NOTE

I'LL MAKE YOU A DEAL: HOW REPEAT INFORMANTS ARE CORRUPTING THE CRIMINAL JUSTICE SYSTEM AND WHAT TO DO ABOUT IT

TABLE OF CONTENTS

INTRODUCTION

The American criminal justice system prides itself as being based on fundamental fairness. Although adversarial by nature, the system includes protections and practices intended to even the playing field between prosecutor and defendant, including such constitutional safeguards as the presumption of innocence[1] and proof beyond a reasonable doubt.[2] The Founders' grave concern with protecting the accused against abuses by the government can be seen in the very structure of the Bill of Rights, in which four of the ten amendments are devoted to guaranteeing the criminally accused fair process and proceedings.[3] In 1963, the Supreme Court pronounced another constitutional tenet designed to equalize opportunity between prosecutor and defendant. In the landmark case of *Brady v. Maryland*, the Court found that criminal defendants have a due process right to receive materially exculpatory evidence in the prosecution's possession.[4] In its opinion, the Court ardently invoked the principles of fairness and justice,[5] and the *Brady* Court's directive seems clear: If the prosecution has evidence that is material to the defendant's innocence, the prosecution, in the interest of fairness, must give it to the defendant.

In practice, however, application of the rule has not been easy, especially as it relates to jailhouse informants. A jailhouse informant is "'an inmate who is either asked by the government to report any incriminating evidence shared with the inmate by another

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1. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 483 (1978) ("'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))).

2. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

3. *See* U.S. CONST. amend. IV (protecting against unreasonable searches and seizures); U.S. CONST. amend. V (providing due process and protecting against double jeopardy and self-incrimination); U.S. CONST. amend. VI (establishing the right to a speedy and public trial, an impartial jury, confrontation of witnesses, and the assistance of counsel); U.S. CONST. amend. VIII (protecting against excessive bail and cruel and unusual punishment).

4. 373 U.S. 83, 87 (1963).

5. *Id.* at 87-88 ("[O]ur system of the administration of justice suffers when any accused is treated unfairly.").

inmate or who comes forward on his or her own with such information,'" usually in exchange for some type of bargain or benefit from the government.[6] These benefits range from the more dramatic sentencing reductions, dismissals of charges, or recommendations for sentencing leniency,[7] to smaller rewards such as cash or cigarettes.[8] The law is settled that if a prosecutor grants such a benefit in exchange for "helpful" testimony in a given case, the benefit must be disclosed under *Brady* as materially exculpatory evidence, because of the possible negative impact it may have on the informant's motivation to testify truthfully.[9] The prosecution, however, is *not* under any *Brady* obligation to disclose whether the informant has made a *habit* of proffering evidence against other inmates or whether the government has given him benefits for his testimony in the past; that is, prosecutors have no obligation to disclose an informant's "testimonial history."

Although this type of evidence seems particularly exculpatory —after all, among the most questionable testimony is that of an informant who has learned that turning in others means gain for himself[10]—*Brady*'s progeny and a restricted materiality standard have hamstrung its discoverability.[11] This Note argues that an informant's testimonial history, because it constitutes impeaching and potentially exculpatory evidence, should be made a part of mandatory *Brady* disclosures through a broadening of the rule's materiality standard, now focused on a post-conviction-type review

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6. Sam Roberts, Note, *Should Prosecutors Be Required To Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 262 (2005) (quoting Jack Call, *Judicial Control of Jailhouse Snitches*, 22 JUST. SYS. J. 73, 73 (2001)).

7. *Id.* at 262-63.

8. *See* Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, at 1.

9. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154-55 (1972); *see also* Napue v. Illinois, 360 U.S. 264, 270 (1959).

10. *See* Banks v. Dretke, 540 U.S. 668, 691, 701-02 (2004); *see also* Call, *supra* note 6, at 74; Roberts, *supra* note 6, at 260.

11. *See, e.g.*, Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 562-64 (discussing the impact of limited discovery on the reliability of outcomes in criminal cases); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644, 661-62 (2002) (discussing the evolution of *Brady*'s materiality standard and arguing that the doctrine has developed into a posttrial remedy for prosecutorial misconduct rather than a pretrial discovery device).

of the outcome, to one that would reach all exculpatory evidence tending to negate guilt. Part I outlines the evolution of the *Brady* rule and the prosecution's existing obligations with regard to jailhouse informants. Part II addresses the problem of repeat informants and the dangers they pose to the administration of genuine justice. Part III analyzes the exculpatory and impeachment value of an informant's testimonial history, and its inclusion under the current and proposed materiality standards. Part IV examines case law supporting an expanded materiality standard, its relationship to jailhouse informant testimony, and recent commentary advocating the same.

Jailhouse informant testimony poses a particular danger to the original promise of *Brady*. Ideally, prosecutors would use informant information as a way to gather important testimony against factually guilty defendants offered by individuals in a unique position to acquire such information. The introduction of benefits in exchange for testimony useful to the prosecution corrupts the process, however, by encouraging those with little to lose to fabricate damaging testimony in order to reap the government's rewards.[12] And the more that an informant "cashes in" on the system, the more doubtful the veracity of that informant's testimony becomes.[13] Broadening the materiality standard to include *all* evidence that *tends* to place the defendant's guilt into doubt would certainly promote the mandatory disclosure of the testimonial history of a repeat informant, by its very nature suspicious. This measure is vital to ensuring that criminal defendants are afforded access not only to evidence suggesting their innocence, but also to the benefits of a fair and just trial lauded in *Brady* and in the American criminal justice system.

12. *See Banks*, 540 U.S. at 691; *see also* Call, *supra* note 6, at 74; Roberts, *supra* note 6, at 260.

13. *See* Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 922 (2007).

I. THE *BRADY* RULE AND THE PROSECUTION'S EXISTING OBLIGATIONS WITH RESPECT TO JAILHOUSE INFORMANTS

A. Evolution of the Brady *Rule*

The Supreme Court's decision in *Brady v. Maryland* was neither an unprecedented nor sudden pronouncement. Even before *Brady* was decided, the Court had already issued an opinion recognizing the suspicious nature of jailhouse informant testimony and the great need for prosecutorial disclosure of information that would illuminate an informant's potential motivation for testifying.[14] In 1959, the Court in *Napue v. Illinois* found reversible error in a case in which a prosecutor permitted his lead witness, a jailhouse informant, to testify falsely that he had not received any bargains in exchange for his testimony, when in fact the prosecution had offered to recommend a reduced sentence.[15]

Writing for the Court, then-Chief Justice Warren stated that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[16] At the time of *Napue*, the Court seemed acutely aware of the danger that a jailhouse informant might deliberately craft false testimony for the very purpose of obtaining the prosecution's good graces. Therefore, regarding the prosecution's failure to disclose the benefit conferred on the informant, the Chief Justice wrote that

> [h]ad the jury been apprised of the true facts ... it might well have concluded that [the informant] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [the informant] was testifying, for [the informant] might have believed that such a representative was in a position to implement ... any promise of consideration.[17]

14. *See Napue*, 360 U.S. at 269.
15. *Id.* at 265-67.
16. *Id.* at 269.
17. *Id.* at 270.

Napue thus laid the groundwork for the case of John Brady, which came before the Court only four years later, in *Brady v. Maryland*.[18] Brady had been convicted of first degree murder, and while he did not deny that he had participated in the crime, he maintained throughout his trial that a companion, Boblit, had performed the actual killing.[19] Before Brady's trial had begun, the defense requested that the prosecution disclose any evidence documenting Boblit's statements.[20] The prosecution complied with the request and turned over the information, except for one noteworthy document in which Boblit admitted that he was the actual killer.[21] John Brady remained unaware of the existence of the document until after his conviction and unsuccessful appeal to the Maryland Court of Appeals.[22]

On certiorari, the Supreme Court famously declared that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution,"[23] thus establishing the principle that would henceforth be known as the *Brady* rule. The Court's fervent statements supporting the pronouncement suggest that the decision was fundamentally based on a question of fairness, and the ruling was fashioned as an unabashed attempt to safeguard justice.[24] Justice Douglas, writing for the majority, declared that "[s]ociety 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."[25] He then quoted an inscription on the walls of the Department of Justice, reading, "The United States wins its point whenever justice is done its citizens in the courts,"[26]

18. 373 U.S. 83 (1963).
19. *Id.* at 84.
20. *Id.*
21. *Id.*
22. *Id.* (discussing Brady's affirmed conviction in *Brady v. State*, 154 A.2d 434 (Md. 1959)).
23. *Id.* at 87.
24. *See id.* at 87-88.
25. *Id.* at 87.
26. *Id.*

and subtly admonished less scrupulous prosecutors who might be tempted to conceal exculpatory material.[27]

But although the moral directive of the *Brady* rule seems obvious, its practical application is not. The years following *Brady* saw the Court simultaneously expand the scope of the *Brady* rule and the situations in which it applied, while also refining and restricting the definition of what constituted "material" evidence.[28] In *Giglio v. United States*, the Supreme Court held that evidence bearing on the credibility of a given witness is exculpatory and requires *Brady* disclosure, and further stated that "evidence of any understanding or agreement as to a future prosecution" is relevant to credibility.[29] But in the very same case, the Court stated that not *all* evidence that could be useful to the defense is required to be disclosed, and reaffirmed the requirement of a finding of "materiality."[30] Here, the Court clarified the meaning of "materiality" by stating that "[a] new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ....'"[31]

By 1985, however, the Court had abandoned the *Giglio* "reasonable likelihood" test and, in *United States v. Bagley*, further restricted the materiality standard. *Bagley* redefined evidence as "material" for *Brady* purposes "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," and narrowly defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome."[32]

In 1995, the Court once again subjected the *Brady* rule to an expand-and-contract holding.[33] First, the Court broadened the scope of *Brady* disclosures by extending a prosecutor's obligation to disclose material evidence beyond the prosecutor's immediate sphere, and required the prosecutor to "learn of any favorable

27. *Id.* at 87-88 ("A prosecution that withholds evidence ... which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.").

28. *See* Sundby, *supra* note 11, at 647.

29. 405 U.S. 150, 154-55 (1972).

30. *Id.* at 154.

31. *Id.* (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).

32. United States v. Bagley, 473 U.S. 667, 682 (1985).

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

evidence known to the others acting on the government's behalf."[34] At the same time, however, the Court also limited disclosure obligations by finding that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."[35] Rather, the Court held that a determination of materiality rested on the question of whether in the *absence* of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[36]

Finally, in *Strickler v. Greene*, the Court set out the three essential elements of a successful *Brady* claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[37] It is under this standard that a prosecutor's disclosure obligations with respect to jailhouse informants must be analyzed.

B. Prosecution's Existing Obligations Under Brady

The Court's precedents leading up to and following *Brady* have made clear that prosecutors must disclose benefits or bargains offered in exchange for a jailhouse informant's testimony.[38] Indeed, according to the Court, the mere fact that an informant testifies with the expectation of receiving a benefit undermines both the informant's credibility and confidence in the veracity of his testi-

34. *Id.* at 437.
35. *Id.* at 436-37.
36. *Id.* at 434.
37. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Legal scholarship has criticized the Court's assertion that a *Brady* claim can succeed only upon a showing of prejudice stemming from the withheld evidence, accusing the requirement of creating a backward-looking perspective and placing an unusual duty on prosecutors to decide *before* trial whether an appellate court might deem the suppression of any given piece of favorable evidence to have caused prejudice *after* conviction, especially in light of all other evidence presented at trial. *See* Sundby, *supra* note 11, at 654-55; *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006); Prosser, *supra* note 11, at 566.
38. *See, e.g.*, United States v. Bagley, 473 U.S. 676, 676 (1985); Giglio v. United States, 405 U.S. 150, 154-55 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959).

mony.[39] Moreover, the Court has stated that there is no difference between exculpatory and impeaching evidence for *Brady* purposes, because both constitute "evidence favorable to an accused"[40] and either could "make the difference between conviction and acquittal."[41]

Further supporting this proposition, the Court in *Banks v. Dretke* held that an informer's paid informant status was material for *Brady* purposes and had to be disclosed.[42] The Court noted that an informant's status as a paid informant "qualifies as evidence advantageous to [the defendant]" and agreed with the appellate court determination that knowledge of paid informant status "would certainly be favorable to [the defendant] in attacking [the informant's] testimony."[43] Eliciting this type of testimony would, of course, bear directly on the informant's credibility. The prosecution's *Brady* obligations with respect to a cooperating informant's testimony, however, go beyond the mere disclosure of any deals, promises, or inducements offered in exchange for testimony. Prosecutors are also required to disclose prior inconsistent statements made by the informant,[44] the informant's prior criminal convictions,[45] and any exculpatory information known by other agencies working on the government's behalf.[46]

Despite the Court's recognition of the suspect nature of informant testimony and its consequent holdings granting defendants a due process right to certain types of informant impeachment information, the Supreme Court's *Brady* line of cases deals *only* with the prosecution's obligations as they relate to benefits or bargains

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39. *See, e.g.*, *Giglio*, 405 U.S. at 154-55; *Napue*, 360 U.S. at 270.

40. *Bagley*, 473 U.S. at 676 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

41. *Id.*; *see also Kyles*, 514 U.S. at 433.

42. 540 U.S. 668, 691 (2004). Although this case dealt with paid informants, as opposed to jailhouse informants, it is the fact of compensation-for-testimony that is important. As this element remains the same for either paid informants or jailhouse informants, the risks and restrictions placed on one translate to the other as well, and the Court's holding can be applied equally—and easily—to both.

43. *Id.* (quoting Banks v. Cockrell, No. 01-40058, 2002 WL 31016679, at *12 (5th Cir. Aug. 20, 2002)).

44. *Kyles*, 514 U.S. at 444-45; *see also* Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 47 (2004).

45. Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir. 1997); *see also Bagley*, 473 U.S. at 678.

46. *Kyles*, 514 U.S. at 438; United States v. Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992).

offered for the informant's testimony in the case at bar. Stated differently, none of these cases address whether the prosecution should be required to disclose to the defense not only any benefits or bargains extended in the instant case, but also the informant's *entire* testimonial history.

The absence of such a holding is striking, as evidence that an informant has proffered testimony in multiple cases, and perhaps has even received multiple benefits, ought to be given utmost importance. Indeed, this January, the Supreme Court will examine the aftermath of one case, that of Thomas Lee Goldstein, in which an informant was permitted to conceal both his testimonial history and the benefits that he was receiving for his testimony in the instant case.[47] In 1980, Goldstein was convicted of murder after Edward Floyd Fink, a jailhouse informant, testified that Goldstein had confessed to him while in jail.[48] Fink also testified that he was not receiving benefits for his testimony and had never received benefits for testifying in the past.[49] In fact, Fink *was* receiving benefits for his testimony, and was a habitual informant who had received "multiple reduced sentences" in return for testimony in other cases.[50] Although some in the district attorney's office knew that Fink was being offered benefits to testify against Goldstein, the attorneys prosecuting the case were never told.[51] As a result, "evidence that could have been used to impeach Fink was not shared with Goldstein's defense counsel, in violation of *Brady v. Maryland*."[52]

After his release from prison in 2004, Goldstein sued the district attorney, alleging that his failure to develop regulations regarding "promises made to informants in exchange for testimony" violated Goldstein's constitutional rights and rendered the district attorney liable under 42 U.S.C. § 1983.[53] The district court agreed that the

47. Goldstein v. City of Long Beach, 481 F.3d 1170, 1171 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1872 (2008).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1171-72 (citation omitted).

53. *Id.* at 1172. Section 1983 allows a citizen to bring a civil action against a judicial officer whose conduct violated the citizen's civil rights, if the judicial officer's conduct was taken outside of his official capacity. 42 U.S.C. § 1983 (2000). In this case, Goldstein alleged

district attorney's conduct in failing to establish a system of information sharing was administrative conduct rather than prosecutorial, and therefore found that he was not immune from Goldstein's suit.[54] The Ninth Circuit affirmed,[55] and the Supreme Court now stands poised to determine whether a district attorney is immune from suit under § 1983 for failure to ensure that his subordinates were made aware of all facts necessary to comply with their constitutional duties.[56]

Although the Supreme Court will certainly take a hard look at both *Brady* and *Giglio*, the case is not likely to address directly the issue of whether Fink's testimonial history and past benefits should have been disclosed to the defense along with the required disclosures regarding benefits offered for his instant testimony. Nonetheless, the case is a stark reminder of the ability of repeat informants to subvert entirely the judicial process, especially when government officials and informants alike take a "don't ask, don't tell" approach to the informant's questionable past.

II. THE TROUBLE WITH JAILHOUSE INFORMANTS

A. Prevalence of Repeat Players

The lack of a Supreme Court holding regarding informant testimonial histories certainly is not due to a lack of necessity. Perhaps the most dramatic—and well-known—story of a repeat informant is that of Leslie Vernon White. In 1988, White, then an inmate in Los Angeles County, was given a telephone and the surname of an inmate he had never met.[57] Despite the fact that White did not know the inmate or the charges against him, he maintained that he could nonetheless gather enough information about the inmate to fabricate a credible confession that he could

that the district attorney's failure to establish a system of information sharing was *administrative* conduct (outside his official capacity), rather than prosecutorial conduct (within his official capacity). *Goldstein*, 481 F.3d at 1172.

54. *Goldstein*, 481 F.3d at 1172.

55. *Id.* at 1171.

56. *See* Van de Kamp v. Goldstein, 128 S. Ct. 1872 (2008).

57. Ted Rohrlich, *Review of Murder Cases Is Ordered: Jail-House Informant Casts Doubt on Convictions Based on Confessions*, L.A. TIMES, Oct. 29, 1988, at 1.

then use to bargain with the government.[58] Using only the telephone, White was able to dupe various members of the police and prosecution into disclosing confidential information about the inmate, victim, and crime, and further arranged a "meeting" with the inmate, in order to create the appearance of an opportunity for the inmate to "confess" to him.[59] The ease with which White was able to fabricate another inmate's confession understandably alarmed the legal community.[60] But perhaps the most alarming part of White's story is not his demonstration, but his history. At the time he fabricated the inmate's confession, White had already testified or offered to testify in more than a dozen cases, receiving in return money, furloughs, and a letter recommending parole.[61] In 1986 alone, White testified in six homicide cases.[62] After the story of the fabricated confession broke, White claimed to have lied in a number of criminal cases.[63]

In the spring following White's fabricated confession demonstration, the *Los Angeles Times* undertook a three-month study of the "world of jailhouse informants"[64] and concluded that informants engage in "relentless campaigns to implicate their fellow prisoners in crimes" in order to receive favors from authorities.[65] Informants went to great lengths to obtain information with which to barter,

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58. *Id.*

59. *Id.* The *Los Angeles Times* article recounts how White was able to obtain enough information to fabricate the confession. According to the article, variously posing as a bondsman, deputy district attorney, sheriff's sergeant assigned to the jail, and police sergeant with informants of his own, White extracted the inmate's personal information piecemeal from the jail's own booking center (where he learned the inmate's first name, booking number, charge, and other perfunctory information), the district attorney's office (where he learned the name of the attorney prosecuting the case and the date of the offense), the sheriff's homicide squad (where he learned the victim's name), and the prosecuting attorney (where he learned details of the crime). *Id.* Also aware that he could not claim to have heard a confession from an inmate he had never met, White placed a call posing as a district attorney and arranged to have himself and the inmate transferred to the courthouse and held in the same holding cell so that the "district attorney" could interview them. *Id.*

60. Call, *supra* note 6, at 74; Lillquist, *supra* note 13, at 922; Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996).

61. Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES, Feb. 16, 1989, at A1; *see also* Rohrlich & Stewart, *supra* note 8, at 1 ("[White] repeatedly had been released from jail for reporting murder confessions.").

62. Rohrlich, *supra* note 57, at 1.

63. Reinhold, *supra* note 61, at A1.

64. Rohrlich & Stewart, *supra* note 8, at 1.

65. *Id.*

including maintaining files of magazine clippings regarding cases, stealing legal documents from other inmates' cells, posing as jailhouse lawyers, twisting an inmate's explanation of his presence in jail into a confession, and even purchasing information from other informants for candy, cigarettes, or money.[66] Although reduced sentences were the "most dramatic" rewards sought from the government, informants also bargained for smaller benefits, including cash, "creature comforts," and participation in undercover police operations.[67]

Leslie Vernon White and the other Los Angeles inmates are not alone in their use of information to obtain benefits. According to the United States Federal Sentencing Commission, in 2003, 15.9 percent of all offenders received a sentencing reduction for "substantial assistance" to the government.[68] By 2006, the percentage had fallen to 14.4 percent of all offenders, but nonetheless, this figure still indicates that one in every seven offenders in the United States receives preferential sentencing for helping the government.[69] This figure also represents only those offenders who received *sentencing reductions* in exchange for their testimony. It does not include offenders who may have received other benefits, such as furloughs, cigarettes, or cash payments.

The dangerous and damaging effects that jailhouse informants wreak on the justice system are further documented by those committed to righting informants' (and other justice system) wrongs. The Innocence Project reports that in more than 15 percent of all wrongful convictions later overturned by DNA evidence, a police or jailhouse informant testified against the defendant.[70] Furthermore, in these cases, "statements from people with incentives to testify—particularly incentives that are not disclosed to the

66. *Id.*

67. *Id.*

68. 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2006), *available at* http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm.

69. *Id.*; *see also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 50 (2000) (noting that "for a cooperating witness to obtain a downward departure from the federal sentencing guidelines, the government must state in its motion 'that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense'" (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1987))).

70. Innocence Project, Understand the Causes: Informants/Snitches, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited July Nov. 20, 2008).

jury—are the *central* evidence in convicting an innocent person."[71] The Innocence Project reports that informants are often incentivized with the same types of offers and rewards that were discovered in the *Los Angeles Times* study of jailhouse informants: cash payments, sentencing reductions, and early releases.[72] The Innocence Project offers numerous stories of victims of jailhouse informants—wrongly convicted individuals sent to prison on the "last resort for a desperate inmate."[73]

More alarming yet, The Center on Wrongful Convictions published a study in 2004 that revealed the disturbing frequency with which innocent defendants are sentenced not only to prison, but also to death row. The study describes the cases of thirty-eight men, out of fifty-one identified, who were convicted of crimes that they did not commit partly or wholly "on the testimony of witnesses with incentives to lie,"[74] many of whom were fellow prisoners and jailhouse informants given prosecutorial "gifts" in exchange for their testimony.[75]

By way of example, one jailhouse informant was offered an eight-year reduction to his fourteen-year sentence if he would agree to testify against (innocent) defendant Steven Manning.[76] Following his testimony, the informant was released to the federal witness protection program.[77] Steven Manning was sent to Illinois's death

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71. *Id.* (emphasis added).

72. *Id.*; *see supra* notes 66-67 and accompanying text.

73. Innocence Project, *supra* note 70. The stories include that of Ken Wyniemko, who served eight years after a jailhouse informant was offered the "deal of the century" in exchange for his testimony. *See id.* (video recording). Wyniemko was released only after DNA evidence later proved his innocence. *Id.* Other cases reported by the Innocence Project include Larry Peterson, who served more than sixteen years after being convicted on the testimony of a jailhouse informant with charges pending in three counties, *see* Innocence Project, Know the Cases: Larry Peterson, http://www.innocenceproject.org/Content/148.php (last visited Nov. 20, 2008), and Wilton Dedge, who lost twenty-two years to the testimony of a jailhouse informant, who, in return, received a drastic cut in his own sentence. *See* Innocence Project, Know the Cases: Wilton Dedge, http://www.innocenceproject.org/Content/84.php (last visited Nov. 20, 2008).

74. ROB WARDEN, NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004-05), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/snitchsystemBooklet.pdf.

75. *Id.*

76. *Id.* at 8, 10.

77. *Id.* at 10.

row, where he spent the next ten years of his life.[78] And Steven Manning is hardly a lone case; the Center on Wrongful Convictions report lists at least eighteen other men who were sentenced to death on false informant testimony.[79] These men lost not only years, sometimes decades, of freedom—they very nearly lost their lives.

In addition to the stories of defendants harmed by jailhouse informants, the report also recounts the story of Darryl Moore, a jailhouse informant himself.[80] Moore was a known criminal who made a "pact" with prosecutors, whereby he agreed to provide testimony in a murder case in return for the prosecution's promise of cash, dropped drug and weapons charges, and immunization for a contract murder in which Moore admitted participation.[81] Moore's own mother testified for the defense, warning the jury that even she would not believe her son's testimony under oath.[82] In the end, the three defendants, an alleged drug kingpin and his associates, were convicted.[83] After their convictions, Moore recanted his testimony, explaining that it had been bought by the prosecution, and stating that he knew nothing of the murder for which the three men had been convicted.[84]

Altogether, the Center on Wrongful Convictions reports that 111 death row inmates have been exonerated since the reinstatement of the death penalty.[85] Police and jailhouse informants played a role in 45.9 percent of those exonerations, "mak[ing] snitches the leading

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78. *Id.*

79. Both the roster of informant-convicted inmates and the amount of time they spent on death row are long: Joseph Amrine, ten years; Dan Bright, eight years; Shabaka Brown, fourteen years; Albert Ronnie Burrell, thirteen years; Michael Ray Graham Jr., thirteen years; Earl Patrick Charles, four years; Robert Charles Cruz, fourteen years; Muneer Deeb, eight years; Charles Irwin Fain, eighteen years; Neil Ferber, five years; Gary Gauger, two years; Steven Manning, ten years; Juan Roberto Melendez, eighteen years; Adolph Munson, eleven years; Alfred Rivera, three years; Christopher Spicer, two years; Gordon (Randy) Steidl, seventeen years; Dennis Williams, sixteen years; Ronald Williamson, sixteen years; Nicholas Yarris, twenty-two years. *Id.* at 3-4, 6, 8, 10, 12. Altogether, the men served a total of 224 years on death row.

80. *Id.* at 13.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* The alleged kingpin died of cancer in prison. *Id.* His associates lost their appeals and are serving life sentences without parole. *Id.*

85. *Id.* at 3.

cause of wrongful convictions in U.S. capital cases."[86] As the Center warns of the American experience with informants and snitches, "when the criminal justice system offers witnesses incentives to lie, they will."[87]

As alarming as these stories and statistics are, they provide only half the story. Although it is possible to track how many exonerees were convicted on informant testimony, it is virtually impossible to know how many of these informants are repeat players. Neither the Innocence Project nor the Center on Wrongful Convictions attempts to discover how many of the identified informants had testified before, or what they received for it. This is not a failure of either organization, but rather a failure of the system. Neither prosecutor nor informant is motivated to reveal the informant's testimonial history, and neither is required to do so.[88]

Furthermore, the ability of defense attorneys to discover this information through conventional methods, such as cross-examination, is extremely restricted. While a defense attorney is permitted to ask an informant on cross-examination whether he has ever testified in the past, or was ever offered benefits for doing so, the attorney is basically out of options if the informant answers "no."[89] The attorney is not permitted to argue with or "badger" the informant into admitting his testimonial history, and may face a challenge for waste of time or confusion of the issues if he attempts to do so.[90] By contrast, if a defense attorney was prepared with a written statement of the informant's history, he would be able not only to ask the question, but also to impeach a false answer.[91] As such evidence is a prototypical example of bias, it would not be excluded by the evidentiary bar on "extrinsic" evidence.[92] Yet, as the law currently stands, the tales of repeat informants and their destructive testimony are usually discovered only after the mistakes

86. *Id.*

87. *Id.* at 2.

88. *See* discussion *supra* pp. 1073-74.

89. This is especially so if, as in the case of Thomas Goldstein, the prosecuting attorney himself has been kept in the dark regarding the informant's testimonial past. *See supra* notes 47-52 and accompanying text.

90. *See* FED. R. EVID. 403.

91. *See* FED. R. EVID. 608(b).

92. *See* FED. R. EVID. 608 advisory committee's note on 2003 amendment.

have already been made, innocent defendants have already been jailed, and crooked informants have already been rewarded.

B. Proposed Reforms

The danger inherent in the sheer unreliability of jailhouse informant testimony, combined with the great frequency of its use, has prompted legal commentators to propose many different types of reform intended to promote the credibility of informant testimony. These proposals range from the milder proposition that the prosecution be required to record its conferences with informants in order to permit the defense to impeach inconsistent statements and allow the fact-finder to gauge an informant's credibility,[93] to the far more radical suggestion that informant misconduct would be best controlled by creating a "rebuttable presumption that informant conduct is state action ... and action under color of law."[94] Somewhere between these two proposals is the suggestion that judges hold pretrial in camera reviews of the prosecutor's file to decide which evidence is exculpatory.[95]

Establishing mandatory pretrial "reliability hearings" of any cooperating witnesses has also been advocated as method of discovering and excluding the testimony of less trustworthy informants.[96] At these hearings, the court would weigh factors bearing on an informant's credibility, including cooperation or benefits received in *other* cases, and would determine whether the informant was reliable enough to testify.[97] Under this paradigm, an informant's "history of repeated cooperation" would weigh against the informant and "create a presumption of insufficient reliability."[98]

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93. Roberts, *supra* note 6, at 298-99.

94. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 89 (1994).

95. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 397-98 (1984).

96. *See, e.g.*, Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 460 (2001) (discussing the recommendation of the Illinois House of Representatives Special Committee on Prosecutorial Misconduct to mandate reliability hearings for all jailhouse informant testimony, and advocating the same); Harris, *supra* note 69, at 63-64 (advocating reliability hearings for compensated witness testimony and proposing guidelines therefor).

97. Harris, *supra* note 69, at 63.

98. *Id.* at 63-64.

Supporters of reliability hearings argue that this method of judicially prohibiting unreliable government witnesses "would be an effective step toward stopping perjury ...."[99] Although this may be true, such reliability hearings would undoubtedly increase the burden and expense of the criminal trial, particularly if the hearings were fully adversarial. Calling the informant to testify, subjecting him to direct- and cross-examination, calling and examining other character witnesses, and presenting evidence bearing on the informant's credibility would significantly encumber courts.[100] Opponents have further suggested that reliability hearings may slow proceedings to such an extent that criminal defendants could be denied their right to a speedy trial.[101]

In recent years, open file discovery policies, in which the defense is provided with everything contained in the prosecution's file, have been advocated as a less burdensome method of preventing *Brady* violations.[102] The Supreme Court, however, has been very clear that open file policies fall outside the scope of constitutional mandates,[103] and at present, whether open file discovery is provided is often left to the discretion of the individual office or prosecutor.[104] Even a

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99. Clark, *supra* note 96, at 460.

100. The strain that reliability hearings would impose on the court is obvious when considering the sheer scope of information supporters suggest should be presented. One commentator stated that the court could consider "the informant's criminal history, any inducement for the informant's testimony, the testimony expected, the circumstances of the alleged incriminating statements to the informant, whether the informant has ever recanted the testimony, and other cases in which the informant has testified." *Id.* Another reliability hearing proposal included each of these factors, and additionally argued that court should consider the existence or nonexistence of physical evidence corroborating the informant's testimony and "anything bearing on the credibility of the compensated witness' testimony." Harris, *supra* note 69, at 63.

101. *See* Clark, *supra* note 96, at 461 (citing Adrienne Drell, *Statement Law Would Slow System*, CHI. SUN-TIMES, Sept. 10, 2000, at 8).

102. *See, e.g.*, Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty To Investigate and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1155 (2004) (noting the "high benefits" of a "prophylactic rule of open file discovery"); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 273 (arguing that *Brady* violations will be reduced by implementing an open file discovery system in which the entire police file would be provided to the defense).

103. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy.").

104. *See* Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 342 n.170 (2005); Prosser, *supra* note 11, at 593-94. Underscoring this assessment, the U.S. Attorneys' Manual states that while prosecutors must disclose all appropriate *Giglio* and *Brady* material, "neither the Constitution nor [the U.S.

mandatory and uniform system of open file discovery, however, would not be sufficient to cure the problem of nondisclosure of jailhouse informant testimonial histories. Because open file policies, by definition, require disclosure of only that which is *in* the file, and because the testimonial histories of jailhouse informants are not likely to be included in the file, the defense will still be denied this valuable information.

An examination of two states that *have* mandated open file discovery illustrates this deficiency. North Carolina's open file discovery statute requires the prosecution to provide the oral and written statements of the defendant, codefendant, and any witnesses, the investigating officers' notes, the results of tests and examinations, a written list of the names of witnesses expected to testify, and other evidence obtained during the investigation.[105] Florida imposes similar discovery obligations, but further requires disclosure of tangible papers and documents, whether the state has been provided information by an informant (but not the informant's history), and whether there has been electronic surveillance.[106] Under these guidelines, unless the jailhouse informant has announced his testimonial history in either a written or oral statement, it is unlikely to be found in the prosecutor's official file.

Because of the prohibitory burden imposed by reliability hearings and the "loophole" created by open file policies, another method must be devised for ensuring that the fact-finder is able to judge fully the credibility of informants who have repeatedly proffered testimony and gained a benefit in return. This objective could easily—and cheaply—be realized through an expansion of the *Brady* materiality requirement to include all evidence that is reasonably considered favorable to the defendant. Under this definition of materiality, an informant's testimonial history would satisfy the *Brady* requirement that evidence that is impeaching and "material"

Attorneys' Manual] ... creates a general discovery right for trial preparation ...." U.S. ATTORNEYS' MANUAL, § 9-5.001(B) (2006), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

105. N.C. GEN. STAT. ANN. § 15A-903 (West 2007).

106. FLA. R. CRIM. P. 3.220 (2007). The Florida rule also mandates disclosure of "any material information within the state's possession or control that tends to negate the guilt of the defendant." *Id.* This requirement, however, simply begs the same question of whether an informant's testimonial history constitutes "material" information. *See* discussion *infra* Part III.B.

be disclosed and available for use by the defendant in making his defense.

III. INFORMANT TESTIMONIAL HISTORIES AND THE *BRADY* ELEMENTS

A. Exculpatory or Impeaching Information

An informant's testimonial history undoubtedly meets the first element of a successful *Brady* claim—that "the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching."[107] Multiple Supreme Court, federal, and state cases have acknowledged the dubious nature of compensated informant testimony and require the prosecution to disclose the compensation to the defense. In every case, courts stressed that the testimony of a compensated jailhouse informant is inherently suspect, simply by the fact that when a benefit is given in exchange for "helpful" testimony, it creates in the informant a strong incentive to lie.[108]

Legal commentators too have recognized that the practice of predicating rewards on useful testimony, rather than on truthful testimony, has the effect of encouraging fabrication. Because defendants know their "only possibility of making a deal with the government ... is a proffer of testimony helpful in convicting another defendant," the proffers and ultimate testimony of cooperating witnesses are "necessarily skewed."[109] Moreover, "[w]itnesses who ... testify on behalf of the government against criminal defendants in exchange for some form of favorable treatment have enormous

107. Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

108. Banks v. Dretke, 540 U.S. 668, 691 (2004) (stating that it was "beyond genuine debate" that the informant's paid status "qualifie[d] as evidence advantageous" to the defendant); United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 153 (1972); Napue v. Illinois, 360 U.S. 264, 269-70 (1959); Ruetter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989); Schofield v. Palmer, 621 S.E.2d 726, 731 (Ga. 2005) ("The habeas court concluded that the State must have believed that [the informant's] evidence was important because it paid $500 for it, and that the State must also have believed that knowledge of the payment would have affected its case against [the defendant] because it went to such great lengths to conceal it."); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

109. Harris, *supra* note 69, at 50.

incentives to testify falsely in order to obtain leniency."[110] This motivation to concoct incriminating statements is precisely the type of impeachment evidence that *Brady* requires to be disclosed. Indeed, the American College of Trial Lawyers describes evidence of favorable treatment and promises of immunity to government witnesses as "not only favorable, but essential, to the defense in a criminal trial."[111] All of these cases and commentaries therefore support the notion that any *single* benefit granted an informer in any *individual* case must be disclosed under *Brady* because it constitutes impeachable evidence.

But this notion takes on even greater significance in the case of a repeat informer, for if a benefits-for-testimony bargain implicates credibility the first time it occurs, suspicion over an informant's veracity must be exponentially greater after the second, third, or fourth time the informant proffers information for a price.[112] Professor Erik Lillquist notes that "the most doubt-inducing informants are those who have *repeatedly* been the recipients of confessions by other inmates."[113] He further states that the more frequently a jailhouse informant is "confessed to," the more "completely implausible" it becomes that the confessions are true.[114] Rather, "[i]t is ... more likely that the informant is doing something to help create those confessions."[115] The American College of Trial Lawyers also recognizes "prior perjury or false testimony of government witnesses" as evidence "essential" to the defendant's

110. Roberts, *supra* note 6, at 260; *see also* Call, *supra* note 6, at 74 ("Because jailhouse informants are already incarcerated, they are likely to feel they have nothing to lose and much to gain by providing information to the government. The problem is that they have so little to lose and so much to gain that there is considerable incentive for them to lie."). Perhaps the starkest commentary on informants' predilection for fabricating testimony comes from Judge Stephen S. Trott, of the United States Court of Appeals for the Ninth Circuit, in a cautionary guide for prosecutors using criminals as witnesses:

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.

Trott, *supra* note 60, at 1394.

111. Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Evidence Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 102-03 (2004).

112. Lillquist, *supra* note 13, at 922.

113. *Id.* (emphasis added).

114. *Id.*

115. *Id.*

ability to make his defense, but notes that *Brady* disclosures are not always sufficient to uncover this type of information.[116] And in a 2002 report by the Governor's Commission on Capital Punishment in Illinois, the Commission unanimously recommended that in cases using informant testimony, "the state should promptly inform the defense as to the identification and background of the witness," noting that such information is necessary for proper cross-examination.[117]

One can clearly understand how evidence that an informant has "snitched" time after time might affect a jury. If an informant comes forward once with a proffer of testimony—perhaps truthful, perhaps not—and receives a reward for his "helpfulness," it is easy to imagine that the informant would be interested in being "helpful" again in the future, so that he might receive another reward. The problem of credibility results because jailhouse informants are not typically conscientious individuals who are reluctant to betray their comrades. Rather, jailhouse informants are usually thought of as being out for themselves and likely to be far more interested in rewards than truth.[118] The proclivity of informants to hand over their possibly innocent associates for personal gain has been a frequent topic of commentary.[119] The general reputation of informants is neatly, if understatedly, summarized in an article focused on the danger of untruthful jailhouse testimony: "[T]he past behavior of most jailhouse informants does not inspire confidence that they are trustworthy."[120] Thus, a jury's affirmative knowledge that an informant (a) received a bargain for his proffer of testimony

116. Am. Coll. of Trial Lawyers, *supra* note 111, at 102-03.

117. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 134 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_ report.pdf.

118. *See* discussion *supra* Part II.A.

119. *See* Trott, *supra* note 60, at 1383 ("Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes ... lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact ...."); Steven D. Clymer, *Undercover Operatives and Recorded Conversations: A Response to Professors Shuy and Liniger*, 92 CORNELL L. REV. 847, 848 (2007) (book review) ("At best, undercover informants are willing to betray factually guilty friends, co-workers, and associates for personal gain. At worst, they are willing to do so to those whom they know to be innocent.").

120. Call, *supra* note 6, at 80.

in the instant case, and (b) has received bargains for proffers of testimony in past cases, combined with the jury's inherent understanding that (c) jailhouse informants will lie to get what they want, and (d) it is doubtful than any single jailhouse informant will continually be the recipient of honest confessions, could easily establish the "reasonable doubt" that results in a verdict of not guilty.[121]

B. That Is Material to Guilt or Innocence

Even though an informant's testimonial history meets the first *Strickler* requirement of being favorable to the defendant because it is impeaching,[122] it must also meet the second element of the *Brady* standard—that is, it must be "material"—in order to constitute admissible evidence under *Brady*.[123]

1. Inadequacy of the Current Definition of Material

Legal scholarship has frequently criticized the *Brady* materiality standard as inadequate to ensure that the defendant receives all the exculpatory material that is of practical use to his defense.[124] These inadequacies go directly to the problem of nondisclosure of informant testimonial histories. Commentators charge *Brady*'s holding and subsequent development in the Supreme Court with transforming the original doctrine into a "post trial remedy for prosecutorial and law enforcement misconduct" rather than a pretrial assurance of discovery of favorable evidence.[125] More specifically, the Court's narrowing of the materiality standard is accused of being primarily responsible for the diminished value of *Brady* as a pretrial

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121. *See id.* Interestingly, the government in the Eighth Circuit case *Ruetter v. Solem* argued that because the informant is a convicted felon, his credibility is already in question and the jury's doubt does not need to be supplemented by evidence that he received benefits for his testimony. Ruetter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989). The court rejected this argument, relying on the Supreme Court's language in *Napue* that the "'fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner [does not turn] what was otherwise a tainted trial into a fair one.'" *Id.* (quoting Napue v. Illinois, 360 U.S. 264, 270 (1959) (omission in original)).

122. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *see* discussion *supra* Part III.A.

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

124. *See supra* text accompanying notes 116-17.

125. *See* Sundby, *supra* note 11, at 644.

discovery rule.[126] The limited discovery required by the restricted materiality standard can force a defendant to build a case without the tools that would adequately permit his counsel to investigate his true level of culpability.[127] One of these tools is, of course, the credibility of any jailhouse informants who claim to have incriminating information regarding the defendant.[128]

Some commentators argue that the language in *Brady* does not necessarily mandate the Court's narrow "reasonable probability" standard for obligatory disclosure.[129] Rather, a "perfectly plausible reading of 'material' within the context of the opinion is that it means 'relevant' ...."[130] Thus, were the Court to adopt a broader materiality standard that focused on an affirmative duty to turn over all "*relevant* favorable evidence," the Court would thereby create a forward-looking rule that would reestablish *Brady*'s pretrial significance.[131] Certainly, under this model, the testimonial history of a repeat informant would qualify as "relevant favorable evidence." Indeed, others note that current standards prevent the defense from receiving disclosure about many aspects of informant testimony, and have proposed regulations to help make access to pertinent information more "neutral" and accessible.[132] These proposals also further the general legal preference that the jury should hear any evidence relating to questionable reliability so that the *fact-finder*—not the prosecutor—is charged with the task of determining whether evidence should be believed.[133]

Frequently, prosecutors are vilified as being generally unconcerned with their obligations to disclosure—and to justice—due to common failures to turn over obviously exculpatory material.[134]

126. *See id.* at 644-45; *see also* Prosser, *supra* note 11, at 569.
127. Prosser, *supra* note 11, at 549-50, 563.
128. *See* Am. Coll. of Trial Lawyers, *supra* note 111, at 102-03.
129. *See* Sundby, *supra* note 11, at 661-62.
130. *Id.* at 646.
131. *Id.*
132. *See, e.g.*, Harris, *supra* note 69, at 61; Prosser, *supra* note 11, at 598, 604.
133. *See* Call, *supra* note 6, at 75.
134. Burke, *supra* note 37, at 1590 ("Prosecutors choose to overcharge defendants, withhold exculpatory evidence, and turn a blind eye to claims of innocence; therefore, the traditional inference goes, they must value obtaining and maintaining convictions over 'doing justice.'"); Capra, *supra* note 95, at 394-95 ("Evidence that defense counsel might consider very favorable (or that can lead to even more favorable evidence) is apt to be downplayed or overlooked—and thus not disclosed—by an advocate on the other side."); Prosser, *supra* note 11, at 567-68

Prosecutors are charged with generally ignoring informant backgrounds and "continu[ing] to prosecute defendants despite having information that ... an informant's status or background was not properly disclosed."[135] However, Alafair Burke argues that such failures do not result from a conscious plan on the part of the prosecutor to undermine justice, but rather that prosecutors are susceptible to certain "cognitive bias[es]" that lead them truly to believe in a defendant's guilt—and therefore overzealously pursue conviction—despite evidence to the contrary.[136] Because of these biases, prosecutors are apt to overestimate the strength of their own case and underestimate the potential exculpatory value of other evidence when asked to evaluate the "reasonable probability" that the evidence will affect the outcome of the trial.[137]

Analyzing the prosecution's nondisclosure of an informant's testimonial history under this framework, a prosecutor may fail to reveal an informant's testimonial history not out of a desire for underhanded or malicious prosecutions, but simply because the prosecutor does not believe the evidence is sufficiently exculpatory to require its disclosure. If the prosecutor holds an honest and earnest belief in the defendant's guilt, seeks to confirm that belief, and tends to overvalue evidence that supports it while downplaying evidence that does not,[138] a prosecutor may "rationally" believe that information obtained from an untrustworthy informant is true.[139] Consequently, the prosecutor may place great weight on that information, while simultaneously *undervaluing* evidence that the informant may be lying—such as evidence that the informant has testified in a dubiously large number of cases or has outright lied in the past.

("Bad faith nondisclosures continue decades after *Brady*.").

135. Zimmerman, *supra* note 94, at 98.

136. Burke, *supra* note 37, at 1593. Burke states that the psychological biases that can convince a prosecutor of the defendant's culpability independent of the existence of exculpatory evidence include a tendency to seek to confirm rather than disconfirm an already-existing hypothesis, a tendency to overvalue information that supports preexisting theories and undervalue evidence that does not, a tendency to continue to adhere to a theory even after it is disproved, and a tendency to adjust one's beliefs to maintain existing self-perceptions. *Id.* at 1593-94.

137. *Id.* at 1610-12.

138. *Id.* at 1593-94.

139. *Id.* at 1611.

Although Burke's theory casts prosecutorial nondisclosure in a more sympathetic light, she does not suggest that an *understandable* prosecutorial decision to withhold evidence is also an *acceptable* one.[140] Rather, Burke argues that "broadening the *Brady* standard to include all favorable information" would avoid the "cognitive disaster" inherent in *Brady* by producing better prosecutorial decision making.[141] In actuality, however, broadening the materiality standard in this way would not produce "better" prosecutorial decision making; it would merely eliminate the need for prosecutors to make decisions about what constitutes "materially exculpatory evidence" at all. Instead, prosecutors would simply disclose *all* favorable information—including testimonial histories.

2. Proposed Definition of Material

The proposal to expand the *Brady* materiality standard to include *all* relevant evidence that tends to exculpate the defendant, rather than only that that is "reasonably probable" to induce a different verdict, has found support among courts and commentators alike. With respect to informant testimonial histories, this expanded standard would transform nondiscoverable—but impeaching—evidence into discoverable evidence. Indeed, Justice Marshall put forth this proposition early, and emphatically, in his dissent in *United States v. Bagley*.[142]

a. Justice Marshall's Bagley *Dissent*

In *Brady*, the Supreme Court's absolute statements regarding the importance of "fairness" and "justice" in criminal actions[143] suggest that the Court originally intended the *Brady* rule to be more than the perfunctory tribute to integrity in the justice system that the restricted materiality standard has created.[144] Rather, these statements denote an intent that *Brady* should further even-handed

140. *Id.* at 1614.
141. *Id.* at 1631-33.
142. 473 U.S. 667, 702 (1985) (Marshall, J., dissenting).
143. *See supra* text accompanying notes 24-26.
144. *See supra* text accompanying notes 124-27.

dealing and true judicial impartiality.[145] By the time of *Bagley* twenty-two years later, however, Justice Marshall had become clearly alarmed at the direction the Court's *Brady* decisions were moving, and harshly criticized the Court for its departure from "the original theory and promise of *Brady*" through its restrictions on the materiality standard.[146] He complained that the disclosure standard permitted prosecutors to avoid revealing "obviously exculpatory evidence" while staying comfortably within constitutional mandates.[147] In a footnote, Justice Marshall dismissed the majority's understanding of the *Brady* materiality standard and argued instead for an "all relevant evidence" standard, maintaining that *Brady*'s original statement requiring prosecutors to turn over evidence "material either to guilt or to punishment" was not intended to limit disclosure obligations to evidence that is "material" under the standard the Court articulated in *Bagley*.[148] Rather, he argued, the *Brady* Court's reasoning provided "strong evidence" that the word was used to mean "germane to the points at issue."[149]

Justice Marshall repeatedly emphasized the need for a much broader materiality standard, finding that both *Brady* and "the fundamental interest in a fair trial" require the prosecution to disclose "*all* information known to the government that might reasonably be considered favorable to the defendant's case."[150] He stated that the "existence of *any small piece* of evidence favorable to the defense" may mean the difference between conviction and acquittal, that suppression of information that "might *reasonably* be considered favorable ... undermines the reliability of the verdict," and that "important interests are served when *potentially* favorable evidence is disclosed."[151]

In addition to his flat rejection of the majority's reasoning behind a restrictive materiality standard,[152] Justice Marshall paid particular attention to the injustice of the prosecution's suppression of

145. Sundby, *supra* note 11, at 643-44.
146. *Bagley*, 473 U.S. at 702 (Marshall, J., dissenting).
147. *Id.* at 700.
148. *Id.* at 703 n.5.
149. *Id.*
150. *Id.* at 695-96.
151. *Id.* at 693, 695 (emphasis added).
152. *See supra* notes 148-51.

evidence bearing on a witness's credibility.[153] Here, he found that "evidence of that witness's possible bias simply may not be said to be irrelevant, or its omission harmless" and nondisclosure of such "corrupts the process to some degree in all instances."[154] Thus, if an informant's testimonial history is determined to be impeaching,[155] and nondisclosure of impeachment evidence is deemed to be "corrupting,"[156] it follows that Justice Marshall would be loathe to accept a materiality standard—in his view, warped from the *Brady* Court's true intent—that permits such relevant and harmful omissions.

b. In Support of Expanded Materiality

Justice Marshall is not alone in his belief that "material" evidence encompasses more than simply evidence that creates a "reasonable probability that ... the result of the proceeding would have been different."[157] Indeed, legal commentators have frequently noted that the American Bar Association Model Rules of Professional Conduct impose more expansive disclosure obligations on the prosecution than does the *Brady* materiality standard.[158] In fact, ABA Model Rule 3.8, governing the "Special Responsibilities of a Prosecutor," states that

> [t]he 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.[159]

153. *Bagley*, 473 U.S. at 693 n.1 (Marshall, J., dissenting).
154. *Id.* at 690-91.
155. *See* discussion *supra* Part III.A.
156. *Bagley*, 473 U.S. at 690 (Marshall, J., dissenting).
157. *Id.* at 682 (majority opinion).
158. *See* Burke, *supra* note 37, at 1628-29; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1592; Sundby, *supra* note 11, at 651; Roberts, *supra* note 6, at 268.
159. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2007). The exception provided for in Rule 3.8 is explained further in Comment 3. The Comment explains that the exception permits a prosecutor to seek a protective order from the court if disclosure to the defense "could result

Because the Model Rule requires disclosure of "all" evidence that "tends" to exculpate the defendant,[160] it effectively ignores *Brady*'s requirement that the favorable information have a "substantial probability" of producing an acquittal.[161] Model Rule 3.8 therefore recognizes that favorable evidence can be enormously useful to the defense as exculpatory evidence even without necessarily satisfying *Strickler*'s post-review materiality standard.[162]

Although the Model Rule does not use the word "material," its language embodies what one might expect to see if "materiality" were understood as Justice Marshall advocated in his *Bagley* dissent—that "any small piece" of evidence may be the evidence that sways the fact-finder toward belief in the defendant's theory of the case,[163] and that *Brady*'s materiality standard was originally intended to describe evidence "germane to the points at issue."[164] The suspicion and lack of credibility inherent when a compensated jailhouse informant takes the witness stand has already been discussed,[165] as has the exponentially greater effect such testimony might have on the jury if it were apprised of the fact that the informant is a "repeat player."[166] Disclosure of the testimonial history of an informant would "allow[ ] defense counsel to use such information" and "hopefully have the effect of reducing the probative

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in substantial harm to an individual or to the public interest." MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.3. Because disclosure to the defendant of information regarding an informant's testimonial history is unlikely to harm any individuals or the public interest at large, this exception would not play a role in this type of disclosure.

160. *Id.* R. 3.8.

161. Burke, *supra* note 37, at 1629; Green, *supra* note 158, at 1592; Sundby, *supra* note 11, at 651; Roberts, *supra* note 6, at 268.

162. *See supra* note 37 and accompanying text.

163. United States v. Bagley, 473 U.S. 667, 693 (1985) (Marshall, J., dissenting).

164. *Id.* at 703 n.5. Without a doubt, the difference between an ABA/Marshall standard requiring disclosure of all evidence that "reasonably appears favorable to the defendant," *id.* at 699, or "tends to negate [his] guilt," MODEL RULES OF PROF'L CONDUCT R. 3.8, and one that demands a post-conviction showing of "reasonable probability," Strickler v. Greene, 527 U.S. 263, 281-82 (1999), would have been enormously helpful to the *Strickler* defendant. There, the Court determined that although the defendant had affirmatively shown that the prosecution suppressed evidence favorable to his case, his conviction should be affirmed because he had shown only a reasonable *possibility* of a different trial outcome instead of a reasonable *probability*. *Id.* at 296. Perhaps, had the *Strickler* defendant been permitted access to all evidence that tended to negate his guilt, he would have been able to turn his "reasonable possibility" of an acquittal into an actual verdict.

165. *See supra* text accompanying notes 108-15.

166. *See supra* text accompanying notes 118-21.

value of such testimony in the very case in which it is the least reliable—where the informant has testified before."[167]

Because this type of evidence has great impeachment value, it satisfies the criteria established by Justice Marshall and ABA Model Rule 3.8 for evidence that ought to be disclosed.[168] The fact that a jailhouse informant purportedly has been the repeated recipient of damning information about other inmates *tends* to suggest that the informant is getting his information through disreputable means,[169] and therefore *tends* to negate the guilt of the defendant, especially in cases in which the informant's testimony constitutes the bulk of the prosecution's case.[170] In these situations, the defense would have much to gain by presenting to a jury evidence that the testimony from the witness on the stand has not only been bought with benefits in the instant case, but that the informant has a habit of offering evidence against other inmates so that he might receive a reward.

Although an informant's testimonial history would surely meet the "all evidence that tends to exculpate" standard, however, it is not clear that this type of evidence satisfies the current *Strickler* "substantial probability" test. Under the current rules, the process by which prosecutors decide whose testimony is most useful to their case is "largely undiscoverable,"[171] making a successful showing of prejudice from the standpoint of post-conviction review nearly impossible.[172] This problem is particularly salient to informant testimonial histories, especially in light of the charge that prosecutors have "simply ignored informant backgrounds" and "have continued to prosecute defendants despite having information ... that an informant's status or background was not properly disclosed."[173] Similarly, some scholars assert that prosecutors deliberately prefer to keep the details of their bargains with informants hazy, as juries are less likely to be turned off by a generalized "deal"

167. Lillquist, *supra* note 13, at 922.
168. See *Bagley*, 473 U.S. at 695-96 (Marshall, J., dissenting); MODEL RULES OF PROF'L CONDUCT R. 3.8.
169. Lillquist, *supra* note 13, at 922.
170. *See, e.g.*, Harris, *supra* note 69, at 53; Roberts, *supra* note 6, at 259.
171. Harris, *supra* note 69, at 53.
172. *Id.*
173. Zimmerman, *supra* note 94, at 98.

than by an "agreement set out a precise discount."[174] Presumably, the prosecution would also prefer to keep an informant's testimonial history quiet for precisely the same reason. Under the current materiality standard, little prevents the prosecution from withholding this information for the very purpose of avoiding its influential effect on the jury.[175]

The fact that an informant's testimonial history is not discoverable under the current materiality standard, but would be under the Model Rule standard, is made even more important by the observation that "courts do not invoke the disciplinary rule as a source of additional disclosure obligations, and courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law."[176] In addition, courts generally accept the "systematic use of informants" without question.[177]

Courts' broad reluctance to hold prosecutors to the disclosure obligations in the Model Rules is particularly perplexing considering that all states also promulgate their own rules governing prosecutorial disclosure,[178] and the rules in forty-seven states and the District of Columbia parrot the language in Model Rule 3.8 that "all" evidence that "tends" to negate guilt should be disclosed.[179] Given the interests of fairness and justice on which the Court so ardently based its holding in *Brady*,[180] the impeachability of an informant's testimonial history,[181] and the ABA and state promotions of an "all relevant evidence" standard[182] that would require the disclosure of an informant's testimonial history, broadening the *Brady* material-

174. Lillquist, *supra* note 13, at 922 (quoting Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 95-96 (1995)).

175. At a minimum, the fact that recent commentaries, cases, and proposals have begun advocating for a requirement of testimonial history disclosure is itself evidence that such disclosure is not now required. *See* Call, *supra* note 6, at 80; Harris, *supra* note 69, at 61; Lillquist, *supra* note 13, at 922; discussion *infra* Part IV.

176. Green, *supra* note 158, at 1593.

177. Zimmerman, *supra* note 94, at 109.

178. Roberts, *supra* note 6, at 268.

179. American Bar Association: Center for Professional Responsibility, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Nov. 20, 2008).

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

181. *See* discussion *supra* Part III.A.

182. *See supra* text accompanying notes 158-62, 178-79.

ity standard to encompass this type of disclosure is a necessary step toward ensuring that defendants are equipped with information bearing directly on their innocence. In addition, considering courts' unwillingness to enforce the state and ABA Model Rules regarding ethical prosecutorial disclosure, an expansion of the *Brady* materiality standard would ensure that courts hold prosecutors accountable for a failure to provide evidence pertinent to defendants' ability to mount an informed defense. As Justice Marshall stated in his *Bagley* dissent, "[T]o require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked."[183]

c. Proposal by the American College of Trial Lawyers

The American College of Trial Lawyers (ACTL), addressing the deficiency of adequate discovery obligations in the federal requirements, has proposed an amendment to Federal Rule of Criminal Procedure 16,[184] which would clarify the nature of exculpatory evidence and expand the scope of its required disclosure, thereby ensuring "that defendants receive the full and consistently applied benefit of the Supreme Court's pronouncements in *Brady* and its progeny."[185] The ACTL proposal maintains that the current Rule 16 fails to provide defendants favorable information that is material to either guilt or innocence, and stresses the "critical language" in *Brady* that disclosure is required of evidence that "*tends to* exculpate or reduce one's penalty."[186]

ACTL's proposal to amend Rule 16 would remedy this deficiency in the current rule by requiring the prosecution to disclose all

183. United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting).

184. Federal Rule of Criminal Procedure 16 governs discovery in federal cases. The rule requires disclosure of the defendant's oral, written, or recorded statements, FED. R. CRIM. P. 16(a)(1)(A)-(B), the defendant's prior record, FED. R. CRIM. P. 16(a)(1)(D), documents, data, objects, and like materials that are material to preparing the defense or that the government intends to use at trial, FED. R. CRIM. P. 16(a)(1)(E), reports of physical or mental examinations, FED. R. CRIM. P. 16(a)(1)(F), and a summary of expert testimony, FED. R. CRIM. P. 16(a)(1)(G); *see also* Am. Coll. of Trial Lawyers, *supra* note 111, at 101-02.

185. Am. Coll. of Trial Lawyers, *supra* note 111, at 95.

186. *Id.* at 103-04 (emphasis in original).

information reasonably favorable to the defendant.[187] The proposal further defines favorable information as "all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) *adversely impact the credibility of government witnesses or evidence*; c) mitigate the offense; or d) mitigate punishment."[188] The admissibility of an informant's testimonial history under this standard hardly could be denied. Because the evidence could adversely impact the credibility of the informant—a government witness—the prosecution would be obligated to disclose his history to the defense. That the amendment would have this result is noteworthy, because ACTL's proposed commentary to the amendment states that the amendment is intended to codify *Brady v. Maryland* and its subsequent line of cases,[189] thus implying a belief that disclosure of this type of impeachment evidence should already be required through the *Brady* standard.

Of greatest significance to ACTL's proposed codification of *Brady*, however, is the drafters' apparent belief that the materiality standard articulated in *Strickler* is unnecessary under *Brady* for pretrial disclosures, and that the definition of "[i]nformation favorable to the defendant" is sufficient to guide the prosecution.[190] ACTL's discussion of the definition of "favorable evidence" states that part (b) of ACTL's definition[191] is intended to "make[ ] clear that *Giglio* or impeachment material must ... be produced."[192] However, there is little in *Giglio* to suggest that the case left this requirement ambiguous and in need of such clarification.[193] Even if it had, the subsequent *Bagley* and *Kyles* cases both unequivocally stated that impeachment material must be disclosed just as exculpatory material must be.[194] But this is not to imply that the ACTL definition of favorable evidence would be merely redundant or would have

187. *Id.* at 95.

188. *Id.* at 111 (emphasis added).

189. *Id.* at 111-12.

190. *Id.* at 114. The proposed comments to the amendment further state that a *Strickler*-type materiality standard is appropriate only for appellate review, but "cannot realistically be applied by a trial court facing a pre-trial discovery request." *Id.*

191. Favorable evidence includes information that tends to adversely impact the credibility of government witnesses or evidence. *Id.* at 111.

192. *Id.* at 115.

193. *See* Giglio v. United States, 405 U.S. 150, 154-55 (1972).

194. Kyles v. Whitley, 514 U.S. 419, 433 (1995); United States v. Bagley, 473 U.S. 667, 676 (1985).

no effect. What the ACTL proposal does do—and what *Giglio*, *Bagley*, and *Kyles* did not—is require that *all* such impeaching information be disclosed by the prosecution, rather than limiting disclosure with the imposition of a hindsight-based materiality standard. As has been discussed, an "all relevant evidence" standard would permit an informant's testimonial history to be discoverable.[195] The ACTL proposal would establish this standard in the federal forum.

In the proposal, ACTL lauds the District of Massachusetts for addressing "federal prosecutors' indifference to pre-trial discovery obligations" by promulgating Local Rule 116.2, which both expands and codifies the prosecutor's disclosure duties.[196] Substantively, the Massachusetts Local Rule contains many of the core elements of Justice Marshall's *Bagley* dissent and Model Rule 3.8. In defining exculpatory information, the Massachusetts rule states that exculpatory information includes "all information that is material and favorable to the accused because it tends to" place into question the defendant's guilt, the admissibility or credibility of the government's evidence, or the degree of the defendant's culpability.[197] The most important feature of this definition, however, is the simple fact that the Massachusetts rule states that the evidence is material *because* it tends to cast doubt on the defendant's guilt in some way[198] and thereby implicitly rejects the *Bagley* standard that evidence is material only when it has a reasonable probability of changing the verdict.[199]

For criminal defendants, the difference between the Massachusettts rule and the *Bagley* rule means the difference between the discoverability of an informant's testimonial history and its nondiscoverability. Indeed, the District of Massachusetts appears to recognize and embrace the broader discovery obligations that its rule imposes on prosecutors with respect to witnesses such as jailhouse informants. The rule requires that within twenty-eight days of arraignment the defendant be provided with information

195. *See* discussion *supra* Part III.B.2.a-b.
196. Am. Coll. of Trial Lawyers, *supra* note 111, at 104-05.
197. D. MASS. LOCAL R. 116.2(A) (2001); *cf. Bagley*, 473 U.S. at 693, 695-96 (Marshall, J., dissenting); MODEL RULES OF PROF'L CONDUCT (2007).
198. D. MASS. LOCAL R. 116.2(A).
199. *See supra* text accompanying note 32.

regarding any benefits given to informants and any criminal cases pending against them.[200] It also requires that no later than three weeks before trial, the prosecution must provide "[a]ny information that tends to cast doubt on the credibility or accuracy of any witness whom ... the government anticipates calling ... in its case-in-chief."[201] Because an informant's testimonial history is highly impeachable and most certainly "casts doubt" on the informant's credibility, the Massachusetts rule—like Marshall's *Bagley* dissent and ABA Model Rule 3.8—would require its disclosure to the defense.[202]

IV. PRECEDENT SUPPORTING AN "ALL RELEVANT EVIDENCE" STANDARD

Support for a broader materiality standard has been advocated not only from a theoretical perspective, but also directly from the bench. In 1989, the Eighth Circuit rendered an opinion supporting the notion that evidence that is relevant and favorable to the accused in defending against present charges must be disclosed, regardless of whether the evidence arose directly from a deal or bargain related to the informant's instant testimony.[203] Specifically, the court in *Ruetter v. Solem* found a *Brady* violation when the prosecution withheld from the defense information that the state's key witness, a cooperating co-conspirator, had applied for a sentence commutation hearing that had been postponed without explanation until after the co-conspirator testified in the defendant's trial.[204] The court stated that this information could "obviously" have been used at trial to attack the co-conspirator's credibility.[205] Of great importance, however, is the fact that the *Ruetter* court did *not* find that the delayed hearing was the product of any deal or bargain between

200. D. MASS. LOCAL R. 116.2(B)(1).

201. *Id.* R. 116.2(B)(2).

202. Massachusetts Local Rule 116.2 has had an impact beyond its immediate jurisdiction. In 2002, the Governor's Commission on Capital Punishment in Illinois unanimously recommended that Illinois adopt the Massachusetts rule's definition of exculpatory information. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 117, at 119. Given the Am. Coll. of Trial Lawyer's high praise for the Massachusetts rule, the rule also likely helped shape ACTL's proposed amendment to Federal Rule of Criminal Procedure 16. American College of Trial Lawyers, *supra* note 111, at 111.

203. *See* Ruetter v. Solem, 888 F.2d 578, 582 (8th Cir. 1989).

204. *Id.* at 581.

205. *Id.*

the prosecutor and the informant with respect to the informant's testimony in the defendant's case.[206] In fact, the court explicitly stated that the district court found *no* such agreement, and this finding was not clearly erroneous.[207] Rather, the court simply held that the plain *fact* of the commutation hearing was itself materially exculpatory because it was impeaching, regardless of the source or purpose of the benefit to the informant.[208]

This type of finding, which supports the mandated disclosure of any benefit given to an informant even if it occurred outside the scope of the instant case, is important to refute the potential argument that prior testimony or proffers of information should not be admissible because they are irrelevant to the case at bar, or that they should fall under an exclusionary evidence rule similar to the one that prevents "prior bad act" evidence from being admitted.[209] Regardless, *Ruetter*'s holding that *Brady* can compel disclosure even without an instant agreement between prosecutor and informant represents a significant step toward obligating the disclosure of prior testimonial histories.

In 2000, the Oklahoma Court of Criminal Appeals[210] went much further than *Ruetter* and fully embraced the "all relevant evidence" standard as it applies to criminal discovery and jailhouse witnesses. In *Dodd v. State*, the defendant was convicted of two counts of homicide in the deaths of his neighbors.[211] In addition to other evidence against the defendant, the State also introduced the testimony of a jailhouse informant, to whom the defendant had allegedly confessed the murders.[212] Prior to trial—but after the preliminary hearing—the informant recanted his testimony regarding the confession, and then later reasserted its truthfulness.[213] The

206. *Id.* at 582.
207. *Id.*
208. *Id.*
209. *See* FED. R. EVID. 404. The analogy to Federal Rule of Evidence 404 would be an imperfect one in any case, as inadmissible "prior bad act" evidence does not include impeachment evidence, FED. R. EVID. 404(a)(3), while evidence of an informant's testimonial history constitutes nothing but impeachment evidence.
210. The Oklahoma Court of Criminal Appeals is the highest court in Oklahoma with appellate jurisdiction in criminal cases and is the court of last resort in criminal matters. The Oklahoma Court of Criminal Appeals, http://www.okcca.net (last visited Nov. 20, 2008).
211. 993 P.2d 778, 780 (Okla. Crim. App. 2000).
212. *Id.* at 782.
213. *Id.*

informant explained the recantation and subsequent reassertion by saying that "he told the investigator 'what she wanted to hear' in hope that she would arrange for him to get an [Own Recognizance] bond."[214]

Reacting to the observation that "most informants relay incriminating statements to the state in expectation of a benefit exchange" and its concerns about "informant reliability or trustworthiness,"[215] the Oklahoma court established a comprehensive and broad policy of disclosure to "apply to all jailhouse informant testimony not specifically excluded by the United States Constitution."[216] The court then established six specific disclosure requirements for jailhouse witnesses, which read in full:

> (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant ...; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) *all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement*; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.[217]

With respect to the disclosure of jailhouse informant testimonial histories, obligation number (4) is most relevant. The Oklahoma court fashioned this requirement as broadly as possible, requiring disclosure not only of past accepted proffers, but also past declined proffers, and statements that were never introduced at trial as well as those that were.[218]

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214. *Id.*
215. *Id.* at 784.
216. *Id.*
217. *Id.* (second emphasis added).
218. *Id.*

In addition to the disclosure requirements, *Dodd* also mandated special jury instructions with respect to informant testimony.[219] These instructions require the judge in any case in which informant testimony is permitted to give the jury an instruction warning that "[t]he testimony of an informer who provides evidence against a defendant must be examined and weighed by [the jury] with greater care than the testimony of an ordinary witness," and that when judging the informant's credibility, the jury should consider "*any other case in which the informant testified or offered statements against an individual*, ... and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement."[220]

Dodd is particularly notable for its obligation that prosecutors not only disclose prior instances in which the informant actually *gave* testimony, but also those times when the informant *wished* to give information, but was refused by the prosecution. Requiring the prosecution to disclose cases in which an informant was not called despite his offer to testify is extremely important to fully realizing the purpose of requiring testimonial histories to be disclosed at all—that is, to ensure that the defendant is provided with all relevant information bearing on the credibility of his accusers. Information that an inmate has repeatedly approached the prosecution with proffers of testimony, even if he was rebuffed, can be interpreted favorably for the defense. Perhaps the informant is a known liar, had clearly fabricated the proffered information, or was simply repeating information already provided in news reports. Whatever the reason for the rejection of the proffer, the existence of repeated attempts to bargain almost certainly indicates that the informant is eager to strike a deal with the prosecution, thus

219. *Id.*

220. *Id.* (emphasis added). The *Dodd* case was actually first heard and decided in 1999, and the court's holding in that case required not only the broad discovery obligations featured in the 2000 case, but also would have required a judge to hold a reliability hearing to determine the credibility of a jailhouse informant before his testimony could be admissible. Call, *supra* note 6, at 79. However, a rehearing of the case was granted, and the 2000 decision eliminated the reliability hearing requirement—though the discovery disclosure obligations remained intact. *Id.*

undermining his credibility and increasing the impeachability of his testimony.[221]

Since *Dodd* was decided, some commentators have seized on the *Dodd* discovery requirements and have advocated them as the proper framework within which informant-related discovery should be constructed.[222] George Harris states that the government should be required to disclose information about an informant's credibility under rules "similar" to the *Dodd* requirements.[223] Although the disclosure rules advocated by Harris are slightly different from the *Dodd* requirements,[224] Harris likewise supports disclosure of "any information regarding the witness' cooperation in return for compensation in other cases, whether or not the cooperator was actually called as a witness in that case."[225]

Similarly, Jack Call also supports *Dodd*-like discovery requirements, although his proposal differs more meaningfully from the *Dodd* requirements with respect to past testimony or proffers of testimony than does the Harris proposal. Call advocates a set of disclosure requirements that, in addition to other obligations, would require the prosecution to disclose "prior testimony given by the informant as a jailhouse informant" and "any prior recantations by the informant, in this case or in other cases, with a transcript or copy of the recantation."[226] Although comparable to *Dodd*, there is

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221. Following the Leslie Vernon White scandal, the *Los Angeles Times* reported on another, less successful informant, Richard Slawinski. Rohrlich & Stewart, *supra* note 8, at 1. Slawinski desired to be labeled as an informant, and five times made proffers of testimony to the prosecution. *Id.* The first four proffers were rejected, but on the fifth try, Slawinski was able to convince prosecutors of the veracity of his report that another inmate had confessed to murder, and prosecutors indicted the inmate based on nothing but Slawinski's testimony. *Id.* During the inmate's trial on the charges, the prosecutor determined that Slawinski had been lying and dismissed the case—but not before Slawinski had received exactly what he wanted: "snitch status," placement in protective custody, and two releases from jail. *Id.* By the time the charges were dismissed against the other inmate, Slawinski had allegedly been the recipient of yet another murder confession. *Id.*

222. *See, e.g.*, Call, *supra* note 6, at 80; Harris, *supra* note 69, at 63. *But see* GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 117, at 133.

223. Harris, *supra* note 69, at 63.

224. Harris recommends that the prosecution be required to disclose the actual agreement reached with the informant, any communications related to the agreement, "any information regarding the witness' cooperation in return for compensation in other cases, whether or not the cooperator was actually called as a witness in that case," and any other information pertinent to the credibility of the informant. *Id.*

225. *Id.*

226. Call, *supra* note 6, at 80.

one notable difference between Call's proposal and *Dodd*: Call would require disclosure of an informant's history of cooperation only in cases in which the informant actually *testified*,[227] while *Dodd*, as has been discussed, requires not only this information, but also disclosure of "all other cases in which the informant testified *or offered statements* against an individual but *was not called*."[228]

As between these alternatives, the *Dodd* standard is more appropriate. An informant who claims to have information and proffers that information to the government is not more reliable or credible simply because the government refused his "help" than one whose proffer is accepted. The very fact that an informant repeatedly wants to bargain bears heavily on the informant's lack of credibility, regardless of whether a bargain is ever struck with the prosecution.[229] Despite the minor differences outlined above, however, the *Dodd* court, Harris, and Call embody the same objective of preventing injustice, as put forth in *Dodd*'s concurring opinion: "[W]e must take certain precautions to ensure a citizen is not convicted on the testimony of an unreliable professional jailhouse informant ... who routinely trades dubious information for favors."[230]

CONCLUSION

Jailhouse informants are a notoriously dubious lot. Given an opportunity for gain, informants are generally understood as willing to "entrap the innocent, manufacture evidence, lie, commit perjury, and manipulate law enforcement officials, judges, and jurors."[231] Because informant testimony has great potential for falsehood, the *Brady* rule mandates disclosure of benefits given to informants in exchange for such testimony in any individual case.[232] More suspect than informant testimony generally, however, is *repeated* informant testimony—yet this information remains undiscoverable under

227. *Id.*
228. Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (emphasis added); *see supra* text accompanying notes 217-18.
229. *See* discussion *supra* pp. 1102-03 & note 221.
230. *Dodd*, 993 P.2d at 785 (Strubhar, P.J., concurring).
231. Clymer, *supra* note 119, at 848.
232. *See supra* text accompanying notes 29, 38-43, 108.

current *Brady* standards.[233] The failure to require disclosure of this information is puzzling, as knowledge that the witness has made a habit of receiving confessions would no doubt aid the accused in mounting his defense—and the jury in rendering its verdict.[234]

Expanding the scope of the materiality standard to include all evidence that tends to negate the defendant's guilt would not only permit the defendant access to the testimonial history of those to whom he has allegedly confessed, but would actually require the prosecution to reveal this information ahead of trial.[235] Recognizing the importance of true prosecutorial neutrality, this standard has already been passionately advocated by Justice Marshall,[236] proposed by the American College of Trial Lawyers,[237] and embraced by the ABA Model Rules of Professional Conduct.[238] Moreover, forty-seven states and the District of Columbia have likewise adopted the Model Rule's language that the prosecutor shall disclose to the defense "all evidence ... that tends to negate the guilt of the accused" in crafting their own rules,[239] though courts have been reticent in their enforcement.[240] Inclusion of informant testimonial histories under an expanded *Brady* materiality standard would ensure judicial enforcement of these rules, as violations of a constitutional right cannot simply be ignored.[241]

Indeed, the tide may be turning for criminal defendants. In 2000, the Oklahoma Court of Criminal Appeals became the first court affirmatively to require disclosure of an informant's complete testimonial history.[242] The defendant's ability to make the jury aware of how frequently the informant testifying against him has also testified against others—and just exactly what is in it for him—will help undercut the probative value of this doubtful testimony and may even curb the creation of unreliable jailhouse

233. *See supra* text accompanying notes 112-16.
234. *See supra* text accompanying note 121.
235. *See* discussion *supra* Part III.B.2.
236. *See* discussion *supra* Part III.B.2.a.
237. *See* discussion *supra* Part III.B.2.c.
238. *See supra* text accompanying notes 158-62.
239. American Bar Association: Center for Professional Responsibility, *supra* note 179.
240. *See supra* text accompanying notes 176-77.
241. *See supra* text accompanying note 183.
242. *See supra* text accompanying notes 210, 215-18.

informant testimony in the first place.[243] Surely prosecutors, knowing that the jury will hear the informant's history, will hesitate to use testimony from the most unreliable of all informants: those to whom prosecutors have frequently given benefits before.[244]

If the American criminal justice system is to remain a model of fairness, the government must be required to prove its case beyond a reasonable doubt through the use of competent, reliable, and trustworthy evidence. If the prosecution does use less reliable testimony, out of necessity or otherwise, the accused must be given an opportunity to confront that evidence and reveal its defects. Nowhere is this truer than in the case of repeated jailhouse informants, enticed regularly to implicate others with the promise of rewards. Revealing the motivations and biases of jailhouse informants through an expanded materiality standard will help to advance *Brady*'s original promise of due process, fairness, and most importantly, a truly just trial.

Emily Jane Dodds[*]

243. *See supra* text accompanying note 121.

244. *See supra* text accompanying notes 112-15, 174-75.

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