CHAPTER 7 The Prosecutor and the Adversarial System

CHAPTER OUTLINE

7.1 THE PROSECUTOR'S DUTY TO DO JUSTICE

Standard 3-1.2 The Function of the Prosecutor

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(c) The duty of the prosecutor is to seek justice, not merely to convict.

—*American Bar Association Standards Relating to the Administration of Criminal Justice (3d ed. 1992)*

The American legal system is adversarial. In its ideal form, the adversarial system pits two equally resourceful, competent, and dedicated advocates against each other. Their job is to win the case and defeat their opponent. To this end, they make the strongest possible showing on their clients' behalf and strive to create and expose weaknesses in their counterpart's case. The advocates gather, present, and test evidence and advance all tenable arguments to promote their clients' interests. A disinterested finder of fact—a judge or jury—considers and evaluates the evidence according to rules of law. An impartial judge presides over the proceedings. Through this clash of equal and opposing advocates, in a fair and open forum, the truth presumably will emerge.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York,* 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). "The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.' . . . To this end we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made." *United States v. Nobles,* 422 U.S. 225, 230, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (cite omitted).

In this and the following chapter we study the legal functions, duties, and responsibilities of the formal advocates in the criminal justice system: the prosecutor and the defense lawyer. We know that in practice the adversarial system of justice often falls short of its lofty ideals. The vast majority of decisions affecting the administration of criminal justice are made outside of the courtroom and greatly in advance of court appearances. The low-visibility decisions made routinely by law enforcement officers and through informal discussions between prosecutors and defense counsel seem far removed from the contemplated adversarial norm. Moreover, it unfortunately is not true that all prosecuting and defense attorneys are equally matched and equipped with comparable skills and resources. Nor is it safe to assume that criminal defendants of different means and socioeconomic status receive equivalent brands of justice.

Nevertheless, it is important to scrutinize the basic premises of the adversarial system and in particular to examine the roles of the respective advocates. Do the prosecutor, in representing the government, and the defense lawyer, in representing the accused, have equivalent obligations and responsibilities? For example, should a prosecutor seek the conviction (and maximum punishment) of all defendants who appear in court, irrespective of claims of innocence or individual circumstances? Should defense counsel advocate with equal vigor on behalf of clients whom she believes are innocent and those whom she knows are guilty (and quite possibly dangerous)? To what extent do rules promoting fairness and other legal objectives check the respective advocates from a "no-holds barred" quest for a verdict of guilty or not guilty?

We focus in this chapter on the role of the prosecutor. Prosecuting attorneys exercise considerable discretion in deciding who to charge, which specific charges to bring, and what punishment to seek. The year before he was appointed to the Supreme Court, while he was still a federal prosecutor, Justice Robert Jackson described the prosecutor as having "more control over life, liberty and reputation than any other person in America. His discretion is tremendous." Jackson, "The Federal Prosecutor," 24 *Journal of the American Judicature Society* 18 (1940). Many others have agreed. "[The prosecutor] has become the most powerful and important official in our criminal process." Arenella, "Reforming the Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication," 78 *Michigan Law Review* 463, 498 (1980). "The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty than any other public official." Note, "Prosecutor's Discretion," 103 *University of Pennsylvania Law Review* 1057 (1955).

As reflected by the American Bar Association (ABA) standard with which we opened this chapter, a prosecutor in the American system of criminal justice is not expected in all cases single-mindedly to pursue the goal of obtaining a conviction. "The duty of the prosecutor is to seek justice." As Justice Sutherland explained in *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. . . .

In the following section, we examine the prosecutor's charging discretion. We focus on constitutional limitations on the reasons for initiating a prosecution and for filing charges of different degrees of seriousness. We next explore the prosecutor's duties regarding the use of perjured testimony and the disclosure of potentially exculpatory evidence to the defendant, even though such disclosure might weaken the prosecution's case. We conclude by considering destruction of evidence by the police and examining whether the prosecutor and the police have similar duties regarding the preservation and disclosure of evidence that could be useful to the defense.

7.2 THE PROSECUTOR'S CHARGING DISCRETION

As we discussed in the previous chapter, prosecutors are the dominant figure in the charging

process. Formal charges are made in many jurisdictions through bills of indictment returned by a grand jury. Although a grand jury has the authority not to return true bills of indictment, this discretion is rarely exercised. The prosecutor largely controls the charging process by submitting bills of indictment to the grand jury and presenting supporting evidence. In other jurisdictions, prosecutors directly file criminal charges through the use of an information, which is followed by a preliminary hearing. Although the prosecutor's charging discretion is vast, it is not without limits. We consider some of those limits in the following cases.

CASE 7.2A Selective Prosecution

Wayte v. United States, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)

Justice **Powell** delivered the opinion of the Court. . . .

[A Presidential Proclamation issued in July 1980 directed males born during 1960 to register with the Selective Service System. Registrants' names and other relevant information were collected so that Selective Service would be able to identify men eligible for military duty in case a need later arose to draft them. The knowing and willful failure to register was a crime punishable by fine and imprisonment.

[The defendant, David Wayte, was a member of the cohort of young men who were required to register, but he declined to do so. "Instead, he wrote several letters to Government officials, including the President, stating that he had not registered and did not intend to do so." Wayte's name thus was included in a Selective Service file of men who personally reported that they would not register or who were reported by others as having failed to register. Selective Service adopted a "passive enforcement" policy, under which only men in this file would be investigated or prosecuted for nonregistration. Pursuant to this policy, Selective Service mailed a letter in June 1981 to each reported violator, explaining that he was delinquent, requesting that he register, and advising him that he faced possible prosecution for noncompliance. Wayte received such a letter and ignored it.

[Thereafter, Wayte was one of approximately 285 men whose names were referred to the FBI and to U.S. Attorneys in the districts where the nonregistrants lived. Pursuant to the Justice Department's so-called "beg" policy, nonregistrants were not immediately prosecuted. Instead, U.S. Attorneys wrote the men letters warning that prosecution would be considered unless registration was completed by a designated date, and FBI agents attempted to interview nonregistrants before a prosecution was started. Finally, the President announced a "grace period" until the end of February 1982, throughout which nonregistrants could comply without penalty. Wayte still refused to register.] . . .

Over the next few months, the Department decided to begin prosecuting those young men who, despite the grace period and "beg" policy, continued to refuse to register. It recognized that under the passive enforcement system those prosecuted were "liable to be vocal proponents of nonregistration" or persons "with religious or moral objections." It also recognized that prosecutions would "undoubtedly result in allegations that the [case was] brought in retribution for the nonregistrant's exercise of his first amendment rights." The Department was advised, however, that Selective Service could not develop a more "active" enforcement system for quite some time. Because of this, the Department decided to begin seeking indictments under the passive system without further delay. On May 21, 1982, United States Attorneys were notified to begin prosecution of nonregistrants. On June 28, 1982, FBI agents interviewed petitioner, and he continued to refuse to register. Accordingly, on July 22, 1982, an indictment was returned against him for knowingly and willfully failing to register with the Selective Service.

Petitioner moved to dismiss the indictment on the ground of selective prosecution. He contended that he and the other indicted nonregistrants were "vocal" opponents of the registration program who had been impermissibly targeted (out of an estimated 674,000 nonregistrants) for prosecution on the basis of their exercise of First Amendment rights. After a hearing, the District Court for the Central District of California granted petitioner's broad request for discovery and directed the Government to produce certain documents and make certain officials available to testify. The Government produced some documents and agreed to make some Government officials available but, citing executive privilege, it withheld other documents and testimony.

On November 15, 1982, the District Court dismissed the indictment on the ground that the Government had failed to rebut petitioner's prima facie case of selective prosecution.

The Court of Appeals reversed. We granted certiorari on the question of selective prosecution.

In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined

Wayte v. United States, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) **CASE**

by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not " 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." In particular, the decision to prosecute may not be " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' " including the exercise of protected statutory and constitutional rights.

It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. All petitioner has shown here is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. Indeed, he could not have done so given the way the "beg" policy was carried out. The Government did not prosecute those who reported themselves but later registered. Nor did it prosecute those who protested registration but did not report themselves or were not reported by others. In fact, the Government did not even investigate those who wrote letters to Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law. The Government, on the other hand, did prosecute people who reported themselves or were reported by others but who did not publicly protest. These facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden. Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government.

Even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. The evidence he presented demonstrated only that the Government was aware that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims. As we have noted, however: " 'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

In the present case, petitioner has not shown that the Government prosecuted him because of his protest activities. Absent such a showing, his claim of selective prosecution fails. . . .

Justice **Marshall,** with whom Justice **Brennan** joins, dissenting. . . .

Notes and Questions

1. Wasn't the *effect* of the Justice Department's prosecution policy to concentrate on vocal opponents of the Selective Service registration system? If, in practice, prosecutions disproportionately were initiated against those nonregistrants who aggressively criticized the registration system, does this represent a threat to First Amendment values? Under the Court's ruling in *Wayte,* is it enough for a defendant to demonstrate an unequal pattern of prosecution to prove unlawful selective prosecution, or must something more be shown?
2. The Court holds in *Wayte* that prosecutors must be given broad latitude in making their charging decisions. What reasons are offered in support of this policy of judicial deference? Are they convincing?
3. The Justice Department seemed almost to bend over backward not to prosecute Wayte and others like him who had failed to register with Selective Service. What if a prosecution had been commenced immediately after government officials received Wayte's initial critical letter? Would Wayte have prevailed if he could establish that only nonregistrants like himself, who criticized the registration requirements, were subject to criminal charges? Under what circumstances can you envision a claim of illegal selective prosecution succeeding?
4. In *McCleskey v. Kemp,* 481 U.S. 279, 107S. Ct. 1756, 95 L. Ed. 2d 262 (1987), Warren McCleskey was sentenced to death in 1978 for murdering a police

officer during a robbery committed in Fulton County, Georgia. McCleskey was an African American. The murdered police officer was white. McCleskey challenged the legality of his death sentence by presenting the results of a comprehensive study of over 2,000 criminal homicides committed in Georgia during the 1970s.

"The raw numbers . . . indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases." 481 U.S., at 286. When the race of both defendants and victims was considered, the disparities were even more striking: "The death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* After the researchers examined the raw figures in more detail, and took into account numerous nonracial factors that could have caused the differential death sentencing rates—for example, the offender's prior criminal record, aggravating circumstances associated with the crime, whether the defendant and victim were acquaintances, and many others—racial disparities still remained. Specifically, in otherwise similar cases, "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.*, at 287.

Prosecutors' charging decisions accounted for a substantial amount of the racial differences. The raw figures showed that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." 481 U.S., at 287.

McCleskey argued that the racial discrepancies reflected in the charging and sentencing statistics undermined the constitutionality of Georgia's death penalty system. He maintained that the evidence of race discrimination showed that capital punishment was being administered arbitrarily, in violation of his Eighth Amendment right to be free from cruel and unusual punishment. He also argued that—as an African American offender sentenced to death for murdering a white victim—he was being denied equal protection of the law in violation of his Fourteenth Amendment rights. By a vote of 5-4, the Supreme Court rejected McCleskey's claims. Justice Powell's majority opinion found insufficient reason to question the legitimacy of prosecutors' charging decisions, even though the Court had assumed that the findings of the study McCleskey had provided were "valid statistically."

> [T]he policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty. . . .481 U.S., at 296–297.
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> [T]he capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." . . . [A] prosecutor can decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," but a capital-punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." 481 U.S., at 311–312 (footnotes and references omitted).

In dissent, Justice Brennan noted that "[n]o guidelines govern prosecutorial decisions to seek the death penalty," which "provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging . . . decisions." 481 U.S., at 333–334. Justice Blackmun's dissent made a similar point. 481 U.S., at 356–358.

In light of the statistical evidence suggesting racially disproportionate charging decisions in death penalty cases, should Georgia prosecutors have been required to try to explain those disparities by pointing to racially neutral factors accounting for them?

What would a set of prosecutorial guidelines for making decisions to seek the death penalty look like? How could such charging guidelines be enforced?

5. Dissenting in *Wayte v. United States, supra,* Justice Marshall argued that the Court had answered the wrong question. The real issue, he suggested, "is whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution." 470 U.S., at 614–615. The government had not fully complied with the district court's order that it make available to Wayte several documents related to its prosecution of men who had not registered with Selective Service.

The Court squarely addressed a defendant's right to discovery in cases of alleged selective prosecution in *United States v. Armstrong,* 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). The respondents Armstrong and Hampton, both African American, were indicted in the U.S. District Court for the Central District of California on charges of conspiring to possess and distribute more than 50

grams of cocaine base, or "crack." They moved to dismiss the indictment on the ground that they had been selected for prosecution because of their race. They likewise moved for discovery from the government of statistics and information about the federal prosecutor's criteria for charging defendants in cases involving crack. In support of their motions, they offered an affidavit reciting that the defendants were African American in each of the 24 cases involving charges of conspiracy to possess and distribute crack cocaine that were closed by that prosecutor's office during 1991. The district court granted the discovery motion. When the government indicated that it would not comply with the discovery order, the district court dismissed the indictment. The Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed, through an opinion written by Chief Justice Rehnquist. Justice Stevens was the lone dissenter.

> A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.
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> A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. The Attorney General and United States Attorneys retain "broad discretion' " to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.
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> As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Of course, a prosecutor's discretion is "subject to constitutional constraints." One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary."
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> The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. The similarly situated requirement does not make a selective-prosecution claim impossible to prove.
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> Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.
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> In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law.
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> The Court of Appeals reached its decision in part because it started "with the presumption that people of all races commit all types of crimes not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show that: More than 90% of the

persons sentenced in 1994 for crack cocaine trafficking were black, 93.4% of convicted LSD dealers were white, and 91% of those convicted for pornography or prostitution were white. Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

The Court of Appeals also expressed concern about the "evidentiary obstacles defendants face." But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California, were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. The study failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. . . .

7.2B Vindictive Prosecutions

We use the term *vindictive prosecution* to refer to a prosecutor's decision to retaliate against a defendant for exercising a right conferred by law within the criminal justice system. The "selective" prosecution issues that we considered in the previous section concerned allegations that defendants were singled out for prosecution for constitutionally impermissible reasons extrinsic to the criminal justice system, such as the exercise of First Amendment rights or their race.

Under the general subject of vindictive prosecutions, we consider, for example, whether a defendant who exercises his constitutional right to plead not guilty and have a trial by jury can for that reason be charged with a more serious crime than a similarly situated defendant who agrees to plead guilty. Similarly, assume that a defendant has her conviction nullified by a court after exercising her right to appeal. If the defendant is given a new trial, can she be reprosecuted on a more serious charge? Can a harsher sentence be given if she is convicted at the new trial than the one originally given before the appeal?

We first examine the issue of vindictive prosecution in *Bordenkircher v. Hayes.*

CASE

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)

Mr. Justice **Stewart** delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act,[1] which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead

1. While cross-examining Hayes during the subsequent trial proceedings the prosecutor described the plea offer in the following language: "Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

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guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted,[3] and that the prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea bargaining process.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ. The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. . . .

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea. The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

We have recently had occasion to observe that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." Blackledge v. Allison, 431 US 63, 71, 97 S Ct 1621, 52 L Ed 2d 135 [(1977)]. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, Brady v. United States, 397 US 742, 758, 90 S Ct 1463, 25 L Ed 2d 747 [(1970)], the need for a public record indicating that a plea was knowingly and voluntarily made, Boykin v. Alabama, 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274 [(1969)], and the requirement that a prosecutor's plea bargaining promise must be kept, Santobello v. New York, 404 US 257, 262, 92 S Ct 495, 30 L Ed 2d 427 [(1971)]. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

This Court held in North Carolina v. Pearce, 395 US 711, 725, 89 S Ct 2072, 23 L Ed 2d 656 [(1969)], that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of 'vindictiveness.' " Blackledge v. Perry, 417 US 21, 27, 94 S Ct 2098, 40 L Ed 2d 628 [(1974)].

3. According to his own testimony, Hayes had pleaded guilty in 1961, when he was 17 years old, to a charge of detaining a female, a lesser included offense of rape, and as a result had served five years in the state reformatory. In 1970 he had been convicted of robbery and sentenced to five years' imprisonment, but had been released on probation immediately.

CASE *Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)*

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." Parker v. North Carolina, 397 US 790, 809, 90 S Ct 1458, 25 L Ed 2d 785 [(1970)] (opinion of Brennan, J.). The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 US 448, 456, 82 S Ct 501, 7 L Ed 2d 446 [(1962)]. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment. . . .

Mr. Justice **Blackmun,** with whom Mr. Justice **Brennan** and Mr. Justice **Marshall** join, dissenting.

I feel that the Court, although purporting to rule narrowly (that is, on "the course of conduct engaged in by the prosecutor in this case,") is departing from, or at least restricting, the principles established in North Carolina v. Pearce, 395 US 711, 89 S Ct 2072, 23 L Ed 2d 656 (1969), and in Blackledge v. Perry, 417 US 21, 94 S Ct 2098, 40 L Ed 2d 628 (1974). . . .

In Pearce, as indeed the Court notes, it was held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."

The Court now says, however, that this concern with vindictiveness is of no import in the present case, despite the difference between five years in prison and a life sentence, because we are here concerned with plea bargaining where there is give-and-take negotiation, and where, it is said, "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Yet in this case vindictiveness is present to the same extent as it was thought to be in Pearce and in

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Perry; the prosecutor here admitted, see ante, at n 1, that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial. Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates "a strong inference" of vindictiveness. I therefore do not understand why, as in Pearce, due process does not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.

Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect. . . .

It might be argued that it really makes little difference how this case, now that it is here, is decided. The Court's holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.[2] . . .

Mr. Justice **Powell,** dissenting.

.....

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from 2 to 10 years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek a new indictment under the State's Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor's initial assessment of respondent's case led him to forgo an indictment under the habitual criminal statute. The circumstances of respondent's prior convictions are relevant to this assessment and to my view of the case. Respondent was 17 years old when he committed his first offense. He was charged with rape but pleaded guilty to the lesser included offense of "detaining a female." One of the other participants in the incident was sentenced to life imprisonment. Respondent was sent not to prison but to a reformatory where he served five years. Respondent's second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although respondent's prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in imprisonment; yet the addition of a conviction on a charge involving $88.30 subjected respondent to a mandatory sentence of imprisonment for life. Persons convicted of rape and murder often are not punished so severely.

No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional rights, and the majority accepts this characterization of events.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed.[2] But here the prosecutor evidently made

2. That prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant, does not add support to today's decision, for this Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process. Normally, of course, it is impossible to show that this is what the prosecutor is doing, and the courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions. . . .

2. The majority suggests that this case cannot be distinguished from the case where the prosecutor initially obtains an indictment under an enhancement statute and later agrees to drop the enhancement charge in exchange for a guilty plea. I would agree that these two situations would be alike only if it were assumed that the hypothetical prosecutor's decision to charge under the enhancement statute was occasioned not by consideration of the public interest but by a strategy to discourage the defendant from exercising his constitutional rights. In theory, I would condemn both practices. In practice, the hypothetical situation is largely unreviewable. The majority's view confuses the propriety of a particular exercise of prosecutorial discretion with its unreviewability. In the instant case, however, we have no problem of proof.

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a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment. Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights. We have stated in unequivocal terms, in discussing United States v. Jackson, 390 US 570, 88 S Ct 1209, 20 L Ed 2d 138 (1968), and North Carolina v. Pearce, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), that "Jackson and Pearce are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.' " Chaffin v. Stynchcombe, 412 US 17, 32 n 20, 93 S Ct 1977, 36 L Ed 2d 714 (1973). . . .

Notes and Questions

1. Justice Stewart's opinion for the Court in *Bordenkircher v. Hayes* distinguishes between "the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right" and the "very different" situation involving "the give-and-take negotiation in plea bargaining between the prosecution and defense." It characterizes the circumstances in Hayes as falling within the latter category. Is this an apt characterization? Precisely what "give and take" do you envision having occurred during the plea negotiations? Must more be involved than the prosecutor instructing the defendant that if he does not "take" what the prosecutor offers to "give," then he must accept the consequences? Is there roughly equal bargaining leverage between the parties, or is the prosecutor essentially in a position "unilaterally" to stipulate the plea-bargaining conditions? We consider plea bargaining at greater length in Chapter 9.
2. What if the prosecutor originally had obtained an indictment against Hayes under the Habitual Criminal Act and thereafter had offered to dismiss that indictment and allow Hayes to plead guilty to uttering a forged instrument with a recommendation for a five-year sentence? Would his offer then be perceived as a more generous one—indeed, even as a gracious one—in contrast to the actual circumstances of the case? Should the timing of the prosecutor's decision to pursue the indictment under the Habitual Criminal Act make a difference, either in fact or in law? What are Justice Powell's views about the timing issue?
3. *Blackledge v. Perry,* 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), is described in *Bordenkircher v. Hayes* as a case involving vindictive prosecution. Perry originally was charged with misdemeanor assault with a deadly weapon. Under North Carolina law, all misdemeanors originally were tried before a judge sitting without a jury in a state district court. Defendants convicted in the district court had a statutory right to appeal for a trial *de novo* at the superior court level, where they were entitled to a jury trial. Perry was convicted of misdemeanor assault by the district court judge and was given a six-month jail sentence. He then exercised his right of appeal. "When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and defense begin anew in the Superior Court."

   Following Perry's appeal, the prosecutor obtained an indictment charging Perry with *felonious* assault with a deadly weapon with intent to kill. This felony indictment was based on the same conduct that had served as the basis for Perry's misdemeanor assault conviction in the district court. He was convicted of the felony charge in superior court and given a five- to seven-year prison sentence.

   Perry challenged his conviction and sentence on multiple grounds and was granted habeas corpus relief by the lower federal courts. The Supreme Court granted certiorari to consider whether Perry's "indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment." The Court ruled (7-2) that Perry's due-process rights had been violated.

   Justice Stewart's majority opinion relied in part on the precedent of *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The defendant in *Pearce* originally was convicted of assault with intent to commit rape and was sentenced to 12 to 15 years in prison. He earned a reversal of the conviction on appeal. On retrial, he was convicted of the same crime and received a sentence that, when added to the time he had been incarcerated prior to and during the pendency of the appeal, "amounted to a longer total sentence than that originally imposed." The Court ruled that Pearce's due-process rights had been violated. It declined to place an absolute ban on a harsher sentence being imposed on a defendant following an appeal and conviction on retrial but cautioned that a more onerous sentence could be justified only under specific circumstances.

   > Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play

no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. . . .

In *Blackledge v. Perry*, the threat or appearance of vindictiveness arose from the prosecutor's decision to obtain an indictment for a more serious offense following a defendant's appeal, instead of a judge's decision on resentencing following a successful appeal. Nevertheless, the Court considered the principles derived from *Pearce* to be controlling.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

.....

The American Bar Association Standards Relating to the Administration of Criminal Justice include a chapter devoted to "The Prosecution Function."

How helpful is the following standard to help resolve the issues that arise in cases like *United States v. Wayte*, *Bordenkircher v. Hayes*, and *Blackledge v. Perry*?

American Bar Association Standards Relating to the Administration of Criminal Justice* **ARTICLE**

Standard 3-3.9 Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

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ARTICLE

(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

7.3 PERJURED TESTIMONY AND EXCULPATORY EVIDENCE: THE PROSECUTOR'S DUTY

7.3A The Knowing Use of Perjured Testimony

American Bar Association Standards Relating to the Administration of Criminal Justice (3d ed. 1992)[d1]

Standard 3-5.6 Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

CASE

Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967)

Mr. Justice **Stewart** delivered the opinion of the Court.

On November 26, 1955, in Canton, Illinois, an eight-year-old girl died as the result of a brutal sexual attack. The petitioner was charged with her murder.

Prior to his trial in an Illinois court, his counsel filed a motion for an order permitting a scientific inspection of the physical evidence the prosecution intended to introduce. The motion was resisted by the prosecution and denied by the court. The jury trial ended in a verdict of guilty and a sentence of death. . . .

There were no eyewitnesses to the brutal crime which the petitioner was charged with perpetrating. A vital component of the case against him was a pair of men's underwear shorts covered with large, dark, reddish-brown stains—People's Exhibit 3 in the trial record. These shorts had been found by a Canton policeman in a place known as the Van Buren Flats three days after the murder. The Van Buren Flats were about a mile from the scene of the crime. It was the prosecution's theory that the petitioner had been wearing these shorts when he committed the murder, and that he had afterwards removed and discarded them at the Van Buren Flats.

During the presentation of the prosecution's case, People's Exhibit 3 was variously described by witnesses in such terms as the "bloody shorts" and "a pair of jockey shorts stained with blood." Early in the trial the victim's mother testified that her daughter "had type 'A' positive blood." Evidence was later introduced to show that the petitioner's blood "was of group 'O.' "

Against this background the jury heard the testimony of a chemist for the State Bureau of Crime Identification. . . .

"I examined and tested 'People's Exhibit 3' to determine the nature of the staining material upon it. The result of the first test was that this material upon the shorts is blood. I made a second examination which disclosed that the blood is of human origin. I made a further examination which disclosed that the blood is of group 'A.' "

The petitioner, testifying in his own behalf, denied that he had ever owned or worn the shorts in evidence as People's Exhibit 3. He himself referred to the shorts as having "dried blood on them."

In argument to the jury the prosecutor made the most of People's Exhibit 3:

"Those shorts were found in the Van Buren Flats, with blood. What type blood? Not 'O' blood as the defendant has, but 'A'—type 'A.' "

Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) **CASE**

And later in his argument he said to the jury:

"And, if you will recall, it has never been contradicted the blood type of Janice May was blood type 'A' positive. Blood type 'A.' Blood type 'A' on these shorts. It wasn't 'O' type as the defendant has. It is 'A' type, what the little girl had."

Such was the state of the evidence with respect to People's Exhibit 3 as the case went to the jury. And such was the state of the record as the judgment of conviction was reviewed by the Supreme Court of Illinois. The "blood stained shorts" clearly played a vital part in the case for the prosecution. They were an important link in the chain of circumstantial evidence against the petitioner, and, in the context of the revolting crime with which he was charged, their gruesomely emotional impact upon the jury was incalculable.

So matters stood with respect to People's Exhibit 3, until the present habeas corpus proceeding in the Federal District Court. In this proceeding the State was ordered to produce the stained shorts, and they were admitted in evidence. It was established that their appearance was the same as when they had been introduced at the trial as People's Exhibit 3. The petitioner was permitted to have the shorts examined by a chemical microanalyst. What the microanalyst found cast an extraordinary new light on People's Exhibit 3. The reddish-brown stains on the shorts were not blood, but paint.

The witness said that he had tested threads from each of the 10 reddish-brown stained areas on the shorts, and that he had found that all of them were encrusted with mineral pigments ". . . which one commonly uses in the preparation of paints." He found "no traces of human blood." . . .

It was further established that counsel for the prosecution had known at the time of the trial that the shorts were stained with paint. The prosecutor even admitted that the Canton police had prepared a memorandum attempting to explain "how this exhibit contains all the paint on it." . . .

The record of the petitioner's trial reflects the prosecution's consistent and repeated misrepresentation that People's Exhibit 3 was, indeed, "a garment heavily stained with blood." The prosecution's whole theory with respect to the exhibit depended upon that misrepresentation. For the theory was that the victim's assailant had discarded the shorts *because* they were stained with blood. A pair of paint-stained shorts, found in an abandoned building a mile away from the scene of the crime, was virtually valueless as evidence against the petitioner. The prosecution deliberately misrepresented the truth.

More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 US 103, 55 S Ct 340, 79 L Ed 791 [(1935)]. There has been no deviation from that established principle. There can be no retreat from that principle here.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes and Questions

1. Lloyd Eldon Miller, Jr., was released from prison in 1967, after having spent 11 years on death row. He faced numerous execution dates and once came within seven and one-half hours of being strapped into Illinois' electric chair. Charges were officially dropped against him in 1971. *See* M. L. Radelet, H. A. Bedau, & C. E. Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* 143 (1992). What do you suppose would motivate the police officer to testify falsely about the "blood" found on the underwear, or the prosecutor knowingly to allow that perjured testimony to be considered by the jury that convicted Miller and sentenced him to death?
2. What, precisely, is offensive to due process in *Miller v. Pate*? Is the prosecutor's knowing use of perjured testimony sufficient in and of itself to require reversal? Or must there be some legitimate risk that the perjured testimony affected the outcome of the trial? For example, if the case against Miller had not been based primarily on circumstantial evidence but had been supported by the testimony of half a dozen eye-witnesses who reported seeing Miller commit the murder, would reversal of the conviction be required? What does the Court mean when it says that "the Fourteenth Amendment cannot tolerate a state criminal conviction *obtained by* the knowing use of false evidence" (emphasis added)?

7.3B The Duty to Disclose Evidence Material to the Defense

Is a prosecutor's duty of fair play limited to refraining from using false evidence and perjured testimony, or does it have a broader scope? Consider the following cases, beginning with *Brady v. Maryland.*

CASE

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)

Opinion of the court by Mr. Justice **Douglas,** announced by Mr. Justice **Brennan.**

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. . . . The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. The case is here on certiorari.

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. . . .

This ruling is an extension of Mooney v. Holohan, 294 US 103, 112, [55 S Ct 340, 79 L Ed 791 (1935)] where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." . . .

In Napue v. Illinois, 360 US 264, 269, 79 S Ct 1173, 3 L Ed 2d 1217 [(1959)], we extended the test formulated in Mooney v. Holohan when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." . . .

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. 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. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. . . .

In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as it might have been done if the court had first admitted a confession and then stricken it from the record. But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) **CASE**

through the use of a bifurcated trial denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed. . . .

Mr. Justice **Harlan,** whom Mr. Justice **Black** joins, dissenting. . . .

Notes and Questions

1. Brady was granted a new sentencing hearing. He was not given a new trial regarding his murder conviction. What justifies these different results? The Court holds that due process is violated when suppressed evidence is "material" to guilt or punishment. How does the concept of materiality figure into the results reached in *Brady*?

2. Under the Court's holding, does it matter whether the prosecutor purposefully suppressed the statement in which Boblit admitted the actual killing because that statement would weaken the state's case against Brady or whether the statement instead was overlooked inadvertently? Should it matter?

3. The defense lawyer in *Brady* made a specific request to examine Boblit's out-of-court statements. If the lawyer had not made such a request, would the prosecutor have had an obligation to produce the statement in question?

.....

The Court first squarely addressed the significance of a specific request being made for exculpatory evidence in *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Justice Stevens's majority opinion distinguished between three types of prosecutorial breaches of duty: (a) the knowing use of perjured testimony; (b) the failure to disclose material evidence following the defense's specific request for such evidence; and (c) the failure to disclose material evidence absent a defense request, or following only a nonspecific or general request. The Court applied different tests for due-process violations depending on the specific type of breach. The different tests made the *materiality,* or likely significance of the evidence to the outcome of the trial, the determining factor.

Specifically, the *Agurs* Court ruled:

a. In the first situation, where "the prosecution's case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury," a "strict standard of materiality would be applied. . . ." A strict standard was justified "because [such cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." The Court concluded that "a conviction obtained by the knowing use of perjury is fundamentally unfair, and must be set aside *if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury*." (Emphasis added.)

b. "The second situation, illustrated by the Brady case itself, is characterized by a pretrial request for specific evidence." The Court noted that before a prosecutor's noncompliance with a request of this nature caused a due-process violation, the evidence at issue had to be "material." "A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence *might have affected the outcome of the trial.*" (Emphasis added.)

c. The third situation arose in *Agurs.* Following Agurs' trial and conviction for murder, defense counsel became aware that the prosecution had evidence at its disposal that arguably was favorable to the defense. However, no pre-trial request had been made of the prosecutor to disclose that evidence. The Court thus had to "consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." After concluding that the prosecutor's unique obligation to serve justice sometimes does impose a constitutional duty to disclose potentially exculpatory evidence, even absent a request from the defendant, the justices announced the proper standard of materiality. They ruled that "*if the evidence creates a reasonable doubt that did not otherwise exist,* constitutional error has been committed." (Emphasis added.) Applying this test to the facts in *Agurs,* the Court concluded that no due-process violation had occurred.

Agurs thus provided a tidy framework for analyzing alleged prosecutorial breaches of duty. The type of alleged breach—knowing use of perjury, failure to produce potentially exculpatory evidence following a specific request, or failure to produce potentially exculpatory evidence absent such a request—first had to be identified. Then, the appropriate standard for judging the materiality of the evidence at issue was selected. Finally, the relevant test was applied to the specific case facts for a decision. However, the *Agurs* analytical framework did not long endure.

.....

The defendant in *United States v. Bagley,* 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), was indicted on several charges of violating federal narcotics and firearms laws. The government's two principal witnesses at Bagley's trial had assisted the Bureau of Alcohol, Tobacco, and Firearms (ATF) in producing evidence against Bagley. Defense counsel had filed a pretrial discovery motion requesting, among other items, information about "any deals, promises or inducements made to witnesses in exchange for their testimony." The government

disclosed no such arrangements in its response. Bagley waived a jury and was tried before a U.S. district court judge. He was convicted of the narcotics charges and acquitted of the firearms offenses. Following his trial, evidence surfaced that the two key witnesses had been paid $300 each for helping the government make its case.

Bagley argued that his due-process rights had been violated by the nondisclosure of the witnesses' arrangement with the government, which resulted in his being unable to attempt to impeach the credibility of the two witnesses by exposing the financial benefits each had reaped for testifying. The judge who had found Bagley guilty concluded "beyond a reasonable doubt . . . that had the existence of the agreements been disclosed to [him] during trial, the disclosure would have had no effect" on his verdict. He thus refused to overturn Bagley's conviction. The Ninth Circuit Court of Appeals reversed. It ruled that "the government's failure to provide requested Brady information to Bagley so that he could effectively cross-examine two important government witnesses requires an *automatic* reversal." (Emphasis added.)

The Supreme Court reversed, rejecting the Ninth Circuit's rule of automatic reversal. In the process, Justice Blackmun's opinion—which spoke only for a plurality of the Court on this issue—dismantled the *Agurs* framework for analyzing breaches of prosecutorial duty. It focused on cases involving prosecutors' nondisclosure of potentially exculpatory evidence in response to a specific request (*Brady*) and also their nondisclosure of evidence absent a specific request (*Agurs*).

> The Court has relied on and reformulated the Agurs standard for the materiality of undisclosed evidence in two subsequent cases arising outside the Brady context. In neither case did the Court's discussion of the Agurs standard distinguish among the three situations described in Agurs. In United States v. Valenzuela-Bernal, 458 US 858, 874, 102 S Ct 3440, 73 L Ed 2d 1193 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." And in Strickland v. Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. The Strickland Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."
>
> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.
>
> We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the Strickland formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.
>
> .....

Justice Blackmun concluded in *Bagley* "that there is a significant likelihood that the prosecutor's response to [Bagley's] discovery motion misleadingly induced defense counsel to believe that [the two witnesses] could not be impeached on the basis of bias or interest arising from inducements offered by the Government." Bagley's conviction was reversed, and the case was remanded "for a determination whether there is a reasonable probability that, had the inducement offered by the Government to [the witnesses] been disclosed to the defense, the result of the trial would have been different." Justice White, joined by

Chief Justice Burger and Justice Rehnquist, concurred in the judgment. Those justices agreed that the standard of materiality announced by Justice Blackmun—that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"—was " 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused." Justices Marshall, Brennan, and Stevens dissented. Justice Powell did not participate.

.....

In *Kyles v. Whitley,* 514 U.S. 419, 115 S. Ct.1555, 131 L. Ed. 2d 490 (1995), a majority of the Court expressly adopted the *Bagley* Court's modification of *Agurs* and elaborated on the meaning of the *Bagley* rule. Justice Souter wrote the majority opinion in a 5-4 decision that set aside Kyles' murder conviction and death sentence.

CASE

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)

Mr. Justice **Souter** delivered the opinion of the Court. . . .

Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . .

Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley,* 473 US, at 678.

The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.

The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as

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imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. 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. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady,* 373 US, at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States,* 405 US 150, 154, 92 S Ct 763, 31 L Ed 2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence.

Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs,* 427 US, at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. 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." *Berger v. United States,* 295 US 78, 88, 55 S Ct 629, 79 L Ed 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. . . .

The New York Court of Appeals has rejected the *Bagley* rule on state constitutional grounds. Its opinion in *People v. Vilardi* helpfully summarizes the federal rule and explains its perceived deficiencies.

CASE

People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990)

KAYE, Judge.

This appeal calls upon us to determine the effect to be given to the People's failure, in an arson prosecution, to disclose a report prepared by its explosives expert that had been specifically sought by defendant in his discovery request. More particularly, we must decide whether the standard of United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 [(1985)] should be adopted as a matter of State law.

Defendant was convicted of arson in the first degree, attempted arson in the first degree and conspiracy, for having conspired with Ronnie and William Bernacet, Ephraim Flores and Gino Romano to plant and set off one pipe bomb below a pizzeria on Nostrand Avenue in Brooklyn, and a second below a nearby laundromat. The first bomb did not explode. It was the People's theory, however, that the bomb planted in the laundromat basement had exploded as planned, and thus the defendants were charged with arson in the first degree, as well as attempt. Damage caused by an explosion is an element of arson in the first degree.

The Bernacet brothers—who unlike defendant had made fairly extensive inculpatory statements—were tried first, on the same charges on which defendant was later tried. Among the prosecution witnesses was Officer Daniel Kiely, a member of the Bomb Squad, who had inspected the laundromat basement the day after the alleged explosion. At the Bernacets' trial, Kiely was cross-examined at length about a report he wrote the day after the incident, in which he stated that a thorough inspection of the basement revealed no evidence that there had been an explosion, but asked that the case be kept open. Although Kiely testified that he ultimately concluded (in light of reinspection of the premises a year later) that there had been an explosion, defense counsel in summation argued that there was insufficient proof of the explosion element of first degree arson, based on Kiely's first report. The Bernacet brothers were acquitted of the completed arson.

Before defendant's trial, counsel made a pre-trial request for all reports "by ballistics, firearm and explosive experts" concerning the laundromat explosion. The prosecutor—not the same Assistant District Attorney who tried the Bernacets—sent him 12 reports, not including Officer Kiely's first report. At trial, no questions about that first report were asked during the brief cross-examination of Kiely, and no effort was made to argue that the People had failed to establish the explosion element of the top count. The sole defense was that the police informant who provided much of the evidence against defendant was too unsavory to be credited. . . . Defendant was convicted on all counts.

While preparing defendant's appeal, appellate counsel reviewed the transcript of the Bernacets' trial, and realized that there was an undisclosed explosives report. Defendant made a motion to vacate the judgment of conviction, . . .arguing . . . that the undisclosed report was Brady material (and failure to disclose violated his due process rights under the State and Federal Constitutions). . . .

The Appellate Division . . . granted defendant's motion to the extent of vacating his conviction of arson in the first degree. Distinguishing this case—in which counsel had specifically sought the undisclosed report—from a case in which no specific request had been made, the Appellate Division held that the report was exculpatory, that the prosecution violated the defendant's constitutional right to be informed of exculpatory information known to the State, and that reversal was required "if there is a reasonable possibility that [the undisclosed material] contributed to the defendant's conviction." Concluding that the People had not met that standard, the Appellate Division ordered a new trial on the completed arson charge to which the exculpatory material was relevant. We now affirm.

Analysis

. . . [T]he People contend that the standard applied by the Appellate Division was erroneous. Noting that the Supreme Court has recently articulated a single standard for determination of when a prosecutor's failure to disclose evidence favorable to the defendant requires reversal (see, United States v. Bagley, supra), the People argue that . . . the Appellate Division should have applied the Bagley standard: that failure to disclose favorable evidence is "constitutional error only if the evidence [was] material in the sense that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Appellate Division's assessment, according to the People, was improperly based on a "reasonable possibility" standard more favorable to defendant, as there is no longer any distinction between cases in which a specific request has been made for undisclosed Brady material and those in which it has not.

. . . [T]his court has not yet had occasion to consider, under State law, whether to adopt Bagley's broad formulation of the materiality standard in the context of a case where the prosecutor has failed to turn over particular exculpatory evidence, despite the fact that defendant has requested disclosure of that very evidence. . . . In this case . . . the withheld

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report is plainly exculpatory, as it suggests there was no evidence of a crucial element of the first degree arson charge; there is no dispute that the report was in the People's possession; and defendant specifically sought discovery of the very material involved here—reports of explosives experts.

. . . Federal constitutional law concerning the People's failure to disclose exculpatory evidence originated in a series of cases involving the prosecution's knowing use of perjured testimony. In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 [(1963)], decided nearly 30 years ago, the Supreme Court established, as a matter of Federal constitutional law, that the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense entitles the defendant to a new trial. Brady itself involved failure to disclose evidence that had been specifically requested by the defense, and the Court noted that the nondisclosure was constitutional error if the evidence would "tend to exculpate" the defendant.

Following the Brady decision, there was considerable doubt as to whether a specific request for the exculpatory evidence might not be an indispensable element of a Brady claim. It was in response to this doubt that in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 [(1976)], the Court created a two-tiered framework for determining whether favorable evidence was "material," so that the failure to disclose it required a new trial. Evidence specifically requested by the defense was material if it "might have affected the outcome of the trial." By contrast, in cases where there had been no request, or only a general request for exculpatory material, the prosecution's duty to disclose arose entirely from the notice provided by the very nature of the evidence, and the standard for a new trial was higher: undisclosed exculpatory evidence was material only if it "create[d] a reasonable doubt that did not otherwise exist."

In Agurs, the Court reasoned that it was appropriate to impose a lesser burden on the defendant in a "specific request" case because such a request puts the prosecutor on notice that there is particular evidence the defense does not have and believes to be important. By contrast, use of the "might have affected" standard where the prosecutor had been given no such notice might require something close to open file discovery. As the Court noted, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable," and this has been read as "reflect[ing] the view that [in the specific request cases], the prosecutor's responsibility for any resulting trial deception is clear."

This court has likewise found the prosecution's failure to turn over specifically requested evidence to be "seldom, if ever, excusable" and to verge on prosecutorial misconduct.

In Bagley, a deeply divided Supreme Court reconsidered its two-tiered approach, and replaced it with a single standard applicable in all cases. Adopting the very same test it had just formulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 [(1984)] for determining ineffective assistance of counsel claims, the Court in Bagley held that undisclosed evidence is material only if there is a "reasonable probability" that it "would" have altered the outcome of the trial; a reasonable probability is "a probability sufficient to undermine confidence in the outcome." The Court opined that this standard was "sufficiently flexible" to cover both the "specific request" and "no request/general request" cases. Justice Blackmun observed that a prosecutor's failure to respond to a specific request not only deprives the defense of the exculpatory evidence (as in all Brady cases) but also may have the effect of misleading the defense to conclude that the particular evidence does not exist, and therefore to abandon its investigative and trial efforts in that direction. But he concluded that under the Strickland formulation, any such additional adverse consequences could be taken into consideration by a reviewing court in the totality of the circumstances, and no separate standard was necessary.

Thus, while continuing to give at least a theoretical preference to specific request cases, the Supreme Court's new rationale and approach are entirely different from Agurs. . . . Rather than giving more serious consideration to specific requests both because of the greater degree of notice they provide, and out of reasons of fairness and prosecutorial misconduct, in Bagley the Court jettisoned such considerations in favor of a single standard, which in some undefined measure may—or may not—include adverse consequences in the specific request context.

From a Federal standard of "seldom, if ever, excusable," it appears that the prosecution's failure to turn over specifically requested evidence, under Bagley, will now seldom, if ever, be unexcused.

Over the course of the decades since Brady was decided, the courts of this State, obviously, have had to deal on a practical level with the consequences of a prosecutor's failure to disclose evidence requested by the defense. As is the Federal rule of Brady, this court's analysis of the prosecutor's duty to disclose exculpatory evidence is rooted in cases dealing with the similar question of knowing prosecutorial use of false and misleading testimony. Notably, these cases even predate the identified Federal progenitors of Brady, and were decided entirely without reference to Federal law, based on our own view of this State's requirements for a fair trial.

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Our own view of important State concerns in this matter has differed significantly from the Supreme Court's newest interpretation of the dictates of the Federal due process standard. We have long emphasized that our view of due process in this area is, in large measure, predicated both upon "elemental fairness" to the defendant, and upon concern that the prosecutor's office discharge its ethical and professional obligations. Although we have refused, in this context, to adopt a rule of automatic reversal, we have endorsed the proposition that " 'the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play.' " . . . In accordance with our long-standing State concerns in cases involving failure to disclose material specifically requested by a defendant, we have described the standard as one premised on Agurs, and that has been understood and cited again and again as the governing standard throughout the State.

We decline to abandon these accepted principles in order to conform to the lesser protections of Bagley.

We agree with the Appellate Division that a showing of a "reasonable possibility" that the failure to disclose the exculpatory report contributed to the verdict remains the appropriate standard to measure materiality, where the prosecutor was made aware by a specific discovery request that defendant considered the material important to the defense. As we have previously noted suppression, or even negligent failure to disclose, is more serious in the face of a specific request in its potential to undermine the fairness of the trial, and ought to be given more weight than as simply one of a number of discretionary factors to be considered by a reviewing court.

Further, a backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People's case clearly provides diminished incentive for the prosecutor, in first responding to discovery requests, thoroughly to review files for exculpatory material, or to err on the side of disclosure where exculpatory value is debatable. Where the defense itself has provided specific notice of its interest in particular material, heightened rather than lessened prosecutorial care is appropriate.

The "reasonable possibility" standard applied by the Appellate Division—essentially a reformulation of the "seldom if ever excusable" rule—is a clear rule that properly encourages compliance with these obligations, and we therefore conclude that as a matter of State constitutional law it is preferable to Bagley. Moreover, the Strickland "reasonable probability" standard—which we have chosen not to adopt as a matter of State law despite several invitations to do so—remits the impact of the exculpatory evidence to appellate hindsight, thus significantly diminishing the vital interest this court has long recognized in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence.

Finally, the new Bagley standard is hardly clear. The Supreme Court itself could not muster a plurality on how the new standard was to be applied to the case before it, and the case has engendered considerable confusion.

For all of these reasons, and not because we "merely disagree[ ] with [the Supreme Court] or dislike[ ] the result reached" (concurring opn.), we choose to adhere to our existing standard as a matter of due process of law under the State Constitution.

Applying that standard in this case, we agree with the Appellate Division that defendant is entitled to a new trial on the first degree arson charge, as there was at least a reasonable possibility that defendant would not have been convicted on that count had the exculpatory report been available to him at trial. That a contemporaneous and avowedly "thorough" inspection of the bomb site by an expert had led him to conclude that no explosion occurred well might have caused the jury to discount his contrary assertion at trial, which was based on challenged circumstantial evidence and arrived at only after the passage of a year. It is the reasonable possibility that the undisclosed evidence might have led to a trial strategy that resulted in a different outcome (as appears to have happened in the Bernacets' case) that requires reversal.

Accordingly, the order of the Appellate Division should be affirmed.

Notes and Questions

1. The New York Court of Appeals expresses concern that "the prosecutor's office discharge its ethical and professional obligations" and warns that prosecutors must not violate "basic concepts of fair play." Does the due-process standard adopted in *Vilardi* for judging the materiality of evidence that has been specifically requested seem more likely to allow courts to enforce those norms than does the *Bagley* standard? Can the *Bagley* test take account of the fact that a prosecutor has failed to comply with a defendant's specific discovery request? Should it, or should the exclusive focus be the materiality of the evidence?

2. Is the *Vilardi* test consistent with the Supreme Court's suggestion in *Brady* and other cases that "the good faith or bad faith of the prosecution" is not at issue when a prosecutor's office fails to produce potentially exculpatory evidence?

3. Should the *Vilardi* standard be applied if the police do not share evidence in their possession with the prosecutor and that evidence may be favorable to the accused? What does the Supreme Court suggest in *Kyles v. Whitley* about whether the prosecutor is held accountable to know what evidence the police have collected? Should a distinction be drawn between evidence the police have collected and preserved, and evidence that the police collected but then discarded or otherwise failed to preserve?

7.3C Is There a Duty for the Police to Preserve Potentially Exculpatory Evidence?

The police function in investigating crimes is crucial to successful prosecutions. How the police perform their jobs can affect a criminal prosecution in several different ways. For example, an unreasonable search or seizure may result in the suppression of evidence that would be useful or even essential to prove guilt. The violation of a suspect's *Miranda* rights may cause a confession to be inadmissible at trial. And, as the Court made clear in *Kyles v. Whitley, supra,* the failure by the police to share potentially exculpatory evidence with a prosecutor does not insulate the prosecutor from his or her duty under *Brady* and *Bagley* to make that evidence available to the defense.

We now consider an issue that generally relates to *Brady* material and the prosecution's obligation to provide potentially exculpatory evidence to the defense. Do the police, because they serve as a vital link in the chain of a prosecution, have a duty analogous to the prosecutor's to preserve evidence that could be useful to the accused in defending against criminal charges?

CASE

Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)

Chief Justice **Rehnquist** delivered the opinion of the Court. . . .

[On October 29, 1983 a 10-year-old boy was abducted from a church carnival by a man who drove the boy to a secluded location and repeatedly sodomized him. The man thereafter released the boy, who made his way home and was taken to a hospital and treated for rectal injuries. A physician used a "sexual assault kit" to collect evidence of the attack, including swabs of the boy's rectum and mouth and samples of the boy's saliva, blood, and hair. The police placed the kit in a secure refrigerator at the police station, and also collected the boy's T-shirt and underwear. These items of clothing were not refrigerated or frozen.

[Nine days after the attack, the boy identified Youngblood as his assailant from a photograph array. The following day, a police criminologist examined the sexual assault kit and determined that sexual contact had occurred but performed no other tests and did not test the boy's clothing. He returned the sexual assault kit to the refrigerator. Youngblood was located and arrested approximately four weeks later, on December 9, 1983. He subsequently was indicted on charges of child molestation, sexual assault, and kidnapping.

[An ABO blood group test later was performed on the rectal swab sample, but it failed to detect any blood group substances. The police criminologist examined the boy's clothing for the first time in January 1985. He located semen stains on both the T-shirt and the underwear, but was unsuccessful in obtaining blood group substances from the stains using the ABO technique. "He also performed a P-30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity."

[At his trial, Youngblood contended that the boy had erroneously identified him as his assailant. "[B]oth a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found that the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest." The jury found Youngblood guilty as charged.

[The Arizona Court of Appeals reversed. It held that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." The Court of Appeals concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. The Court of Appeals reached this conclusion even though it did "not imply any bad faith on the part of the State."

[The Supreme Court granted certiorari "to consider the extent to which the Due Process Clause of

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the Federal Constitution requires the State to preserve evidentiary material that might be useful to a criminal defendant."]

. . .

Decision of this case requires us to again consider "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 US 858, 867, 102 S Ct 3440, 73 L Ed 2d 1193 (1982). In Brady v. Maryland, we held "that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In United States v. Agurs, we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel."

There is no question but that the State complied with Brady and Agurs here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as Brady and Agurs. Our most recent decision in this area of the law, California v. Trombetta, 467 US 479, 104 S Ct 2528, 81 L Ed 2d 413 (1984), arose out of a drunk driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice,' " second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in Trombetta, but here, unlike in Trombetta, the State did not attempt to make any use of the materials in its own case in chief.

Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In United States v. Marion, 404 US 307, 92 S Ct 455, 30 L Ed 2d 468 (1971), we said that "[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." Similarly, in United States v. Valenzuela-Bernal, supra, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt deportation of the witnesses was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution."

The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, supra, at 486, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In this case, the police collected the rectal swab and clothing on the night of the crime: respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's

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expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and we agree—that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P-30 test. If the court means by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunk driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalizer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

The judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. . . .

Justice **Stevens,** concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, defense counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant. More significantly, the trial judge instructed the jury: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage.

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was "immaterial." In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. . . .

Justice **Blackmun,** with whom Justice **Brennan** and Justice **Marshall** join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.

The cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can result in a violation of due process. As Agurs points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material, but which actually would have been of no help to the defense. In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious.

I also doubt that the "bad faith" standard creates the bright-line rule sought by the majority. Apart from the inherent difficulty a defendant would have in obtaining evidence to show a lack of good faith, the line between "good faith" and "bad faith" is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? While the majority leaves these questions for another day, its quick embrace of a bad-faith standard has not brightened the line; it only has moved

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the line so as to provide fewer protections for criminal defendants.

The inquiry the majority eliminates in setting up its "bad faith" rule is whether the evidence in question here was "constitutionally material," so that its destruction violates due process.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, i.e., someone who does not secrete a blood type "marker" into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence: it has "interfere[d] with the accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill." Hilliard v. Spalding, 719 F2d [1443,] 1446 [(9thCir. 1983)]. Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

I recognize the difficulties presented by such a situation. The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendants from receiving a fair trial. In a situation where the substance of the lost evidence is known, the materiality analysis laid out in Trombetta is adequate. But in a situation like the present one, due process requires something more. Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process. To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in Trombetta, of performing the proper tests on physical evidence and then discarding it. Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store.

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law. . . .

Notes and Questions

1. If the good faith or bad faith of the prosecutor is not relevant to a claimed *Brady* violation, why is a showing of bad faith necessary for the defendant to prevail when the police fail to preserve potentially exculpatory evidence?
2. Assume that Youngblood had a codefendant, Oldblood, against whom a police officer held a personal grudge. Further assume that the officer intentionally and in bad faith destroyed physical evidence that may have been useful to Oldblood's defense. In contrast, potentially exculpatory evidence relevant to Youngblood became unavailable through no apparent bad faith on the part of the police. Would you expect different results in the resolution of Oldblood's and Youngblood's cases? Would the basic fairness of their respective trials—defined in terms of confidence that a just result had been produced based on all potentially relevant evidence—be affected by whether the police acted in bad faith?

On the other hand, what inferences does Chief Justice Rehnquist suggest might be supported by the bad-faith destruction of evidence?

3. What, exactly, does *bad faith* mean in this context? Does the Court provide examples or suggest how this term should be defined?

4. In 1985, Kirk Bloodsworth was convicted of the rape and murder of a nine-year-old girl in Maryland. He was sentenced to death. His conviction was overturned on appeal, but he was again convicted on retrial and sentenced to three terms of life imprisonment. " In 1993, newly available DNA tests revealed conclusively that the semen found on the victim did not match Bloodsworth's." After spending nine years in prison, Bloodsworth was released, prosecutors dismissed the case against him, and he was officially pardoned. M. Radelet, W. Lofquist, & H. Bedau, "Prisoners Released from Death Rows Since 1970 Because of Doubts about Their Guilt," 13 *Thomas M. Cooley Law Review* 907, 926 (1996). Bloodsworth's conviction had been supported by eyewitness identification testimony. Does Kirk Bloodsworth's case have any relevance to Youngblood?

5. Consider the following news item, published in the *Arizona Republic* on August 13, 2000, at p. B6:

> **Innocent Man's Liberty Almost Didn't Happen: Case Highlights Police Neglect in Saving Evidence**
>
> A 17-year-old cotton swab held the microscopic evidence that made Larry Youngblood a free man again.
>
> DNA extracted from dried semen on the swab showed that Youngblood, 47, did not molest the 10-year-old boy who identified him as his attacker in 1983. Youngblood, who was convicted of sexual assault, child molestation and kidnapping in 1985, was released last week from jail. . . .
>
> "As far as we're concerned, there's no uncertainty at all involved in this," said Walter Tannert, who oversees the Tucson Police Department crime lab, where the test was done. "He was not the donor of the semen." . . .
>
> Today's DNA technology was not available then to investigators, who relied on blood-typing and tests of proteins called isoenzymes. Tannert said both tests are "very sensitive to deterioration."
>
> The briefs and one of the two cotton swabs in the kit were tested in 1983, but they produced unreadable results, Tannert said. . . .
>
> In the Youngblood case, the victim's underpants weren't available for modern DNA testing, and one of the two swabs in the sexual assault kit had been used. That left a single cotton swab.
>
> Last February, public defender Carol Wittels asked Tucson police to conduct DNA tests on the remaining swab. . . .
>
> Tucson crime lab investigators looked for repetitive segments of DNA, called short tandem repeats, or STRs, between genes on the chromosomes. When testing the swab and comparing its DNA to cells taken from Youngblood's cheek, the forensic scientists looked at 13 of the STR genetic markers.
>
> If even a single STR does not match, then the DNA came from two different people.
>
> In Youngblood's test, 12 of the 13 STRs were different, Tannert said.
>
> "There is no doubt," he said.

6. The rule in *Youngblood* has been rejected by some state courts on state constitutional grounds. *See Thorne v. Department of Public Safety,* 774 P.2d 1326 (Alaska 1989); *State v. Snagula,* 133 N.H. 600, 578 A.2d 1215 (1990); *State v. Matafeo,* 71 Ha. 183, 787 P.2d 671 (1990). *See* B. Latzer, *State Constitutional Criminal Law* § 8:7 (1995).

7.4 CONCLUSION

Prosecutors play a vitally important role in the administration of criminal justice in this country. The cases and materials in this chapter have focused on examples in which something allegedly or actually has gone very wrong in a criminal prosecution: where charges may have been filed or enhanced for impermissible reasons; where perjured testimony has been used to help secure a conviction; or where important evidence material to an accused's defense has not been disclosed or preserved by the prosecutor or the police. In these different contexts, the courts have had to give meaning to the lofty imperative that the prosecutor's duty "is to seek justice, not merely to convict," and to the constitutional standard of due process of law.

Prosecutors who are true to these ideals occupy an indispensable role in the criminal justice process. Their work is equally important in preserving suspects' constitutional rights, promoting the integrity of the law, and helping preserve public safety through the prosecution of alleged criminal offenders. Large numbers of conscientious prosecutors appropriately balance due process and crime control values and serve their offices well. The constitutional constraints discussed in this chapter help keep in check prosecutors who lose sight of their obligation to do justice. They simultaneously provide support and guidance to prosecutors who faithfully strive to do their jobs consistent with due process standards.