]

Fourth, IAC does nothing to address some of the more problematic aspects of the defendant due diligence rule. For example, an IAC claim would have no effect on a prosecutor's incentive to comply with *Brady* before trial. In addition, IAC would not cure a deliberate failure to disclose in cases where the defendant himself, rather than counsel, had knowledge of the exculpatory fact. In a case like *Fullwood*, where the court faulted the defendant for not telling his lawyer about the statement he made to the police, IAC would not entitle Mr. Fullwood to a new trial.

In sum, the IAC inquiry is unique and distinct from *Brady*. As the Supreme Judicial Court of Massachusetts noted, "[T]he omissions of defense counsel (a) do not relieve the prosecution of its obligation to disclose exculpatory evidence and (b) may provide the defendant with an independent claim of an unconstitutional denial of the effective assistance of counsel."[219]

IV. PUTTING BITE BACK INTO *BRADY*: ABANDONING THE DEFENDANT DUE DILIGENCE RULE

As this Article has demonstrated, there is no doctrinal support for the defendant due diligence rule, nor is it workable in light of the realities of criminal practice. The only solution, it would seem, is for courts to adopt the approach taken by the Tenth and D.C. Circuits: "[W]hether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information. 'The only relevant inquiry is whether the information was exculpatory.'"[220] The diligence—or effectiveness—of a defendant or defense counsel has no role in evaluating whether the government

(plurality opinion) ("[T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases."). Every state but Alabama provides, via statute, the right to postconviction counsel in death penalty cases. The Court recently noted this inequity in *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012).

218. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 49–56 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (demonstrating that error rates are much lower in state habeas proceedings than on direct appeal).

219. Commonwealth v. Tucceri, 589 N.E. 2d 1216, 1221 (Mass. 1992).

220. United States v. Quintanilla, 193 F.3d 1139, 1149 (10th Cir. 1999) (citation omitted) (quoting Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995)) (some internal quotation marks omitted).

violated *Brady*. Simply put, the defense's failure to investigate does not absolve the prosecutor of his duty to disclose favorable evidence.

Nonetheless, the rule persists, presumably because of its intuitive appeal. Such appeal is likely based not only on the misperceptions discussed in Part III but also perhaps on a fear that without such a rule, defendants will receive a windfall of some kind. Yet eliminating the defendant due diligence rule will not result in a boon for defendants and their lawyers. If there were no due diligence requirement, a prosecutor would only be required to disclose what he is already obligated to disclose—namely, anything in his possession that is favorable and material.

Although possession is defined broadly for purposes of *Brady*, it is not without limits.[221] A prosecutor need only disclose favorable evidence known to him and to "others acting on the government's behalf in the case."[222] There is no expectation that prosecutors investigate the case for the defense lawyer or seek out favorable material beyond the parameters established by *Kyles v. Whitley*.[223] If the prosecutor does not possess the evidence within the *Kyles* definition of possession, there is no suppression for *Brady* purposes. Even more fundamentally, if the goal of the adversarial system is to uncover the truth, then a regime incentivizing more discovery—rather than less—supports that objective.

Finally, as a matter of efficiency, we should reject a regime that requires the government and the defense to expend resources to collect redundant evidence. After all, taxpayers pay public defender salaries. It costs the government nothing to simply disclose any evidence that is favorable and material before trial. Further, "[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden."[224]

CONCLUSION

The emergence of the defendant due diligence rule helps explain why, in many respects, *Brady* has become an empty promise. By shifting the burden of disclosure away from the government, courts have ensured that the "prosecutor may hide, [and the] defendant must seek."[225] As a result, *Brady* itself is

221. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (explaining that a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").
222. *Id.*
223. 514 U.S. 419 (1995).
224. Giglio v. United States, 405 U.S. 150, 154 (1972).
225. Banks v. Dretke, 540 U.S. 668, 696 (2004).

undermined, as is the "public respect for the criminal process" that focuses on the "underlying fairness of the trial."[226] To the extent that prosecutors are asked to speculate about what a defendant or his attorney knows or should know, the truth-seeking purpose of criminal trials is jeopardized and the due process rights of criminal defendants are violated.

226. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).