THE PROFESSIONAL DUTY OF PROSECUTORS TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE: IMPLICATIONS OF RULE 3.8(D) OF THE MODEL RULES OF PROFESSIONAL CONDUCT

I. INTRODUCTION

Criminal prosecutors are bound both constitutionally and professionally to disclose potentially exculpatory evidence to the defense.1 The following briefly chronicles the doctrinal development of the constitutional duty of prosecutors to disclose exculpatory evidence, but focuses on the ethical and disciplinary implications of the professional duty of prosecutors to disclose the same. Whereas the legal consequences of prosecutorial misconduct are largely beyond the scope of this Comment, the following will explore the professional implications of Rule 3.8(d) of the Model Rules of Professional Conduct and demonstrate the relative effect of prosecutorial bad faith in disciplinary sanctions for its violation.

II. THE LEGAL REQUIREMENTS OF DUE PROCESS

In Berger v. United States,2 the Supreme Court outlined the government’s role in a criminal prosecution as, “not that it shall win a case, but that justice shall be done”3 and the individual prosecutor’s role as “the servant of the law, [whose] twofold aim . . . is that guilt shall not escape or innocence suffer.”4 The Court, in remarking that the prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones,”5 identified the prosecutorial function as one subject to the limitation of constitutional due process.6

Legal due process affects the prosecution’s role in criminal discovery.7 In Brady v. Maryland,8 the prosecution withheld the extra-judicial confession of a co-defendant when that information was requested by the defense.9

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4. Id.
5. Id.
6. See also Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.”).
8. Id.
9. Id. at 84.
Such information could have operated to mitigate the jury’s sentence. The Court held that the prosecution’s suppression of the co-defendant’s statement violated Brady’s Fourteenth Amendment due process right. The Court accordingly outlined the rule for prosecutorial disclosure of exculpatory evidence stating: “[w]e 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 Court in subsequent decisions more accurately defined this requirement of prosecutorial disclosure, but it also maintained the chief governmental interest in criminal prosecutions by noting that, “[t]he United States wins its point whenever justice is done its citizens in the courts.”

In United States v. Agurs, the prosecution failed to disclose the victim’s prior criminal record to the defense wherein such information could have supported the defendant’s claim of self defense. Unlike the facts in Brady, the defense counsel in Agurs made no request for specific information. The Court, while noting that “there is . . . no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor,” shifted its inquiry to the issue of materiality wherein “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Such “omitted evidence creates a reasonable doubt that did not otherwise exist . . . [and] must be evaluated in the context of the entire record.”

United States v. Bagley further articulates the outcome-based standard for mandatory disclosure of exculpatory evidence. In Bagley, the court held that “[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule. Such evidence is ‘evidence favorable to an accused,’ so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” As in Agurs, the standard for materiality is based on the evidence’s ability to affect the outcome of the trial.
fore, with respect to the defendant’s right to a fair trial, “a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” 23 Further defined, “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 . . . [wherein a] ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” 24 Accordingly, as both Agurs and Bagley determine the materiality of evidence retrospectively, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” 25

More recently in Kyles v. Whitley, 26 the court continues to assess the materiality of exculpatory evidence by its ability to affect the outcome of the trial. 27 In so doing, it imposes an affirmative duty of disclosure on the prosecution. 28 Because the prosecution “alone can know what is undisclosed, [it] must be assigned the consequent responsibility to gauge the likely net effect of all such evidence.” 29 The prosecution thus “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case.” 30 Such an affirmative duty will produce the desirable effect that “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.” 31 Thus the individual prosecutor’s role in the discovery process largely affects the possibility of reviewable error and impacts the legal outcome of the case. 32

III. **THE PROFESSIONAL DUTY OF PROSECUTORS TO DISCLOSE POTENTIALLY EXCULPATORY EVIDENCE**

The ethical duty of the individual prosecutor to disclose potentially exculpatory evidence to the defense mirrors the Constitutional due process requirements articulated by Brady and its progeny. 33 The professional role of the individual prosecutor is outlined in Rule 3.8 Comment 1 of the ABA Model Rules of Professional Conduct: “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibil-
ity carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

Similar to judicial prescriptions, the prosecutor is ethically bound to seek justice rather than merely the conviction of the accused adversary. Accordingly, the prosecution’s duty to disclose evidence favorable to the accused emerges among professional guidelines and implies an ethical obligation correspondent to that of due process.

The professional guidelines governing the prosecutorial disclosure of exculpatory evidence are set out in Rule 3.8(d) of the ABA Model Rules of Professional Conduct:

The prosecutor in a criminal case shall:

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

The rule is broadly reaching in its mandate of timely disclosure of “all evidence or information,” which, coupled with the “reasonable probability” standard, creates a heavy burden for prosecutorial disclosure.

Failure to comply with Rule 3.8(d) necessarily implies attorney misconduct under Rule 8.4: “[i]t is professional misconduct for a lawyer to [v]iolate or attempt to violate the Rules of Professional Conduct, [or] knowingly

34. Model Rules of Professional Conduct R. 3.8 cmt. 1 (2002). See also Brady, 373 U.S. at 87 (stating that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.”).
35. See generally Berger v. United States, 295 U.S. 78, 88 (1935) (stating that “[i]t is as much [a U.S. Attorney’s] 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.”).
37. Id.
39. See generally Model Code of Prof’l Responsibility DR 7-103 (b) (1983) (“A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”) (emphasis added); Model Code of Prof’l Responsibility EC 7-13 (1983) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict . . . the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”) (emphasis added); Canons of Prof’l Ethics Canon 5 (1969) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”) (emphasis added).
assist or induce another to do so, or do so through the acts of another.”

Consequently, upon such misconduct, the prosecutor is subject to discipline. Comment 1 to Rule 8.4 clearly notes, “[l]awyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct.” Consequently, a violation, whether intentional or not may, nevertheless, qualify under Rule 8.4 as misconduct. It must then be logically considered that instances of prosecutorial misconduct marked by mere negligence regarding the failure to adequately disclose exculpatory evidence are subject to less intrusive professional sanctions than are those marked by the intentional withholding of exculpatory information.

A. Negligent Failure to Disclose Exculpatory Information

The severity of professional sanctions for prosecutorial violation of Brady disclosure requirements varies according to the intent driving such failure. Generally, prosecutorial negligence is sanctioned less severely than willful misconduct. In In re Brophy, the prosecutor violated his duty under Brady, and was found criminally liable. Professionally, however, Brophy argued that his error was “inadvertent” and sought to avoid a $500 fine and the automatic suspension of his license to practice law. The Court, noting Brophy’s “previous unblemished record . . . [and] that he has suffered the stigma of criminal conviction,” determined that “the interests of justice [would] be adequately served by a censure.” Thus, as Brophy demonstrated his lack of willfulness regarding the failure to disclose exculpatory evidence, he was disciplined merely by censure rather than by harsher sanctions.

41. Id. at cmt. 1.
42. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2002).
43. STANDARDS FOR IMPOSING LAWYER SANCTIONS Definitions (1986) (“‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.”).
44. See Imbler v. Pachtman, 424 U.S. 409 (1976) (holding prosecutorial immunity exists for civil damages where the prosecuting attorney acted within the scope of duty).
45. STANDARDS FOR IMPOSING LAWYER SANCTIONS Definitions (1986) (“‘Intent’ is the conscious objective or purpose to accomplish a particular result.”).
47. See STANDARDS FOR IMPOSING LAWYER DISCIPLINE Standard 5.23 (1986) (“Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.”).
49. Brophy, 442 N.Y.S.2d at 819.
50. Id.
51. Id.
52. Id.
In *In re Attorney C.*, the Court, relying on the ABA Standards for Criminal Justice requirements, held that 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,” held that the prosecutor, though failing to make timely disclosure, nevertheless lacked the culpable intent “necessary to justify a sanction.”

The court declined to accept the argument that Rule 3.8(d) “does not incorporate a *Brady* constitutional materiality standard, but rather is broader and more encompassing” because such would “impose inconsistent obligations upon prosecutors attempting to comply with both procedural rules and rules of professional conduct.” Therefore, in Colorado, the legal requirements of Rule 3.8(d) mirror those of *Brady*, wherein sanctions for its violation require willful misconduct.

In *Cuyahoga County Bar Association v. Gerstenslager,* however, the prosecution did not “knowingly” violate Disciplinary Rule 7-103(b), but that its “grossly negligent and ‘sloppy’ actions did rise to the level of egregiousness so as to constitute a violation of [Disciplinary Rule] 1-102(A)(5).” The court, accordingly, publicly reprimanded Gerstenslager, demonstrating that as negligence approaches recklessness, the appropriate disciplinary sanctions employed become correspondingly severe.

**B. Knowing Failure to Disclose Exculpatory Evidence**

As prosecutors knowingly fail to disclose potentially exculpatory evidence, resultant sanctions increase in severity. In *Office of Disciplinary*
The prosecution knowingly concealed the location of potentially exculpatory exhibits by intentionally remaining silent as to their whereabouts during the trial. Such action was found to “fly in the face of [the prosecutor’s] public mandate to protect the rights of all citizens.” Jones was consequently suspended from the practice of law for six months.

Similarly, in Committee on Professional Ethics and Conduct of the Iowa State Bar Ass’n v. Ramey, the prosecutor’s false statements at trial, coupled with his failure to disclose exculpatory evidence, resulted in an indefinite suspension of his license without the possibility of reinstatement for three months. The court held that notwithstanding Ramey’s contention that he withheld evidence was immaterial, “the duty to disclose exculpatory evidence cannot be ignored because of a prosecutor’s private belief that it is beside the point.” Herein again, the professional sanctions attached to the disclosure violation are severe in relation to the willfulness of the misconduct.

Contrastingly, in Read v. Virginia State Bar, the Court reversed a disciplinary order revoking Read’s license to practice law. After testifying at the trial, the prosecution’s witness changed his testimony. Knowing this, Read neither told the defense counsel of the change nor recalled the witness, making “a conscious decision not to reveal [the witness’s] change in position.” The court held “that a defendant must show that the failure to earlier disclose prejudiced him because it came so late that the information disclosed could not be effectively used at trial.” The court thus held that “[defense] counsel knew of [the] change in testimony in sufficient time to make use of his testimony at trial,” and dismissed the case. The court’s decision in Read is atypical.

63 See STANDARDS FOR IMPOSING LAWYER DISCIPLINE Standard 5.22 (1986) (“Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and caused injury or potential injury to a party or to the integrity of the legal process.”).  
65 Jones, 613 N.E.2d at 178.  
66 Id. at 179.  
67 Id. at 180.  
68 Comm. Prof’l Ethics and Conduct Iowa State Bar Ass’n v. Ramey, 512 N.W.2d 569 (Iowa 1994).  
69 Ramey, 512 N.W.2d at 572. Ramey also had prior instances of professional sanction. Id.  
70 Id.  
72 Read, 357 S.E.2d at 545-46.  
73 Id. at 546.  
74 Id. at 546-47 (quoting United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985)).  
75 Id. at 546.  
IV. Conclusion

Criminal prosecutors have a professional and a legal duty to disclose to the defense potentially exculpatory evidence. Violations of these duties may greatly affect the freedom of the accused as well as the professional status of the prosecutor. Though ethical sanctions for the prosecutorial failure to disclose evidence favorable to the accused vary in severity corresponding to the degree of willfulness driving such failure, professional discipline is nevertheless to be avoided. Therefore, regarding the disclosure of exculpatory evidence to the accused, prosecutors must make every effort to be aware of the existence of such evidence and accordingly disclose that evidence so to maintain the prescriptions of Constitutional due process, as well as to uphold the high standards of professional ethics.

Jeremy L. Carlson